

DOES FEDERAL OR STATE LAW APPLY?

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DOES FEDERAL OR STATE LAW APPLY?

- I. **Substance vs. Procedure: The Three-Test Process**
 - A. Specific Federal Procedural Statute or Rule that is “Sufficiently Broad to Cover the Situation”
 - B. “Outcome-Determinative” Test
 - C. Overriding Federal Interest in the Particular Matter
- II. **Determining State Substantive Law**
- III. **Key Consideration in Removing a Case to Federal Court**

INTRODUCTION

Considerations in deciding whether to file or remove a case to federal court?

1. You have been admitted to practice in the federal court;
2. You are familiar with federal court procedure and local rules;
3. You represent an out of state plaintiff or defendant who could be subject to potential prejudice by a local jury;
4. Your case could be resolved or simplified through a motion for summary judgment;
5. You want to move the case quickly through the judicial process and are willing to abide by quick, definite deadlines;
6. You want a mandatory settlement conference with an experienced judge;
7. You prefer written motions rather than oral arguments to persuade the court;
8. A six person jury may benefit your case;
9. You like to file motions and pleadings before midnight, from your computer; and
10. You like imposing, quiet buildings with heavy security.

This presentation will address current authority controlling when state or federal law is applied in diversity actions; how state conflict of laws provisions are applied in federal court, and removal of actions from state to federal court.

I. SUBSTANCE VERSUS PROCEDURE: ERIE AND IT’S PROGENY

A brief review of historical developments in the application of state versus federal law in diversity actions may assist in gaining a command of a difficult and often confusing area.

Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842), in which the court had tried to create a uniform body of substantive law, a *federal common law* applicable to diversity actions.

Federal Rules Enabling Act (1934).

Erie v. Tompkins, 304 U.S. 64 (1938). Holding Swift unconstitutional [violation of equal protection between state and federal litigants]; announcing the *substance versus procedure* test; and declaring the twin aims of discouraging forum shopping and disparate outcomes.

Guaranty Trust Co. v. York, 326 U.S. 99 (1945) distinguishing substance and procedure under an *outcome determinative* analysis.

Byrd v. Blue Ridge Electrical Cooperative, Inc., 356 U.S. 525 (1958). “Balancing countervailing federal considerations” in allocation of judge and jury functions under the Seventh Amendment

Hanna v. Plumer, 380 U.S. 460 (1965) FRCP control where valid and federal rule “sufficiently broad to cover the situation”. The “outcome-determination” test must not be applied mechanically to sweep in all manner of variations; instead, its application must be guided by the twin aims of the Erie rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws.

Gasperini v. Center for Humanities, Inc., 516 U.S. 415 (1996). “Accommodation” of state law with proscriptions under the Reexamination Clause of the Seventh Amendment.

The prevalence of state “tort reform” legislation over the past decade has generated increasing

litigation over these issues.

Despite the fact that distinguishing substantive and procedural law may appear straight forward, opinions repeatedly comment on the difficulty and complexity of their resolution. (See, Gasparini,). Elements of a claim, for example, are clearly substantive. McKethan v. Texas Farm Bureau, 996 F. 2d 734 (5th Cir. 1993), cert. Denied, 510 U.S. 1046 (1994) (elements of an intentional infliction of emotional distress claim governed by Texas law). The problem lay in those rules that are both substantive and procedural such as statutes of limitation, notice provisions, special pleading requirements and burdens of proof.

Erie (Substance versus Procedure):

Diversity cases in federal court must apply state substantive law and federal procedural law.¹ Erie v. Tompkins, 304 U.S. 64 (1938). Tompkins, a Pennsylvania citizen, was struck by an Erie Railroad freight train. In Pennsylvania state court, he would have been a trespasser under Pennsylvania common law and could have recovered damages only if he were able to show wanton or willful negligence by the railroad. He brought his lawsuit in a New York federal court where the railroad was incorporated. Under Swift and federal “common law” a simple

¹Tillam v. Georgia 466 F.Supp.2d 1311 (S.D. Ga. 2006). *Federal courts generally decide claims falling into one of four categories: (1) claims arising out of federal-law (federal question claims); (2) claims arising out of state-law between parties from different states where the amount in controversy exceeds \$75,000 (diversity claims); (3) state-law claims arising out of the same nucleus of operative fact as a filed diversity claim (diversity/supplemental state-law claims); and (4) state-law claims arising out of the same nucleus of operative facts as a filed federal law claim (federal/supplemental state-law claims).*

In category (1), federal question claims, federal law governs both the substance and procedure of the action and generally state law need not be referenced. In categories (2) and (3) - diversity and diversity/supplemental claims - the federal court must delve into the law as developed around the seminal case of Erie Railroad v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), which, as an oversimplification, requires that state law govern substance and federal law govern procedure. Though never explicitly stated by the Supreme Court, the Erie doctrine must also govern the applicable law in category (4) - federal/supplemental state-law claims.

negligence standard would apply. Justice Brandeis, writing for the majority, held that the federal court, except in matters governed by the U.S. Constitution or by Acts of Congress, must apply the relevant law of the state in matters of substance.

28 U.S.C. §1652. State laws as rules of decision.

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

This was the genesis of the substance versus procedural test.

York (Outcome Determinative Test):

The U. S. Supreme Court first created a framework for determining whether a state law was substantive or procedural in Guaranty Trust Co. v. York, 326 U.S. 99 (1945). The issue was whether the New York statute of limitations, which would have barred the lawsuit applied. The Court held that if the rule or law in question would significantly affect the outcome of the case, then the federal court must classify the rule or law in question as substantive and apply the rule or law in accordance with Erie. The action was dismissed under the New York statute of limitations. This test provided little practical guidance to federal district courts in diversity cases since many clearly procedural rules are often outcome determinative.

Refining the Outcome Determinative Test:

Three U.S. Supreme Court decisions helped to clarify, and to some extent modify, the loose outcome determinative test: Byrd v. Blue Ridge Electrical Cooperative, Inc., 356 U.S. 525 (1958), Hanna v. Plumer, 380 U.S. 460 (1965), and Gasperini v. Center for Humanities, Inc., 516 U.S. 415 (1996). These cases establish the existing framework for analysis of these issue

Byrd (Balancing Countervailing Federal Considerations):

Byrd was a personal injury case brought by a lineman working for an independent

contractor who had an assignment to work on the Blue Ridge Electrical Cooperative's lines. Byrd was a citizen of North Carolina while Blue Ridge was a South Carolina corporation. Byrd, injured in South Carolina, brought his lawsuit in federal court in South Carolina. The electric company argued that under South Carolina law it had immunity from personal injury lawsuits if Byrd was determined to be a statutory employee. If the lineman was a statutory employee he was limited to redress under the workmen's compensation laws of South Carolina. Moreover, the defendant argued, such a determination had to be made by a judge in accordance with South Carolina case law, instead of a jury. Byrd argued that taking this factual determination away from a jury disrupted the federal system of allocating functions between the judge and jury.

Justice Brennan wrote that if the outcome determination test were the appropriate analysis, then the federal court would have to follow the state court rule and let the judge determine this factual issue. But instead, the Court found that there were countervailing considerations, including the federal system of assigning trial functions between a judge and jury, which precluded the federal court from following this particular South Carolina rule. If the state rule is not bound up with the rights and obligations the state law is designed to protect and if application of the state rule would disrupt the federal system of trial functions, the rule will be considered procedural. Finding that there was a strong federal policy against allowing a state rule to disrupt the judge-jury relationship, the Court ruled that the federal trial court did not have to follow this State rule.

Hanna (Federal Rules of Civil Procedure control under The Rule Enabling Act)

In Hanna v. Plumer, 380 U.S. 460 (1965) the Supreme Court held that a valid Federal Rule of Civil Procedure controls when in direct conflict with a state rule or law.

Hanna, a citizen of Ohio, was injured by a Massachusetts citizen in a South Carolina car

accident. The Massachusetts defendant was deceased by the time Hanna filed her lawsuit in the Massachusetts federal district court. Hanna named and served the personal representative of the estate. Hanna's service processor complied with Federal Rule of Civil Procedure 4(d)(1) for service by leaving a copy of the summons and complaint with the personal representative's spouse at their home. However, Massachusetts law required that a personal representative be served in person. If the Massachusetts law was applied, the case had to be dismissed (as the district court held and first circuit affirmed). Obviously, the outcome of the case hung in the balance depending on which rule for service applied.

The Supreme Court announced that the Federal Rules of Civil Procedure are governed by The Rules Enabling Act which codified the grant of authority to the U.S. Supreme Court to prescribe the Federal Rules of Civil Procedure.

28 U.S.C. §2072. Rules of procedure and evidence; power to prescribe

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts

(b) Such rules shall not abridge, enlarge or modify any substantive right.

Chief Justice Warren wrote that when a state law or rule and a federal rule of procedure conflict, the federal trial court must apply the federal rule when:

1) the rule is constitutional and valid exercise of the Supreme Court's rule-making authority under the federal rules Enabling Act; and,

2) the scope of the federal rule is sufficiently broad to cover the situation².

²A federal rule of procedure is sufficiently broad to control the issue if the trial court cannot apply both the federal rule and the state rule. For example, there was a conflict between the Federal Rule of Civil Procedure 41(b) and the Nevada Rule of Civil Procedure 41(b) where the federal rule *permits* a court to dismiss a case for failure to prosecute (with no specific time

The Federal Rules of Civil Procedure are presumed to be valid under the Necessary and Proper Clause of the United States Constitution, which empowered Congress to enact the Rules Enabling Act. If the rule regulates procedure - the judicial process for enforcing substantive rights and duties for justly administering relief - it is presumed to be valid.

Erie, and the York outcome determinative test were never meant to be a talisman and did not apply in this case. The policies and purposes of the Erie rule always had to be kept in mind when determining whether a state or federal rule applied. The twin aims of Erie were: 1) to discourage forum shopping between state and federal courts; and 2) to avoid the inequitable administration of laws between state and federal courts. The Court acknowledged the obvious in that application of federal rules of procedure will often affect the rights of parties even to the point of determining the outcome of the litigation. The question is whether such rules abridge, enlarge or modify any substantive [State] right under the enabling clause..

Federal Rule of Civil Procedure 4(d)(1) providing for service by leaving a copy of the summons and complaint with the personal representative's spouse at their home was valid and sufficiently broad to cover the situation. Hanna applied the federal rule despite the fact that the outcome determinative test would have required the opposite result.

period mentioned) while the Nevada rule *requires* a court to dismiss a case for failure to prosecute after five years. See, Harvey's Wagon Whell, Inc. V. Van Blitter, 959 F.2d 153 (9th Cir. 1992). The Ninth Circuit held that the federal rule was sufficiently broad to control the issue and must be applied rather than the state rule.

But state tolling statutes have been held to be applicable to a lawsuit in federal court because Federal Rule of Civil Procedure 3 is not sufficiently broad to address state law statute of limitations tolling purposes. In Walker v. Armco Steel Corp., 446 U.S. 740 (1980), the Court held that the federal rule that determined when a civil action is commenced was not sufficiently broad to conflict with the Oklahoma state rule that required service within sixty days of filing a complaint to toll the statute of limitations. The Oklahoma rule applied and barred the lawsuit. The Court noted that if the lawsuit had been brought in Oklahoma state court it would have been barred because the plaintiff did not timely serve the defendant. Therefore, the action was also barred in Oklahoma federal district court for failure to comply with the Oklahoma time of service rule.

Gasperini (Accommodation Test):

Gasperini v. Center for Humanities, Inc., 518 U.S. 415 (1996) is especially interesting for its review of Erie and its progeny, its considered dicta, and its acknowledgment of the difficulty of applying competing state and federal laws in diversity cases. In Gasperini, the New York law that imposed a strict standard on reviewing courts when they were called upon to review a jury's damage award conflicted with significant federal interests found in the Seventh Amendment. The Court tried to accommodate both the state and the federal constitutional interests by applying an analysis refined beyond Hanna.

Gasperini, a Californian, loaned some photographic slides to a New York institution, which subsequently lost the slides. Gasperini sued for damages in the New York federal district court. The defendant admitted liability and the trial was limited to the determination of damages. The jury awarded Gasperini \$450,000. The federal appellate court found the award excessive in light of other similar cases under the New York "materially deviated from reasonable compensation" standard. The issue before the Court was whether the federal court was required to apply the New York statute requiring the reviewing court to determine if the damage award "materially deviated from reasonable compensation" or whether it should apply the "shock the conscience" standard applicable to the review of damage awards in federal courts. Gasperini argued that application of the New York statute would violate the re-examination clause of the Seventh Amendment, which states that no fact tried by a jury shall be otherwise re-examined by any Court of the United States. He argued that the only standard by which the jury award could be reviewed by an appellate court consistent with the Seventh Amendment was the "shock the conscience" standard.

Justice Ginsburg, writing the majority opinion for a strongly divided court, held that the

re-examination clause of the Seventh Amendment could be “accommodated” with the New York statute by directing the federal trial court (as opposed to the federal appellate court) to review the size of the damages award under the New York “materially deviates” standard.

Justice Scalia decried the Courts ruling for 1) ignoring the historical basis for the Seventh Amendments limits on appellate review of factual determinations, and 2) departing from Hanna under which FRCP Rule 59 was both valid and sufficiently broad to directly conflict with the New York law.

Hanna remains the standard for analysis and determination of most substantive versus procedural conflicts. Note that both Byrd and Gasparini involved application of the Seventh Amendment. To some extent they can both be considered anomalies and distinguishable from a more typical analysis under Hanna.

Sample of Georgia Cases:

Statute of Limitations as affected by service requirements.

Tillman v. Georgia, 466 F. Supp. 2d 1311 (S.D. Ga. 2006). Tillman filed his case within the applicable Georgia statute of limitations but did not serve Kight until 110 days later, after the two-year period had run. To stop the statute of limitations clock in Georgia a plaintiff must file suit and serve the defendant (1) within five days; or (2) after five days, so long as the plaintiff is diligent in perfecting service. If the plaintiff complies with (1) or (2), the service relates back to the date the suit was filed, which then controls for statute of limitations purposes. Issue: FRCP 4(m) governing service of process. Holding by Judge Edenfield: This Order may be said to "tinker" with the scope of rights created by the State of Georgia by extending the life of those rights. Any extension,

however, is not given by this Court in an unguided Erie choice; it was given by Congress in enacting the Federal Civil Procedure Amendments Act of 1982, providing an "irreducible allowance" of 120 days for serving process in federal court. Henderson, 517 U.S. at 661, 116 S.Ct. 1638. The Act's effect on substantive state rights is a permissible consequence of the federal government's exercise of its power to draft laws necessary and proper to create and regulate a federal court system. U.S. CONST. art. I, sec. 8, cl. 9, 18; see Hanna, 380 U.S. at 476, 85 S.Ct. 1136 (Harlan, J. concurring) (Court's touchstone for federal power is whether the enactment is "arguably procedural").

Though Tillman was required to file the complaint and serve Kight to stop the Georgia statute of limitations, the timeliness of his service is controlled by Rule 4(m). Tillman thus had 120 days to serve Kight under FRCP 4(m) and have that service relate back to the date of filing.

Professional Affidavit Pleading Requirement.

Boone v. Knight, 131 F.R.D. 609 (S.D.Ga.1990). Georgia statute requiring plaintiffs alleging professional malpractice to file with the complaint an affidavit of a competent expert applied exclusively to actions brought in state court and was inapplicable in federal cases (reasoning that the Georgia rule was "essentially a pleading requirement" that conflicted with the "notice pleading" standard set forth in FRCP Rule 8).

Brown v. Nichols, 8 F.3d 770, 773 (11th Cir.1993). Declining to decide whether Georgia statute is in conflict with federal rules and applicable in federal court; see generally Robert K. Harris, Case Comment, Brown v. Nichols: The Eleventh

Circuit Refuses to Play the Erie Game with Georgia's Expert Affidavit Requirement, 29 Ga. L.Rev. 291 (1994).

Baird v. Celis, 41 F.Supp.2d 1358 (1999). Patient brought medical malpractice action. The District Court, Camp, J., held that Georgia's expert affidavit requirement for malpractice cases did not apply to actions filed in federal court. [But see, RTC Mortg. Trust 1994 N-1 v. Fidelity Nat. Title Ins. Co., 981 F.Supp. 334 (1997) distinguishing Georgia professional affidavit requirement from New Jersey Affidavit of Merit. "*Quite unlike the affidavit required by the New Jersey statute, the affidavit required in Georgia actually supplements, i.e., adds to or goes beyond, the allegations of the complaint. See Ga.Code Ann. 9-11-9.1(a) ...; In short, the facts that: 1) the affidavit required by the New Jersey statute may be filed well after initial pleadings are filed, if the affidavit of merit will be filed at all; and 2) the statute does not affect, limit, or impact the content or timing of pleadings in federal court, prevent this Court from finding any conflict with Rules 8 and 9.*"]

Offers of Judgement and offers of settlement.

Wheatley v. Moe's Southwest Grill, LLC., 580 F.Supp.2d 1324 (09/30/2008).

Holding: Because O.C.G.A. § 9-11-68 is substantive in nature and does not conflict with a federal law or rule of procedure, the Court is bound to apply it to this case. Reasoning: Similarly, Rule 68 and O.C.G.A. § 9-11-68 are not in "direct collision" with one another. Rule 68 is available only to a party defending against a claim, whereas O.C.G.A. § 9-11-68 is available to both plaintiffs and defendants. Moreover, Rule 68 allows the recovery of "costs," which ordinarily

does not include attorney's fees. O.C.G.A. § 9-11-68, on the other hand, awards the successful offeror his attorney's fees incurred between the date of rejection of the offer and the entry of judgment. Additionally, Rule 68 applies to any claim, whereas O.C.G.A. § 9-11-68 is applicable only to tort claims. Further, Rule 68 authorizes offers of judgment, not offers of settlement, as is the case with O.C.G.A. § 9-11-68. Finally, unlike Rule 68, O.C.G.A. § 9-11-68 expressly allows the offeror to place conditions (as Defendants did here)(fn3) on the acceptance of the offer of settlement. In light of these substantial differences between Rule 68 and O.C.G.A. § 9-11-68, the two cannot be said to be in "direct collision," and there is no reason to believe that O.C.G.A. § 9-11-68 cannot be applied in harmony with Rule 68.

II. CONFLICTS OF LAW WHEN STATE LAW APPLIES

Under Diversity Jurisdiction:

Since diversity case in federal court invariably involve citizens of different states, the issue often arises as to which state law the court should apply. The U.S. Supreme Court has ruled that the federal district court must apply the choice of law rules of the state in which it sits. Klaxon Co. V. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941) [relying upon Erie goals]. The Klaxon rule has been criticized because it can encourage horizontal forum shopping among various federal courts by allowing a plaintiff to choose the forum state with the most advantageous choice of law rules for his case. It has been cited with approval as late as 2008 in Danforth v. Minnesota, S.Ct. 06-8273 (2008)

When Venue is Changed:

There are two kinds of venue transfer available in federal court - convenience or improper venue [28 U.S.C. §1404(a) and §1406(a) respectively]. If a case is transferred for convenience, the transferee court must apply the choice of law rules of the transferor court. Ferens v. John Deere Co., 494 U.S. 516 (1990); Van Dusen v. Barrack, 376 U.S. 612 (1964). In Ferens the plaintiff initiated the venue transfer; in Van Dusen the defendant initiated the venue transfer. In both cases, however, the rule remains the same. The venue statute, 28 U.S.C. §1404(a) only allows the litigants to change the location of the courtroom, not the choice of law rules.

However, when a case is transferred for improper venue the transferee court must apply the choice of law rules of the state in which it sits. Wisland v. Admiral Beverage Corp., 119 F.3d 733 (8th Cir. 1997). Otherwise, a litigant would file the original lawsuit in the improper venue state in order to obtain the benefit of the better choice of law rules (a forum shopping concern).

Lastly, if the state law is a procedural one, as opposed to one involving substance, the federal district court must apply the forum state's procedural law. The analysis should be 1) does state law or federal law apply, using the rules of Erie and its progeny; 2) if state law applies, which state's choice of law applies; and 3) after determining which state's choice of law applies, does that state characterize the particular rule or law as substantive or procedural? If the state characterized the rule as procedural, the federal district court will apply its forum state's rule. See, e.g., Muldoon v. Tropitone Furniture Co., 1 F.3d 964 (9th Cir. 1993) (transferor court choice of law principles apply and under transferor state, statute of limitations is procedural so court should have applied its forum state statute of limitations).

III. REMOVAL OF A CASE TO FEDERAL COURT:

Removing a case to federal court is governed by 28 U.S.C. § 1441. Removal refers to the

notice, filed by the defendant or defendants, which informs the federal court and the parties that the defendant has removed the case from state court where it was originally filed and has invoked the jurisdiction of the federal district court. No action or ruling is required by the federal court. The filing and service of the notice of removal is the act that removes the case to federal court.

28 U.S.C. §1441. Actions removable generally

(a) 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. For the purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable 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.

(c) Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.

Basic questions to ask when deciding whether to remove a case to federal court:

- 1) Does the civil case arise under the Constitution, laws or treaties of the United States? If so, jurisdiction is governed by 28 U.S.C. § 1331 and the case is removable.
- 2) If the case does not arise under federal law does this civil case have complete diversity of citizenship between the plaintiff(s) and defendant(s)? If one of the

defendants shares citizenship with one of the plaintiffs, complete diversity does not exist. If complete diversity exists, jurisdiction is governed by 28 U.S.C. § 1332.

3) Is one or more of the defendants a citizen of the state in which the complaint was filed? If so, the defendant(s) cannot remove the case to federal court by virtue of 28 U.S.C. § 1441(b).

4) If complete diversity does exist, does the amount in controversy, exclusive of interest and costs, meet or exceed \$75,000? The amount in controversy must be ascertainable from the complaint.

5) Are there claims in the complaint in which state law predominates? If so, those claims may be tried in federal court under its exercise of supplemental jurisdiction. The federal court may also, but is not required to, adjudicate state law claims under its exercise of supplemental jurisdiction in a diversity case. The exercise of supplemental jurisdiction is governed by 28 U.S.C. §1367.

Complete diversity of citizenship means that the plaintiffs do not share citizenship with any of the defendants. If diversity would exist but for one or more improperly joined defendants, the properly joined defendants can move to have the improperly joined defendants dismissed or can remove the case and then argue to the federal court that the improperly joined defendants should be disregarded for purposes of determining complete diversity.

Corporations are citizens of the state in which they are incorporated and of the state where they have their principal place of business. Class actions that may be removed to federal court are governed by separate statutes such as 28 U.S.C. §1453. Once a case has been removed to federal court, case proceeds as though it had originally been filed in federal court.

How to remove a case to federal court:

Removal of a case is governed by 28 U.S.C. §1446.

28 U.S.C. § 1446. Procedure for removal

(a) A defendant or defendants desiring to remove an civil action or criminal prosecution 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.

(b) The notice of removal of a civil action or proceeding shall be filed within thirty 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 thirty 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.

©) 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 on which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

(d) 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 the removal and the State court shall proceed no further unless and until the case is remanded.

The running of the thirty days in which to remove a case to federal court is computed from the date the first defendant is served or otherwise receives a copy of the initial pleading, even in a multiple defendant case. All defendants who have been served at the time of the filing of the motion to remove must join in the motion to remove. Cornwall v. Robinson, 654 F.2d 685 (10th Cir. 1981). If a complaint becomes removable within the first year through an amendment or otherwise, the defendant or defendants who want to remove the case to federal court must file the notice of removal within thirty days of the event that makes the case removable. See, Heniford v. Am. Motor Sales Corp., 471 F. Supp. 328 (D.S.C. 1979).

However, even if a case becomes removable at some later time, in no event can the case be removed after one year from the commencement of the action. Currently, there is no provision in 28 U.S.C. §1146 for a federal court to exercise its discretion and allow the removal of a case after one year.

Remand:

If the plaintiff determines that the case should not have been removed to federal court, the plaintiff must file his or her motion to remand on any basis other than lack of subject matter jurisdiction within thirty days of the filing of the notice (not service) or removal. However, if it appears that the federal court lacks subject matter jurisdiction at any time prior to final judgment, the court shall remand the case to state court.

Sec. 1447. Procedure after removal generally

- (a) In any case removed from State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.
- (b) It may require the removing party to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to such State court.
- (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. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of removal. 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.

If a co-defendant has not been served at the time of filing a Notice of Removal, the subsequently served defendant retains his right to timely file a motion for remand. 28 U.S.C. §1448.

