

Demand letter 'other paper' for removal purposes

Today's column involves the timeliness of filing a notice seeking removal of a case from state court to federal court pursuant to 28 U.S.C. § 1441(a), 1446(b). *Morrow v. Daimlerchrysler Corporation*, 451 F.Supp.2d 965 (N.D.Ill. 2006).

Section 1441 requires removal must be within 30 days of the filing of the complaint. Section 1446(b) requires removal within 30 days of receipt of an "amended pleading, motion, order or other paper" that first shows removal is proper, where the complaint does not reveal the case is removable.

U.S. District Judge Ruben Castillo, in an issue of first impression in the 7th U.S. Circuit, held that a demand letter seeking settlement of \$2.5 million was an "other paper" under section 1446(b) triggering the running of 30 days to remove.

Castillo also cautioned that while the original complaint did not seek a specific dollar amount, the allegations that the injuries were serious and permanent, resulting in disability and lost wages, could place a defendant on notice that the case was removable.

Felipe Morrow filed suit in the Cook County Circuit Court against Daimlerchrysler and Johnson Controls Inc. on strict products liability and negligence theories contending he sustained personal injuries as the results of an accident involving a 1999 Chrysler 300M motor vehicle.

Morrow filed his complaint on Feb. 24, 2005 seeking damages "in excess of \$50,000." On May 2, 2005, Morrow's counsel sent Chrysler and Johnson's attorneys a demand letter and package seeking \$2.5 million in damages.

On Dec. 16, 2005, Chrysler filed, in state court, Morrow's responses to Chrysler's request to admit wherein Morrow denied he was seeking damages in an amount less than \$75,000.

Chrysler filed its notice of removal to federal court on Jan. 11, 2006, within 30 days of the filing of responses to admit date. Johnson joined in.

On Feb. 8, Morrow filed his motion to remand to state court, contending the removal was too late — beyond the 30-day requirement.

Castillo granted Morrow's motion to remand, finding Chrysler's removal was untimely. Chrysler contended that its notice of removal on Jan. 11 was timely because it was within 30 days of the filing of Morrow's responses to its request to admit filed on Dec. 16, 2005 — complying with section 1446(b).



Federal Courts

By Jay S. Judge

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Morrow retorted that the 30-day time period for removal began to run when he made his \$2.5 million demand in his letter of May 2, 2005 — this was an "other paper" under section 1446(b).

Castillo began his analysis of the motion to remand noting Chrysler's position under section 1446(b):

"Section 1441 specifies that a notice of removal must be filed within 30 days of the filing of the complaint. While Chrysler acknowledges missing that deadline, Chrysler claims that its notice of removal was properly filed under 28 U.S.C. § 1446(b), which states, in relevant part:

"If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty 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 U.S.C. § 1446(b)."

Finding Chrysler's contention that it did not know Morrow's claim for damages was "in excess of \$75,000" from the original complaint was unpersuasive, the court explained:

"In a personal injury and product liability action such as this one, Chrysler's protestations of ignorance as to the damages in this case are far-fetched. While Morrow's complaint states that it seeks damages in excess of \$50,000, it also repeatedly alleges that:

"The seat breaking caused the plaintiff to sustain injuries, both internally and externally, of a permanent and lasting nature, the plaintiff was caused and will in the future be caused to endure pain and suffering in body and mind; further, in

an endeavor to cure his said injuries, the plaintiff was caused to and will in the future be caused to expend money for medical care; furthermore, the plaintiff was unable to and will in the future be unable to attend to his normal affairs and duties for an indefinite period of time."

"As this Court has previously held, the rules do not 'obviate a defendant's responsibility to ascertain from a reasonable and commonsense reading of the complaint whether the action is removable. Nor does the Local Rule provide a safe harbor that encourages defendants to wait for discovery responses that simply confirm what was obvious from the face of the complaint; in such cases, defendants are not insulated from a remand to state court."

Castillo began consideration of Morrow's motion to remand to state court by setting out the test for removal:

"A defendant may remove a case to federal court if there is federal subject matter jurisdiction. 28 U.S.C. § 1441(a). Removal based on diversity requires that the parties be of diverse state citizenship and that the amount in controversy exceed \$75,000, exclusive of interest and costs. 28 U.S.C. § 1332; *Rubel v. Pflizer Inc.*, 361 F.3d 1016, 1017 (7th Cir. 2004). The party seeking removal has the burden of establishing federal jurisdiction. 'Courts should interpret the removal statute narrowly and presume that the plaintiff may choose his or her forum,' leading to a strong presumption in favor of remand. If the district court lacks subject matter jurisdiction, the action must be remanded to state court pursuant to 28 U.S.C. § 1447(c)."

The court reasoned that a complaint, while pleading no dollar amount, seeking damages for permanent injuries and lost wages and disability alerts a defendant to the likelihood it may seek damages "in excess of \$75,000."

The opinion stated: "*McCoy by Webb v. Gen. Motors Corp.*, 226 F.Supp.2d 939, 941 (N.D.Ill. 2002) (collecting cases). In *McCoy*, as in this case, the plaintiff alleged that he incurred lasting and permanent injuries, lost wages and profits, and suffered severe pain, emotional distress, and disability, among other injuries: 'In the parlance of product liability suits, these statements should sound warning bells in defendants' ears that significant damages are sought.' Thus, defendants were on notice that the case was

removable, and it should have removed within 30 days of receipt of the complaint."

Next, suggesting any doubt as to what amount of damages were sought was resolved by the May 2, 2005 demand letter for \$2.5 million, Castillo considered whether the letter was an "other paper" under section 1446(b):

"Even if this court gives Chrysler the benefit of the doubt that it was not on notice that the jurisdictional minimum was met in the complaint, Chrysler knew diversity jurisdiction existed on May 2, 2005, when Morrow's counsel issued a demand letter and package to Chrysler's counsel — copies to a representative of Johnson Controls — seeking settlement in the amount of \$2.5 million. Morrow contends that this demand letter constitutes 'other paper' under 28 U.S.C. § 1446(b), pursuant to which Chrysler should have 'first ascertained' that the case was removable to federal court. Having failed to seek removal within 30 days of May 2, 2005, Morrow claims that Defendants are now barred from seeking removal."

Noting there was little precedent interpreting the meaning of "other paper" under section 1446(b), but such precedent that existed and its rationale suggested the May 2, 2005, demand letter was such an "other paper," the court reasoned:

"The 5th Circuit is the only appellate court to have addressed whether a post-complaint settlement demand letter constitutes 'other paper' within the meaning of 28 U.S.C. § 1446. In *Addo v. Globe Life and Acc. Ins. Co.*, after considering a range of lower court decisions, the 5th Circuit held that 'a post-complaint letter, which is not plainly a sham, may be "other paper" under § 1446(b).' 230 F.3d 759, 761-62 (5th Cir. 2000) (collecting cases). The 5th Circuit reasoned that its decision was 'consistent with the purpose of the removal statute to encourage prompt resort to federal court when a defendant first learns that the plaintiff's demand exceeds the federal jurisdictional limit. Further, this holding discourages disingenuous pleading by plaintiffs in state court to avoid removal.' Many district courts have followed suit, agreeing that settlement demand letters may constitute 'other paper.' See, e.g., *LaFree v. Prudential Fin.*, 385 F.Supp.2d 839, 849 (S.D. Iowa 2005); *Efford v. Milam*, 368 F.Supp.2d 380, 385 (E.D. Pa. 2005)."

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And, Castillo observed: "While not directly deciding the meaning of 'other paper,' other appellate courts, including the 7th Circuit, appear to agree that '[a] settlement letter is relevant evidence of the amount in controversy if it appears to reflect a reasonable estimate of the plaintiff's claim.' *Warehouse Foods Inc.*, 110 F.3d 424, 428-30 (7th Cir. 1997) (plaintiff's settlement offer is properly consulted in determining 'plaintiff's assessment of the value of her case')."

Finally, Castillo found that one unpublished Northern District of Illinois case which held that subpoenaed medical records were not an "other paper" under section 1446(b) was not

applicable because medical records were quite different from a demand letter specifying an amount of damages sought. (*Hernandez v. Schering Corp.*, No. 05 C 0870, 2005 WL 1126911 (N.D.Ill. 5/5/05). Granting Morrow's motion to remand, the court held:

"Accordingly, Morrow's post-complaint demand letter was 'other paper' which gave defendants notice that the case was removable. Because defendants did not, however, remove within 30 days of receiving the letter, defendants' subsequent removal of this case was improper, and the court thus grants Morrow's motion to remand."