14C Fed. Prac. & Proc. Juris. § 3729 (Rev. 4th ed.)

Federal Practice and Procedure (Wright & Miller) | April 2023 Update

Jurisdiction and Related Matters

Chapter 7. Removal from State Courts

Joan Steinman prepared the Fourth Edition of Chapter 7., Mary Kay Kane prepared the Revised Fourth Edition of Chapter 7., A. Benjamin Spencer presently updates Chapter 7.

§ 3729 Procedure for Removal—In General

Primary Authority

28 U.S.C.A §§ 1446, 1447, 1455

Forms

2 West's Federal Forms, District Courts—Civil §§ 2:7, 2:17, 2:18 to 2:75

The practice and procedure for removing a case from a state court to a federal court is governed by federal statute and not by the Federal Rules of Civil Procedure; the latter, however, govern a case after removal is effected.[1] Today, removal can be achieved with relative simplicity. But prior to 1948, the procedure for removal from a state to a federal court was extremely unsatisfactory for both the court systems and the litigants.[2]

Before 1948, the defendant had to file a petition for removal and a bond in the state court. If the state court refused to allow removal, the defendant had three possible courses of action available, none of them economical or reassuring. The defendant could note an exception to the court's ruling and continue to litigate in the state trial court. Then, on appeal to the state appellate courts and perhaps to the United States Supreme Court, the defendant could contend that removal had been erroneously denied. In the unlikely event that the highest appellate court to rule on the matter agreed, the case would go to a federal court to be tried all over again, at great cost to the litigants and to the judicial system. Alternatively, the defendant could ignore the state proceeding and proceed in the federal court as if the petition for removal had been granted by the state court. The risk was that the state action also might continue, and a state-court judgment against the defendant would be valid if it ultimately were determined that the state court was right in its refusal to grant removal. Finally, the defendant could litigate in both the state and federal courts at the same time, an extremely wasteful alternative, although in some ways the safest.[3]

The 1948 Judicial Code substantially improved the procedure for removal and virtually ended any conflict between state and federal court jurisdiction in this context.[4] Since the removal statute's most recent amendment in 2011, the procedure for removal

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is spelled out in Section 1446 (civil actions) and Section 1455 (criminal prosecutions) of Title 28. The basic steps that normally must be taken will be outlined briefly here, as an introduction to the more detailed discussion of various aspects of the procedure that appears in the following sections.

A defendant wishing to remove simply files a notice of removal, signed subject to Federal Rule of Civil Procedure 11, with the federal district court for the district and division in which the state-court action is pending.[5] The notice of removal should state only the grounds for removal and not the facts supporting removal.[6] The notice of removal now called for by Sections 1446 and 1455 replaces the former requirement of a verified petition,[7] which obliged the defendant to set out the facts that justified removal and therefore frequently resulted in a detailed document. The notice usually must be filed with the district court within 30 days after the defendant receives the complaint in a state-court civil action or after the defendant has been arraigned in a state-court criminal prosecution.[8] The requirement that the removal document be accompanied by a bond for costs and disbursements has been abolished.[9]

In a civil action, after filing the notice of removal with the federal court, the defendant must give written notice of removal to all adverse parties,[10] and file a copy of the notice of removal with the state court in which the action originated.[11] Once the papers have been filed, specific language in Section 1446 prohibits the state court from proceeding further with the case.[12] The action proceeds in the federal court as if it had been commenced there. But in criminal actions, the removal notice does not automatically stay a state-court action. The state-court proceedings will not be halted or delayed until removal is granted. However, a judgment of conviction may not be entered unless the federal court remands the case.[13]

Removal does not depend on the defendant securing leave from either the state or the federal court. However, the propriety of removal in civil cases may be tested in the federal court by a motion to remand.[14] This approach both reduces friction between the two court systems and avoids imposing on the federal courts the tremendous burden of passing on the propriety of every notice of removal before cases can proceed in the federal system.[15] Moreover, most conflict between the two court systems is eliminated by the statutory bar against further proceedings in the state court after removal. So long as the case has not been remanded by the federal court, any subsequent activity in the state action is void, even if the case was removed improperly.[16] In contrast, in criminal actions Section 1455 requires the federal court to examine the notice promptly to determine whether to remand or retain the case so that all removal attempts are subject to judicial scrutiny.[17]

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Footnotes

1 **Federal Rules**

Flowers v. Aetna Cas. & Sur. Co., 163 F.2d 411 (C.C.A. 6th Cir. 1947).

Brown v. Kerkhoff, 462 F. Supp. 2d 976 (S.D. Iowa 2006) (after removal of a class action, the state court subsequently ruled on parties' motions that had been filed prior to removal, and the district court refused to adopt the state court's ruling, holding that its ruling was a legal nullity under 28 U.S.C.A. § 1446(d) because it was issued after removal notice had been filed with state and federal courts and parties showed no defects in the removal process).

This point is discussed further in § 3738.

2 **Prior to 1948**

Brown, Procedure for Removal of Cases to Federal District Courts, 31 Iowa L.Rev. 354 (1946).

Jones, Procedure in Removal of Causes, 18 Notre Dame Law. 95 (1942).

3

Wasteful procedure

These procedures are outlined in Metropolitan Cas. Ins. Co. v. Stevens, 312 U.S. 563, 567–568, 61 S. Ct. 715, 717–718, 85 L. Ed. 1044 (1941).

See generally

Note, Federal Jurisdiction—Removal of Causes—Appeal from Order of Removal—Separable Controversies, 26 Col.L.Rev. 629 (1926).

Note, Removal of Causes—Proceedings in Federal and State Courts Subsequent to State Courts' Denial of Motion to Remove, 20 N.C.L.Rev. 438 (1942).

Note, State Court Determination of Removability as Res Judicata in Federal District Court, 50 Yale L.J. 158 (1940).

4

Conflicts ended

Case comment, 9 Okl.L.Rev. 191 (1956).

Note, State—Federal Court Conflicts Over the Removability of Causes: The Prospect Under the New Judicial Code, 98 U.Pa.L.Rev. 80 (1949).

5

File notice

28 U.S.C.A. §§ 1446(a), 1455(a).

See § 3735.

6

Notice must state grounds

See §§ 3734- 3735.

But see

Leite v. Crane Co., 749 F.3d 1117 (9th Cir. 2014) ("Like Plaintiffs pleading subject-matter jurisdiction under Rule 8(a) (1), a defendant seeking to remove an action may not offer mere legal conclusions; it must allege the underlying facts supporting each of the requirements for removal jurisdiction.").

7

Verified petition replaced

White v. Lively, 304 F. Supp. 2d 829 (W.D. Va. 2004), **citing Wright, Miller & Cooper**.

Rollwitz v. Burlington Northern R. R., 507 F. Supp. 582 (D. Mont. 1981), **citing Wright, Miller & Cooper**.

8

30-day time limit

28 U.S.C.A. § 1446(b)(1) and 28 U.S.C.A. § 1455(b)(1).

See § 3731.

9

Bond abolished

Libhart v. Santa Monica Dairy Co., 592 F.2d 1062, 1065 (9th Cir. 1979), **citing Wright, Miller & Cooper**.

10

Notice to adverse parties and state court

28 U.S.C.A. § 1446(d).

Dutton v. Ethicon, Inc., 423 F. Supp. 3d 81, 87-88 (D.N.J. 2019) ("Although EJ&J filed notice of removal in the U.S. District Court for the District of New Jersey one minute before service of process, they did not complete all required removal steps until providing copies of the notice to both Gilbert and the state court in Middlesex County. Therefore, EJ&J were 'properly joined and served defendants' under § 1441(b) prior to removal."), **quoting Wright & Miller**.

11

File where originated

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Dutton v. Ethicon, Inc., 423 F. Supp. 3d 81, 87-89 (D.N.J. 2019) ("[R]emoval is not 'effected' until all three steps are completed. * * * [A]s Defendants did not complete all three removal steps before being properly served, the forum defendant rule bars removal of the Gilbert action."), **citing Wright & Miller**.

Wright v. Leasecomm Corp., 817 F. Supp. 106 (M.D. Fla. 1993) (suit filed in Massachusetts state court could not be removed to the United States District Court for the Middle District of Florida because the matter can be removed only to the district and division within which the action was pending).

12 **State court prohibited**
28 U.S.C.A. § 1446(d).

Saade Ferrer v. Banco Central Hispano-Puerto Rico, Inc., 142 F. Supp. 2d 190 (D.P.R. 2001), **quoting Wright, Miller & Cooper**.

13 **Criminal notice procedure**
28 U.S.C.A. § 1455(b)(3)–(b)(5).

For a discussion of the time requirements applicable to removal of criminal cases, see § 3731 at notes 4–9.

14 **Motion to remand**
See §§ 3739 to 3739.3.

See also
In a claim related to the defendants' alleged theft of trade secrets in connection with a software program developed and sold by the plaintiff, the Fifth Circuit held that that the district court was correct to consider only the original petition when deciding the plaintiff's motion to remand. The plaintiff conflated the question whether the initial removal was proper, which follows the time-of-filing rule, with the question whether the district court should, in its discretion, remand the case when the federal claims disappear as the case progresses. Since the plaintiff's motion sought remand under § 1447(c) contending that removal had been improper, the relevant record was the original petition. Spear Marketing, Inc. v. BancorpSouth Bank, 791 F.3d 586 (5th Cir. 2015).

15 **Avoids friction and burden**
Ironically, the Reviser's Note to the 1948 Code states that the right to remove will be determined in the federal court "before the petition is granted." Obviously, the text of the statute does not correspond with the note.

16 **State proceedings void**
See § 3736.

17 **All notices in criminal actions reviewed**
28 U.S.C.A. § 1455(b)(4),(b)(5).

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