YOU RECEIVED A NOTICE OF REMOVAL TO FEDERAL COURT– NOW WHAT?

A Case Study

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Begin with the Basics

- Look at the statute!

28 U.S. C. §1441, et seq.

(a) Generally. Except as otherwise expressly provided by Act of Congress, ***any civil action*** brought in a State court ***of which the district courts of the United States have original jurisdiction,*** may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

- However, "[r]emoval statutes do not create jurisdiction. They are instead a mechanism to enable federal courts to hear the cases that are already within their original jurisdiction." *Lontz v. Tharp*, 413 F.3d 435, 444 (4th Cir. 2005).

Is there original jurisdiction?

- Jurisdiction in the federal system is controlled by federal statute.

- Pursuant to 28 U.S. C. §1331 “the district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States” 28 U.S.C. §1331. Federal District Courts have subject matter jurisdiction over cases that raise federal questions.

- District Courts also have jurisdiction over cases where there is diversity of citizenship and the amount in controversy exceeds $75,000.

  28 U.S.C. § 1332.

More Basics

Do I want to be in federal or state court:

- Jury pool
- Potential verdict size
- Local prejudice (for or against)
- Logistics
- Complex versus straightforward case
- Costs
- Special evidentiary considerations: Daubert v. Frye rule for expert witnesses

Case Example

- Under 28 U.S. C. §1441, et seq., a case may be removed from state court to federal court where there is either a federal question or complete diversity of citizenship.

- If we amend the complaint to remove the "federal question" can we defeat removal and win a motion to remand?

Answer: No

- Jurisdiction is measured at the time of the notice of removal.

- The defendant's right to remove is to be determined according to the plaintiffs' pleading at the time of the petition for removal, and it is the defendant's burden to show the existence of federal jurisdiction.

  Abels v. State Farm Fire & Casualty Co., 770 F.2d 26, 29 (3d Cir. Pa. 1985)

- Federal Courts in the Third Circuit have followed the general rule that filing an amended complaint which does not include the previously -asserted federal law claims does not divest the federal court of subject matter jurisdiction over the action.

- Instead, "subject[-]matter jurisdiction is to be … on the basis of the record in the state court, at the time the petition for removal is presented." *Westmoreland Hosp. Ass'n*, 605 F.2d 119, 124 (3d Cir. 1979).

- However, a federal court retains discretion to remand a removed case if the federal law claims are no longer in the case and only the supplemental state law claims remain. *Hartman v. Cadmus-Cenveo Co,* Civ. No. 13-7494, 2014 U.S. Dist. LEXIS 131517 (E.D. Pa. Sept. 19, 2014)

Factors for Exercise of Discretion

- When exercising this discretion a federal court should consider and weigh the values of:

  - judicial economy;

  - convenience;

  - fairness; and

  - comity;

  in deciding whether to exercise jurisdiction over a case brought in that court involving pendent state-law claims.

- When the balance of these factors indicates that a case properly belongs in state court, as when the federal-law claims have dropped out of the lawsuit in its early stages and only state-law claims remain, the federal court should decline the exercise of jurisdiction.

Examples of the Court's Exercise of Discretion in Declining Federal Jurisdiction

Hartman v. Cadmus-Cenveo Co, Civ. No. 13-7494, 2014 U.S. Dist. LEXIS 131517 (E.D. Pa. Sept. 19, 2014) Remand motion filed 14 days after motion to dismiss.

- Nevertheless, the Court concluded that the amended complaint was not merely a manipulative tactic to secure a state forum.
- Not an instance where the amendment was filed in response to an unfavorable ruling.
- It was more likely that the Plaintiff dropped the federal claims in response to the motion to dismiss rather than to forum shop.
- The court reached this decision because it "does not find that the plaintiff has attempted to manipulate the forum and considerations of judicial economy, convenience, fairness, and comity all weigh in favor of remand."

Procedure

DO SWEAT THE SMALL STUFF

The requirements of the removal statute are jurisdictional:

Beard v. Lehman Bros. Holdings, Inc., 458 F. Supp. 2d 1314, 1317 (M.D. Ala. 2006) ("[a] court must strictly construe the requirements of the removal statute, as removal constitutes an infringement on state sovereignty.")

Procedure

- **HOW?**

  "(a) Generally. A defendant or defendants desiring to remove any civil action from a State court shall file in the district court of the United States for the district and division within which such action is pending ***a notice of removal signed*** pursuant to Rule 11 of the Federal Rules of Civil Procedure and ***containing a short and plain statement of the grounds for removal,*** together with ***a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.***"

28 U.S. C. §1446(a)

Case example

The Notice of Removal that we received stated that the action was commenced by the filing of a Complaint, which was incorrect. The case was commenced by the filing of a Writ. The Notice attached the Complaint as an Exhibit and says nothing about the writ.

Is the Notice defective because it does not have attached to it “all of the process, pleadings and orders…” from the state court?

Some courts have interpreted Section 1446(a) to require that the removing party attach ***all*** (not just part) of the process, pleadings and orders that have been served in the state court action ***at the time*** the notice of removal is filed, and have remanded the case as improperly removed based upon a defective removal notice.

Rationale:

- The purpose of filing copies of the state court process is to give the federal court sufficient information on which it may determine whether the removal was proper and timely.

See, e.g., *Cook v. Robinson*, 612 F. Supp. 187, 190 (E.D. Va. 1985) ("The failure to submit the process served … is significant because the process could have served as an independent means of determining whether the petition for removal was timely filed.")

Examples of Strict Construction

- *Andalusia Enterprises, Inc. v. Evanston Ins. Co.*, 487 F. Supp. 2d 1290, 1300 (N.D. 2007)(remanding action because, among other reasons, the removing party failed to include in the notice of removal copies of the summonses served on the defendants).

- *Emp'rs-Shopmens Local 516 Pension Trust v. Travelers Cas. & Sur. Co. of Am.*, No. 05-444, 2005 U.S. Dist. LEXIS 38971, 2005 WL 1653629, *4 (D. Or. July 6, 2005)(remand is required due to defendant's failure to attach exhibits from the state court complaint within the thirty-day removal period);

- *Comtrade Ltd. v. United States*, No. 05-80729-CIV, 2005 U.S. Dist. LEXIS 40150, 2005 WL 5643875, *1 (S.D. Fla. 2005) (removal was defective due to absence of state court papers);

- *Kisor v. Collins*, 338 F. Supp. 2d 1279, 1280-81 (N.D. Ala. 2004) (remanding when defendant failed to attach a copy of the summons and returns of service to the notice of removal; attempts to correct too late).

De minimus rule

- However, there are a substantial number of jurisdictions that hold that the failure to attach the state court documents is a technical defect which may be remedied.
- Rationale: Some of these cases base their holdings on the fact that the Section 1447(b) grants the district court the authority to "require the removing party to file with its clerk copies of all records and proceedings in such State court, and the lack of prejudice to the opposing party. *Christenson Media Group, Inc. v. Lang Indus.*, 782 F. Supp. 2d 1213, 1219, 2011 U.S. Dist. LEXIS 28833, *14 (D. Kan. 2011*)*
- The grant of a motion to amend the Notice of removal is viewed as the appropriate remedy. *Id.*

- *See, e.g.*, *Walton v. Bayer Corp.*, 643 F.3d 994, 999 (7th Cir. 2011) (failure to include summonses was "totally inconsequential defect" that did not deprive district court of jurisdiction);
- *Countryman v. Farmers Ins. Exch.*, 639 F.3d 1270, 1272 (10th Cir. 2011) (failure to attach summons constituted *de minimis* procedural defect that did not necessitate remand, and that defect was curable, either [6] before or after expiration of the thirty-day removal period);
- *Cook v. Randolph Cnty., Ga.*, 573 F.3d 1143, 1150 (11th Cir. 2009) ("[T]he failure to include all state court pleadings and process with the notice of removal is procedurally incorrect but is not a jurisdictional defect.");
- *Covington v. Indem. Ins. Co.*, 251 F.2d 930, 932-33 (5th Cir. 1958) (failure to include "a copy of all process, pleadings and orders" was a mere procedural defect, not a jurisdictional defect necessitating remand, and missing state court papers could be supplied later);
- *Presnell v. Cottrell, Inc.,* No. 09-CV-656, 2009 U.S. Dist. LEXIS 116288, 2009 WL 4923808, at *5 (S.D. Ill. Dec. 14, 2009) ("The omission of documents required to be filed with the notice of removal does not require remand if the Court is able to determine its jurisdiction from the documents filed and the plaintiff is not prejudiced by the omission.");
- *Wood v. City of Lanett*, 564 F. Supp. 2d 1317, 1320-21 (M.D. Ala. 2008) (failure to attach various state court filings was not jurisdictional defect and did not require remand);
- *Agee v. Huggins*, 888 F.Supp. 1573, 1577 (N.D. Ga. 1995) ("Defendant's failure to file the documents complained of by Plaintiff is not grounds for remand. Rather, the subsequent filing of these documents is the proper remedy.")

Whither the Third Circuit?

- No definitive case on the issue in the Third Circuit, but see *Boyce v. Saint Paul Fire & Marine Ins. Co*., 1993 U.S. Dist. LEXIS 728 (E.D. Pa. Jan. 28, 1993), which followed the "de minimus" view. The court reasoned that "[o]missions which are merely formal or modal do not affect the right to remove and may be subsequently remedied. " *Id.* at *8.

- Distinguishable? *Boyce* involved the failure to file with the petition for removal an *exhibit* to the state court pleading, and not a failure to include the state court process altogether.

Procedure: More How

- "Rule of Unanimity" With consent of other served defendants.

  "When a civil action is removed solely under section 1441(a), all defendants who have been properly joined and served must join in or consent to the removal of the action."

  28 U.S.C. § 1446 (b)(2)(A).

Case example

- The Notice of Removal referred to an "Affidavit of Consent" but that exhibit was not attached. Is the notice defective?

- If that Affidavit is simply the removing party's counsel stating that he obtained the consent of the other parties, or a verified Notice containing an averment of consent, it is not sufficient. It must be signed by the other defendants' counsel.

Consent in the Third Circuit

- The prevailing view of the district courts within the Third Circuit is that "it is not enough for the removing party to simply state that the codefendants consent or do not oppose removal because this verification cannot legally bind the allegedly consenting codefendant." *Baldy v. First Niagara Pavilion, C.C.R.L., LLC*, 2015 U.S. Dist. LEXIS 162123, *20, 2015 WL 7864187 (W.D. Pa. Dec. 3, 2015).

Consent in the Third Circuit

- A split exists among the circuits, but courts in the Third Circuit follows the view that “although counsel for the nonfiling defendant [is] not required to sign the removal notice,” the nonfiling defendant "must nonetheless join in or consent to the removal by way of 'an official filing or voicing of consent.” *Baldy v. First Niagara Pavilion, C.C.R.L., LLC*, 2015 U.S. Dist. LEXIS 162123, *26, 2015 WL 7864187 (W.D. Pa. Dec. 3, 2015)

Second, Fifth and Seventh Circuits have found that a defendant may not verify consent to removal on another codefendant's behalf

- *Pietrangelo v. Alvas Corp.,* 686 F.3d 62, 66 (2d Cir. 2012) (finding that codefendants satisfied the unanimity requirement of independently expressing consent to removal by submitting letters to the district court within removal period)

- *Roe v. O'Donohue*, 38 F.3d 298, 301 (7th Cir. 1994), abrogated on other grounds by *Murphy Bros. v. Michetti PipeStringing, Inc.,* 526 U.S. 344, 119 S. Ct. 1322, 143 L. Ed. 2d 448 (1999) (explaining that the removal statute's directive that "all defendants who have been properly joined and served must join in or consent to the removal of the action" means that each codefendant must submit their consent in writing)

- *Getty Oil Corp. v. Ins.Co. of N. Am*., 841 F.2d 1254, 1262 n.11 (5th Cir. 1988) (noting unanimity requires "some timely filed written indication from each served defendant or from some person or entity purporting to formally act on its behalf in this respect and to have the authority to do so, that it has actually consented to such action").

Contra Fourth, Sixth, Eighth and Ninth Circuits

- A statement in one defendant's timely notice of removal that its codefendants consent to removal is sufficient.
- *Griffioen v. Cedar Rapids & Iowa City Ry. Co.*, 785 F.3d 1182, 1188 (8th Cir. 2015) (notice of removal signed and filed by attorney for one defendant and representing unambiguously that other defendants consented to removal satisfies the removal statute's unanimous consent requirement); *Mayo v. Bd. of Educ.*, 713 F.3d 735, 742 (4th Cir. 2013) (same); *Proctor v. Vishay Intertechnology Inc.*, 584 F.3d 1208, 1225 (9th Cir. 2009) (same); *Harper v. AutoAlliance Int'l, Inc.*, 392 F.3d 195, 201-02 (6th Cir. 2004) (same).

- Rule 11 sanctions and a codefendant's opportunity to "alert the court to any falsities in the removing defendant's notice serve as safeguards to prevent removing defendants from making false representations of unanimous consent and forcing codefendants into a federal forum against their will.“ *Griffioen, supra*.

More How: Notice to Parties

- (d) Notice to adverse parties and State court. Promptly after the filing of such notice of removal of a civil action the defendant or defendants shall give written notice thereof to all adverse parties ….
  28 USC § 1446

Procedure: **WHEN?**

- "….within 30 days after the receipt by the defendant, ***through service or otherwise***, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within 30 days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter."

28 U.S.C. §1446(b)

What triggers the thirty days?

The United States Supreme Court clarified what triggers the thirty days in *Murphy Brothers v. Michetti Pipe Stringing Inc.*, 526 U.S. 344 (1999).

What triggers the thirty days?

- First, if the summons and complaint are served together, the 30 day period for removal runs at once.

- Second, if the defendant is served with the summons but is furnished with the complaint sometime after, the removal period runs from the receipt of the complaint.

- Third, if the defendant is served with the summons and the complaint is filed in federal court, but under local rules, service of the complaint is not required, the removal period runs from the date the complaint is made available through filing.

- Finally, if the complaint is filed in court prior to any service, the removal period runs from service of the summons.

What triggers the thirty days?

- "service or otherwise" -- The thirty days does not begin running upon receipt of a faxed courtesy copy of a complaint, unaccompanied by formal service.

Murphy Brothers, supra.

Removal after initial pleading

- ……if the case stated by the initial pleading is not removable, a notice of removal may be filed within 30 days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order *or other paper* from which it may first be ascertained that the case is one which is or has become removable.

  28 USCS § 1446 (b)(3)

Discovery as “other paper”

- Answers to interrogatories may trigger 30 day removal period.

- (A) If the case stated by the initial pleading is not removable solely because the amount in controversy does not exceed the amount specified in section 1332(a) [28 USCS § 1332(a)], ***information relating to the amount in controversy*** in the record of the State proceeding, or ***in responses to discovery***, ***shall be treated as an "other paper"*** under subsection (b)(3).

  28 USCS § 1446 (c)(3)

More When—Multiple Defendants

- 1446(b)(2) (A) When a civil action is removed solely under section 1441(a), all defendants who have been properly joined and served must join in or consent to the removal of the action.
- (b)(2)(B) Each defendant shall have 30 days after receipt by or service on that defendant of the initial pleading or summons described in paragraph (1) to file the notice of removal.
- (b)(2)(C) If defendants are served at different times, and a later-served defendant files a notice of removal, any earlier-served defendant may consent to the removal even though that earlier-served defendant did not previously initiate or consent to removal.

State Court Divested of Jurisdiction

- (d) Notice to adverse parties and State court. Promptly ***after the filing of such notice of removal*** of a civil action the defendant or defendants shall ***give written notice thereof to all adverse parties and shall file a copy of the notice with the clerk of such State court***, which shall effect removal and ***the State court shall proceed no further*** unless and until the case is remanded.

  28 USCS § 1446 (emphasis added).

REMAND

- When?
- For procedural defects, within 30 days after filing of notice of removal

(c) A motion to remand the case ***on the basis of any defect other than lack of subject matter jurisdiction*** must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded…..

28 U.S. C. §1447(c) (emphasis added).

REMAND – Lack of Subject Matter Jurisdiction

- (c) A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). ***If at any time before final judgment*** it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.
- 28 U.S. C. §1447(c) (emphasis added).

Waiver

- Lack of subject matter jurisdiction cannot be waived.

- Federal Courts have an ever present obligation to satisfy themselves of their subject matter jurisdiction and to decide the issue *sua sponte* (without any initiation by the Plaintiffs) *Liberty Mut. Ins. Co. v. Ward Trucking Corp*., 48 F.3d 742, 750 (3d. Cir. 1995).

Waiver by Litigation Conduct

- Subject matter jurisdiction: No; parties' conduct is irrelevant

- "Subject-matter jurisdiction…is an Art. III as well as a statutory requirement…, no action of the parties can confer subject-matter jurisdiction upon a federal court. Thus, the consent of the parties is irrelevant…principles of estoppel do not apply, *Am. Fire & Casualty Co. v. Finn*, 341 U. S. 6, 17-18 (1951), and a party does not waive the requirement by failing to challenge jurisdiction early in the proceedings.

Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 (1982)

Waiver by Litigation Conduct

Procedural defect: Maybe

- "Although a party may waive objections to procedural defects in removal, a waiver will be found only when there is ***'affirmative conduct or unequivocal assen***t of a sort which would render it offensive to fundamental principles of fairness to remand.'" *Godman v. Sears, Roebuck & Co*., 588 F. Supp. 121, 124 (E.D. Mich. 1984)

- "***Examples*** of such conduct include unsuccessfully ***litigating a substantial issue,*** such as the right to a jury trial, or filing an amended complaint seeking further or different relief." *Id*.

- See also *Lanier v. Am. Bd. of Endodontics,* 843 F.2d 901, 905 (6th Cir. 1988) (finding waiver of objections to removal where, before filing motion to remand, ***plaintiff entered into stipulations, filed requests for discovery, sought to amend her complaint,*** filed a new lawsuit against the defendant in the federal court, demanded trial by jury, and proceeded with discovery).

- CASE EXAMPLE: What about filing amended complaint?
- In *Newport v. Dell, Inc.,* No. CIV.A.08-96, 2008 U.S. Dist. LEXIS 111754, 2008 WL 2705364, at *4 (D. Ariz. Jul. 2, 2008), the district court distinguished cases where a plaintiff affirmatively sought the jurisdiction of the federal court by filing motions for leave to amend the complaint ***prior to seeking remand***.
  - "Plaintiff's First Amended Complaint was an amendment as of right, filed in lieu of a response to Defendants' Motions to Dismiss. . . Because Plaintiff's First Amended Complaint was filed after her Motion to Remand as a defensive maneuver responsive to the filing of Defendants' Motions to Dismiss, the Court sees no reason why it offends the fundamental principles of fairness to consider the Motion for Remand."

Id. Cited with approval in *The Knit With v. Aurora Yarns,* 2010 U.S. Dist. LEXIS 22592, *24, 2010 WL 844739 (E.D. Pa. Mar. 11, 2010)

Federal Question Jurisdiction: The Well-Pleaded Complaint Rule

- Under the "well-pleaded complaint" rule, the plaintiff's complaint controls and there can be no removal on the basis of federal question unless the federal law under which the claim arises is a direct and essential element of the plaintiff's case.

In re Community Bank of Northern Virginia, 418 F. 3d 277, 293-94 (3d Cir. 2005).

Case Example

- The Complaint contained a claim under Section 402A of the Restatement of Torts (Second) regarding a Class III medical device.
- Under *Riegel v. Medtronic,* 552 U.S. 312 (2008) federal law expressly preempts state-law tort claims challenging the design, manufacture, or labeling of a medical device approved by the FDA via the Pre-market Approval Process for Class III devices.

A Federal *Defense* Does Not Suffice to Create a Federal Question for Removal

The Supreme Court has held that merely asserting a defense that injects a federal question, such as preemption, does not transform what is plainly a state law claim, such as negligence and/or malpractice, into an action arising under federal law for purposes of removal jurisdiction. *Caterpillar v. Williams*, 482 U.S. 386 (1987)

Rationale

- "The presence of a federal question . . . in a defensive argument does not overcome the paramount policies embodied in the well-pleaded complaint rule -- that the plaintiff is the master of the complaint, that a federal question must appear on the face of the complaint, and that ***the plaintiff may, by eschewing claims based on federal law, choose to have the cause heard in state court.*** When a plaintiff invokes a right . . . the plaintiff has *chosen* to plead what we have held must be regarded as a federal claim, and removal is at the defendant's option. But ***a defendant cannot, merely by injecting a federal question into an action that asserts what is plainly a state-law claim, transform the action into one arising under federal law,*** thereby selecting the forum in which the claim shall be litigated. ***If a defendant could do so, the plaintiff would be master of nothing.*** Congress has long since decided that federal defenses do not provide a basis for removal."

Caterpillar v. Williams, 482 U.S. 386 (1987)

Preemption, Asserted as a Defense, Does Not Create Federal Jurisdiction

- "In tort suits, ordinary preemption operates as a defense to override the state laws in conflict with federal laws, ***but it cannot create federal jurisdiction on its own.*** " *Greenawalt v. Philip Rosenar Co., Inc.*, 471 F. Supp. 2d 531, 532 (E.D. Pa. 2007)(emphasis added)

Third Circuit

Courts within the Third Circuit have concurred.

- *Mack v. Ventacor, Ltd,* 2011 U.S. Dist. LEXIS 24567 (E.D. Pa. Mar. 9, 2011): where " neither party asserts that a federal cause of action exists on the face of plaintiff's complaint" and plaintiff's causes of action did not raise significant federal issues because no federal cause of action for enforcement and no preemption of state remedies existed under the federal regulations. Id. at *38-39.
- In *Lane v.CBS Broad*, 612 F. Supp. 2d 623 (E.D. Pa. 2009), the defendants had argued that the case should be heard in a federal forum because federal law would have to be referenced and applied when interpreting Plaintiff's claims, because the state statutes were modeled on federal statutes. The Court concluded that only substantial federal questions in the Complaint should open the door to federal court, and further, permitting peripheral federal elements, which at best, serve as alternative theories of liability would violate the removal statute itself.

Complete v. Ordinary Preemption

- Complete preemption must be distinguished from “ordinary preemption.”
- *Caterpillar v. Williams*, 482 U.S. 386 (1987), states that there is an "independent corollary" to the well pleaded complaint rule, known as the "complete pre-emption doctrine.” On occasion, the Court has concluded that the pre-emptive force of a statute is so "extraordinary" that it "converts an ordinary state common law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule." *Id*. at 393

Complete Statutory Preemption Creates Federal Jurisdiction

- The Supreme Court has found complete preemption in only four statutory areas, sufficient to permit federal jurisdiction:
- the Labor Management Relations Act
- the Employment Retirement Income Security Act,
- some areas involving the affairs of American Indians, and
- the National Bank Act.

Substantial Federal Question?

- Case law is in flux
- Under what has been termed the substantial-federal-question doctrine, the *Grable* Court said that "the question is, does a state-law claim [1***] necessarily raise a stated federal issue***, [2] actually disputed and [3] ***substantial,*** [4] which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities." (emphasis added).
  Grable v. & Sons Metal Products, Inc. v Darue Engineering & Manufacturing, 545 U.S. 308 (2005).
- Cases under the *Grable* paradigm are a "special and narrow category." *Empire Healthchoice Assur., Inc. v. McVeigh,* 547 U.S. 677, 699 (2006).

Substantial Federal Question

- *Gunn v. Minton,* 133 S. Ct. 1059, 185 L.Ed. 2d 72 (2013), clarified that the requirement of a "substantial" issue under *Grable* is not measured against the case at hand and its significance to the particular parties, but "looks instead to the ***importance of the issue to the federal system as a whole***." Id. at 1066. The issues involved in *Grable* directly implicated the validity of actions of a federal agency where the plaintiff alleged that the Internal Revenue Service failed to comply with federal notice requirements.

- Federal courts' greater expertise with federal issues is not enough. *Gunn,* 133 S. Ct at 1068. "[T]he possibility that a state court will incorrectly resolve a state claim is not, by itself enough to trigger the federal courts' [jurisdiction]…" *Id.*

Removal based on Diversity Jurisdiction

- Under 28 U.S.C. Section 1332, federal courts have original jurisdiction in diversity cases where the amount in conflict is greater than $75,000.
- Diversity is when parties to a lawsuit are from different states or between a U.S. citizen and a citizen of a different country.
- In cases involving multiple parties, removal is only permitted where none of the defendants are citizens of the forum state. 28 U.S. C. §1441(b)(2)

Removal Jurisdiction Based Upon Diversity Jurisdiction

A civil action otherwise removable solely on the basis of the jurisdiction under section 1332(a) of this title [28 USCS § 1332(a)] may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

28 U.S. C. §1441(b)(2)

Forum State Rule Example

Blackburn v. UPS, Inc., 179 F.3d 81 (3d Cir.1999)

- Blackburn [Plaintiff] was a citizen of Connecticut at the time suit was filed. UPS is a citizen of New York. Knowles is a citizen of New Jersey. The case was removed to the Federal District Court of New Jersey. Therefore, complete diversity existed and subject-matter jurisdiction is proper.

- "However …this case was technically not removable …as a civil action in which jurisdiction is based on diversity of citizenship may be removed "only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought." *Id.,* at 90 n. 3.

Majority: Forum Defendant Rule Is Not Jurisdictional

"Nonetheless, under 28 U.S.C. § 1447(c) (Supp. II 1996), this defect is waived if not raised within 30 days after the notice of removal is filed. No motion to remand having been filed within this period, jurisdiction in the District Court was properly exercised."

Blackburn v. UPS, Inc., 179 F.3d 81, 90 n. 3(3d Cir. 1999)

Time limit in diversity cases

- In cases founded upon diversity jurisdiction, ***removal is not permitted more than one year after commencement of the action***, unless the court finds that the plaintiff has "acted in bad faith in order to prevent a defendant from removing the action."

28 U.S.C. § 1446 (c)(emphasis added).

Attorney's Fees Following Remand

- Where a case is remanded to the state court, 28 U.S.C. § 1447(c) provides for an award of "just costs and any actual expenses, including attorneys fees, incurred as a result of the removal."

- This is included within remand petition.

Case Example

- We did not include the factual basis for attorneys' fees in the Motion to Remand, only in the "Wherefore" clause. Order granting Remand did not address fees and costs. Could we file a motion after the order of remand?

- Circuits are split whether it can be requested following grant of remand.

Attorneys Fees in the Third Circuit

- In the Third Circuit: The district court does not lose jurisdiction to award fees and costs when the clerk of the district court mails a certified copy of the order of remand to the clerk of the state court, but may entertain an application post-remand, so long as it is filed within the time provided under Fed. R. Civ. P. 54(d)(2)(B). *Mints v. Education Testing Serv.,* 99 F. 3d. 1253 (3d Cir. 1996).

- Rationale: post-remand award of costs is a collateral decision that will not interfere with the state court proceedings.

- BUT SEE: “This court is of the opinion that the plain language of the statute controls and clearly provides that if the court is going to award costs and expenses, including attorneys' fees pursuant to 28 U.S.C. § 1447(c), it must be taken care of in the order of remand.”

  United Broadcasting Corp. v. Miami Tele-Communications, 140 F.R.D. 12, 14 (S.D. Fla. 1991)

Attorneys' Fees Standard

- The Supreme Court has held that fees under § 1447(c) may be awarded when the removing party lacks "an objectively reasonable basis for seeking removal." *Martin v. Franklin Capital Corp.,* 546 U.S. 132, 141, 126 S.Ct. 704, 163 L.Ed.2d 547 (2005).

- This standard does ***not*** require " a showing that the unsuccessful party's position was 'frivolous, unreasonable, or without foundation.'" *Id*. at 139.

- Neither does it require a showing of bad faith. *Mints v. Educ. Testing Serv.*, 99 F.3d 1253, 1260 (3d Cir. 1996).

“Insubstantial” basis for removal

- All that is required for the exercise of the District Court's discretion in favor of the award of fees is that " the assertion in the removal petition that the district court had jurisdiction was . . . at best insubstantial." *Mints, supra*, at 1261.

- *See, e.g., S. Annville Twp. v. Kovarik,* 651 Fed. Appx. 127 (3d Cir. Pa. 2016) (asserted grounds for removal were insubstantial where the underlying action involved a municipal lien, defendants claimed that there was a federal question because the Authority's purported purpose in pursuing the lien was to repay a loan to the United States Treasury under the American Recovery and Reinvestment Act of 2009, and court found "attempt to raise questions pertaining to its interpretations does not connect to [the Authority's] original lien.)

Return to State Court

- ……A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case. 28 USCS § 1447

Appeal

- 28 U.S.C. Section 1447(d) prohibits appellate review of a remand order:
- "An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1442 [federal officers case]or 1443 [civil rights cases] of this title shall be reviewable by appeal or otherwise."

- Prohibition applies only to remands under Section 1447(c), that is based on lack of subject matter jurisdiction or procedural defect.

- HOWEVER, the U.S. Supreme Court held that while a defendant cannot appeal the district court's remand order, because the dismissal of its cross-action preceded, and was separate from, the remand, the Court could review the dismissal as a collateral order. *Waco v. U.S. Fidelity & Guaranty,* 293 U.S. 140 (1934).

Agostini v. Piper Aircraft

- The Third Circuit recently held, on first impression, that an order to reconsider remand is not appealable. *Agostini v. Piper Aircraft*, 729 F.3d 350 (3d Cir. 2013) . One of the defendants sought reconsideration of the remand order, which the district court denied. The defendant then appealed that denial, arguing that while the remand order itself is not appealable, the motion for reconsideration of the remand order was a collateral decision, akin to orders pertaining to attorney fees or costs, and jurisdiction was not stripped by the non-reviewability rule in 28 U.S.C. §1447(d). The defendant pointed to the Supreme Court's decision in *Waco* as authority for an exception to the general rule of non-reviewability. The Third Circuit rejected this argument, finding that it was not possible to separate the motion for reconsideration of the remand order from the remand order itself.

- The Third Circuit in *Agostini* held that allowing appeal would defeat the statutory purpose of the prohibition of review on an order to remand.

- Although the Court of Appeals held that it had no jurisdiction to hear the appeal of the motion for reconsideration of the remand order, it found that the district court did have jurisdiction to reconsider the remand order in the first instance. According to the Third Circuit, the "jurisdiction-transferring" event at the district court is the "the mailing of a certified copy of the remand order to state court." Until that occurs, the district court retains jurisdiction.

Appeal of Denial of Remand

- The prohibition of Section 1447(d) does not apply to review of denial of motions to remand.

- May be raised after final judgment or if certified as an interlocutory appeal. *See, e.g., La Chemise Lacoste v. Alligator Company,* 506 F. 2d 339 (3d Cir. 1974)(remand motion denied and application for interlocutory appeal also rejected; after six day trial, issue raised on appeal from final judgment and Third Circuit held removal improper, reversed and remanded to state court).