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Jurisdiction and Related Matters

Chapter 7. Removal from State Courts

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§ 3738 Procedure After Removal

Link to Monthly Supplemental Service

Primary Authority

28 U.S.C.A §§ 1446, 1447, 1448, 1449, 1450
Fed. R. Civ. P. 81

Forms

2 West's Federal Forms, District Courts—Civil §§ 2:8, 2:18 to 2:75

After the removal of an action from state court, the federal district court acquires full and exclusive subject-matter jurisdiction over the litigation.[1] The case will proceed as if it originally had been brought in the federal court.[2] Thus, it has been settled by numerous cases that the removed case will be governed by the Federal Rules of Civil Procedure and all other provisions of federal law relating to procedural matters.[3]

The specific practice of the federal courts in cases removed from state court is governed by Sections 1447 through 1450 of Title 28 and Federal Civil Rule 81(c). The federal court may require the party or parties who filed the notice of removal to file with the federal court clerk copies of all records and proceedings in the state court, or may cause those copies to be brought before it by writ of certiorari issued to the state court.[4] Under Section 1449, if the clerk of the state court fails to deliver certified copies of the state-court record and proceedings, the district court may direct the parties to supply the substance of the material, by affidavit or otherwise.[5]

The federal court usually will not require the parties to redo the state-court pleadings according to federal form and content standards,[6] although at least in some early cases the district court found it necessary to order repleading when the state pleading

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requirements varied markedly from federal practice.[7] Because the Federal Civil Rules have had a strong impact on court procedures in most states, especially with regard to pleading, the form and content of state-court pleadings have not proven to be a significant problem.

Once a case has been removed, the parties may amend the pleadings filed in the state court, in accordance with Federal Civil Rule 15[8] but, with the exception of amendments to add non-diverse parties that are authorized by Section 1447(e),[9] a pleading amendment normally will not be permitted to oust the federal court of its subject-matter jurisdiction.[10] Moreover, an amendment asserting a claim for relief over which the state court would not have had jurisdiction but which is within the subject-matter jurisdiction of the federal court is permissible.[11]

Section 1447(a) authorizes a federal court to issue "all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise." Section 1448 specifically provides that if any defendants have not been served, or if prior service was inadequate, "process or service may be completed or new process issued in the same manner as in cases originally filed in such district court."[12] The federal court can look into the sufficiency of the service of process issued prior to removal.[13] State law governs the sufficiency of the state-court process and the existence of personal jurisdiction insofar as that is a state-law issue, rather than a federal constitutional question,[14] but the sufficiency of post-removal service pursuant to the Federal Civil Rules and the form and timing of a challenge by the defendant to the adequacy of service is governed by the Federal Civil Rules.[15]

Defendants do not waive any defense by removing a case to federal court and may move to dismiss—for lack of personal jurisdiction, for example—or assert the defense of lack of personal jurisdiction in an answer filed before or after removal. It is well-settled that removal of a case does not act as a general consent to jurisdiction, defeating the motion or defense.[16]

By virtue of the language of Federal Civil Rule 81(c), the Federal Rules of Civil Procedure provide at least two deviations from normal procedural practice in removed actions. First, if a defendant in a removed action has not answered the complaint prior to removal, he must answer or present the available defenses or objections under the federal pleading rules within 21 days[17] after the receipt, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which the action is based, or within 21 days after being served with the summons for a previously filed complaint, or within 7 days after the filing of the notice of removal, whichever period is longest.[18]

The second deviation involves the right to a jury trial. Before 1963, there was considerable uncertainty whether a party had to properly make a jury-trial demand in the state court prior to removal in order to retain a right to jury trial in the federal court.[19] In 1955, the Advisory Committee on Civil Rules proposed an amendment to Federal Civil Rule 81(c) that would have made clear that there was no need for a second demand when an affirmative jury demand had been made in the state court prior to removal. The Supreme Court did not take any action on this proposal.[20]

But in 1963, the Supreme Court adopted an amendment to Civil Rule 81(c) that actually went beyond the 1955 suggestion. Under the 1963 amendment, a party in a removed action not only is freed from any obligation to repeat a demand for jury trial if one was made in the state court before removal; the party need not make any demand for jury trial after removal if the state law applicable in the court from which the case was removed did not require an express demand.[21] In this situation, however, the federal court, after removal, may direct the parties to demand a jury if they wish that form of trial,[22] and the court must so order if a party requests it to do so. These provisions strike an appropriate balance between the desirability of an early jury-trial demand and the reduction of technicalities that might lead to an inadvertent waiver of the jury-trial right. If the state court from which the action was removed does require an express jury demand, and no party made a request for jury trial prior to

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removal, the right to jury trial may well be waived unless a timely demand for a jury trial is filed pursuant to Federal Civil Rule 38(b), once the case reaches the federal court.[23]

Under Section 1450 of Title 28, orders or rulings issued by the state court prior to removal are not conclusive in the federal action after removal. However, it is well-settled that state-court rulings do remain binding on the parties[24] unless and until formally set aside by the federal district court.[25] Indeed, the third paragraph of Section 1450 provides that "all injunctions, orders, and other proceedings had in such action prior to its removal shall remain in full force and effect until dissolved or modified by the district court." The federal court thus may redetermine, for example, the propriety of state-court orders concerning the sufficiency of process,[26] and even may reconsider a default judgment entered by the state court prior to the removal, if the removal notice has been filed within the time period specified in the removal statute.[27] A federal court has particularly good reason to reconsider a state-court determination when federal standards differ from state-law standards on an issue. Thus, in Fairbank v. Johnson,[28] the Ninth Circuit held that a district court did not abuse its discretion in reaching the merits of defendant's motion for summary judgment on an employee's retaliation claim after the state court, before removal, had denied summary judgment on that claim. The differences between the federal and the state standards for granting summary judgment provided a cogent reason to reconsider the state-court ruling.

Prior to 1974, Section 1450 was interpreted by some federal courts to preclude the automatic expiration of state-court temporary restraining orders after removal to federal court. The district court had to "dissolve or modify" the decree.[29] These decisions were rejected by the Supreme Court in 1974 in Granny Goose Foods, Incorporated v. Brotherhood of Teamsters and Auto Truck Drivers Local No. 70 of Alameda County.[30] There, the district court had held the respondent union in contempt for violating a temporary restraining order issued by the state court before removal, by acts that occurred after the date the order would have expired in state court. The court of appeals reversed, noting that, under either California or federal procedure, the order would have expired before the allegedly contemptuous acts were committed, and the Supreme Court affirmed in an opinion by Justice Marshall. The Court reasoned that Section 1450 had been enacted to avoid duplication of proceedings after removal and to prevent the rights of the parties from lapsing on removal, rather than to give injunctions greater effect in the federal court than they would have had in the state court issuing them. According to Justice Marshall:

> At the outset, we can find no basis for petitioners' argument that Section 1450 was intended to turn *ex parte* state court temporary restraining orders of limited duration into federal court injunctions of unlimited duration. Section 1450 was simply designed to deal with the unique problem of a shift in jurisdiction in the middle of a case which arises whenever cases are removed from state to federal court. In this respect two basic purposes are served. Judicial economy is promoted by providing that proceedings had in state court shall have force and effect in federal court, so that pleadings filed in state court, for example, need not be duplicated in federal court. In addition, the statute ensures that interlocutory orders entered by the state court to protect various rights of the parties will not lapse upon removal. Thus attachments, sequestrations, bonds, undertakings, securities, injunctions, and other orders obtained in state court all remain effective after the case is removed to federal court.

> But while Congress clearly intended to preserve the effectiveness of state court orders after removal, there is no basis for believing that § 1450 was designed to give injunctions or other orders *greater* effect after removal to federal court than they would have had if the case had remained in state court. After removal the federal court "takes the case up where the State court left it off." * * * The "full force and effect" provided state court orders after removal of the case to federal court was not intended to be more than the force and effect the orders would have had in state court.[31]

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The Supreme Court further indicated that the respondent was entitled to the protection of the time limitations of Federal Civil Rule 65(b).[32] It then formulated, as a rule of general application, the principle that a temporary restraining order issued by a state court prior to removal will not remain in force after removal any longer than it would have remained in effect under state law. Further, in no event will it continue in effect longer than the time specified in Federal Civil Rule 65(b), as measured from the date of removal. As a result, both Section 1450's policy of continuity and the time limitations of Federal Civil Rule 65(b) are accommodated.[33]

As noted in Justice Marshall's opinion in Granny Goose, under paragraph one of Section 1450, an attachment or sequestration of a defendant's property, issued by a state court, is effective in the federal court after removal.[34] Similarly, under paragraph two of the same section, all bonds, undertakings, or security given prior to removal remain effective thereafter, unless and until set aside.[35]

Once an action has been removed, a plaintiff is free to institute a second state-court action based on a claim in the removed action. The federal court having jurisdiction over the removed action is unlikely to invoke its authority under Section 2283 of Title 28 "in aid of" its jurisdiction to enjoin the new state-court action because simultaneous state and federal actions normally are permitted.[36] However, federal courts have enjoined state-court actions filed subsequent to the removal of a nearly identical action when the only significant difference was the joinder of a resident defendant in an apparent attempt to defeat removal and circumvent the federal court's discretion to disallow an amendment of the complaint that would create the same party configuration as the second state-court action presents.[37]

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Footnotes

1

Exclusive jurisdiction

French v. Hay, 89 U.S. 238, 22 Wall. 238, 22 L. Ed. 854, 1874 WL 17437 (1874).

Ward v. Resolution Trust Corp., 972 F.2d 196 (8th Cir. 1992).

Farias v. Bexar County Bd. of Trustees for Mental Health Mental Retardation Services, 925 F.2d 866 (5th Cir. 1991).

Koliqi v. Walmart Stores, Inc., 2022 WL 1073423 (Conn. Super. Ct. 2022) ("[T]he court concludes that state court deadlines are tolled as of the date an action is removed to federal court, and resume upon the mailing of a certified copy of the order or remand from the clerk of the District Court to the clerk of the Superior Court."), **citing Wright & Miller**.

When a complaint has been amended after removal, to set forth, for the first time, a basis for federal jurisdiction, the federal court hearing the matter, if the basis for federal jurisdiction is found to be valid, becomes vested with jurisdiction to proceed further, even if it is shown later that removal was improvidently granted. Home Sav. and Loan Ass'n of Joliet v. Samuel T. Isaac & Associates, Inc., 496 F. Supp. 831 (N.D. Ill. 1980).

Compare

After removal and a subsequent appeal, the federal court of appeals could examine all antecedent interlocutory rulings, including those rendered by the state court, whether or not they were reexamined by the district court. Reilly v. Waukesha County, Wis., 993 F.2d 1284 (7th Cir. 1993).

But see

Schmude v. Sheahan, 420 F.3d 645 (7th Cir. 2005) (despite district court's jurisdiction over removed case and state statute authorizing court in which a suit is pending to appoint an attorney in place of a State's attorney in specified circumstances, the district court erred in imposing sanctions on attorneys who sought and received

those appointments, and received compensation, from the state court because the state court had continuing authority to make the appointments regardless of pendency of suit in federal court at time of appointments).

2 **Proceed as if filed in federal court**

Bacardi Intern. Ltd. v. V. Suarez & Co., Inc., 719 F.3d 1 (1st Cir. 2013) (reviewing for abuse of discretion, as it would in a case commenced in federal court, a removed case in which the district court had determined whether an absent person was a Rule 19(b) party).

Tellado v. IndyMac Mortg. Services, 707 F.3d 275 (3d Cir. 2013) (court lacked subject-matter jurisdiction over removed case under the Financial Institutions Reform, Recovery, and Enforcement Act, for failure of the plaintiff to exhaust administrative remedies).

Countrywide Home Loans, Inc., v. Mortgage Guar. Ins. Corp., 642 F.3d 849 (9th Cir. 2011) (a district court that had diversity jurisdiction over suit was required by Federal Arbitration Act (FAA) to consider defendant's motion for stay pending arbitration before exercising its discretion under the federal Declaratory Judgment Act to remand the case to state court because, even though § 3 of the FAA refers only to actions initiated in federal court, the statute should be held to operate differently in a removed case).

Ervin v. OS Restaurant Services, Inc., 632 F.3d 971 (7th Cir. 2011).

Carvalho v. Equifax Information Services, LLC, 629 F.3d 876 (9th Cir. 2010) (treating state court's pre-removal order sustaining a demurrer as a validly entered dismissal pursuant to Federal Civil Rule 12(b)(6)).

Gerena v. Korb, 617 F.3d 197 (2d Cir. 2010) (the court enforced the same choice of law principles that it applies in cases that have been filed in federal court and then transferred within the federal system).

Anderson v. Aon Corp., 614 F.3d 361 (7th Cir. 2010) (choice of law rules of the state in which the action was brought would govern after intercircuit transfer of case but the procedures of the transferee district court govern).

Eggleton v. Plasser & Theurer Export Von Bahnbaumaschinen Gesellschaft, MBH, 495 F.3d 582 (8th Cir. 2007) (deciding choice of law issue in case removed and transferred for lack of personal jurisdiction).

EPRO Services, Inc. v. Regenesis Bioremediation Products, 2019 WL 4054030 (D. Kan. 2019) ("Furthermore, when evaluating a motion to dissolve a temporary restraining order issued by a state court before removal, federal law is applied as though the action was originally commenced in federal court.") (citation and internal quotation marks omitted), **citing Wright & Miller**.

Talton v. BAC Home Loans Servicing LP, 839 F. Supp. 2d 896 (E.D. Mich. 2012) (federal pleading requirements govern actions removed to federal court).

State Farm Fire and Cas. Co. v. Valspar Corp., Inc., 824 F. Supp. 2d 923, 942–43 (D.S.D. 2010), **citing Wright, Miller, Cooper & Steinman** (state law governs substantive matters in diversity suits, whether filed in or removed to federal court).

In Re Yasmin and Yaz (Drospirenone) Marketing, Sales Practices and Products Liability Litigation, 692 F. Supp. 2d 1012 (S.D. Ill. 2010), aff'd, 643 F.3d 994 (7th Cir. 2011) (denying motion to dismiss removed case and rejecting plaintiff's contention that her case was not part of an MDL, citing JPML Rules, the absence of need for action on the part of the Panel for a case to be included in an MDL, and the fact that the case was made part of the consolidation by local practice.

Hogston v. Allis-Chalmers Corp., 672 F. Supp. 2d 705 (E.D. Pa. 2009) (in case that was removed and then transferred and consolidated by order of the JPML, applying Federal Civil Rule 56(c) as interpreted by the Third Circuit, where the transferee court sat).

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Berna v. City of Detroit, 419 F. Supp. 2d 954 (E.D. Mich. 2006) (granting plaintiff's counsel extra time to comply with local rule requiring electronic filing because he lacked experience in federal court and had not expected to be litigating this case there).

Chapman v. Clarendon Nat. Ins. Co., 299 F. Supp. 2d 559 (E.D. Va. 2004), **citing Wright, Miller & Cooper** (the action was to be treated as if filed under the federal declaratory judgment act, which makes the grant of declaratory relief discretionary).

Hill v. Ascent Assur., Inc., 205 F. Supp. 2d 606 (N.D. Miss. 2002).

See generally
Gallagher, In Search of a Dispositive Answer on Whether Remand is Dispositive, 5 Seton Hall Cir. Rev. 303 (2009).

3 **Federal Civil Rules control**
Smith v. Bayer Corp., 564 U.S. 299, 131 S. Ct. 2368, 180 L. Ed. 2d 341 (2011).

Willy v. Coastal Corp., 503 U.S. 131, 112 S. Ct. 1076, 117 L. Ed. 2d 280 (1992).

Granny Goose Foods, Inc. v. Brotherhood of Teamsters and Auto Truck Drivers Local No. 70 of Alameda County, 415 U.S. 423, 437, 94 S. Ct. 1113, 1123, 39 L. Ed. 2d 435 (1974), **citing Wright & Miller**.

Freeman v. Bee Mach. Co., 319 U.S. 448, 63 S. Ct. 1146, 87 L. Ed. 1509 (1943).

King v. Worthington, 104 U.S. 44, 26 L. Ed. 652, 1881 WL 19729 (1881).

Goodwin v. Reynolds, 757 F.3d 1216 (11th Cir. 2014) (voluntary dismissal without prejudice).

Melamed v. Blue Cross of California, 557 Fed. Appx. 659 (9th Cir. 2014).

RES-GA Cobblestone, LLC v. Blake Const. and Development, LLC, 718 F.3d 1308 (11th Cir. 2013).

Dunbar v. Wells Fargo Bank, N.A., 709 F.3d 1254 (8th Cir. 2013) (federal pleading standards applied to determine if a complaint states a claim arising under state law).

Juarez v. Select Portfolio Servicing, Inc., 708 F.3d 269 (1st Cir. 2013) (Civil Rules 8(a) and 15(a)).

Hooper-Haas v. Ziegler Holdings, LLC, 690 F.3d 34 (1st Cir. 2012) (entry of default as a discovery sanction).

Elliott v. Archdiocese of New York, 682 F.3d 213 (3d Cir. 2012) (Civil Rule 54(b)).

E-Shops Corp. v. U.S. Bank Nat. Ass'n, 678 F.3d 659 (8th Cir. 2012) (Civil Rule 12(b)(6)).

Wallace v. Microsoft Corp., 596 F.3d 703, 706 (10th Cir. 2010), **quoting Wright, Miller, Cooper, & Steinman**.

Asher v. Unarco Material Handling, Inc., 596 F.3d 313 (6th Cir. 2010) (Civil Rule 15(c)).

Williams v. Lampe, 399 F.3d 867 (7th Cir. 2005) (amendment of answer to permit defendant to assert affirmative defense of limitations under Federal Civil Rule 8(c)).

In re Memorial Estates, Inc., 797 F.2d 516 (7th Cir. 1986) (power to appoint receiver).

Barcelo v. Teva Pharmaceuticals U.S.A., Inc., 2020 WL 1666116, *2-3, *5 (S.D. Tex. 2020) ("Barcelo argues that either the Pennsylvania or Texas Rules of Civil Procedure should govern the pleading standard in resolving the defendants' motion, because Barcelo originally filed her case in Pennsylvania state court before it was removed to federal court and then transferred to this court. But this case is properly in federal

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court, and the Federal Rules of Civil Procedure govern the appropriate pleading standard."), **quoting Wright & Miller**.

Froehlich v. CACH, LLC, 289 F.R.D. 454 (S.D. Ohio 2013) (Civil Rule 6(b)).

Busby v. Capital One, N.A., 841 F. Supp. 2d 49 (D.D.C. 2012) (Civil Rule 41(a)(1)).

Killmeyer v. Oglebay Norton Co., 817 F. Supp. 2d 681, 687 (W.D. Pa. 2011) (Civil Rule 60(a)).

Diaz v. U.S., 789 F. Supp. 2d 722 (S.D. Miss. 2011) (Civil Rule 55(c)).

Morgan v. Cabela's Inc., 788 F. Supp. 2d 552 (E.D. Ky. 2011) (Civil Rule 56).

Buchanan County v. Equitable Production Co., 788 F. Supp. 2d 497 (W.D. Va. 2011) (Civil Rule 41(b)).

Slater v. Hoffman-La Roche Inc., 771 F. Supp. 2d 524, 528 (E.D. Pa. 2011) (Civil Rule 21).

Terra Nova Sciences, LLC v. JOA Oil and Gas Houston, LLC, 738 F. Supp. 2d 689 (S.D. Tex. 2010) (amendment to add defendants).

Smith v. Local Union No. 110, Intern. Broth. of Elec. Workers, 681 F. Supp. 2d 995, 1006 (D. Minn. 2010), **quoting Wright, Miller, Cooper, & Steinman**.

Counsel Financial Services, LLC v. Melkersen Law, P.C., 602 F. Supp. 2d 448 (W.D. N.Y. 2009) (Civil Rule 13).

Mickalis Pawn Shop, LLC v. Bloomberg, 465 F. Supp. 2d 543 (D.S.C. 2006) (Civil Rule 6(b)).

Brown v. Kerkhoff, 462 F. Supp. 2d 976 (S.D. Iowa 2006).

In re Clayton, 386 F. Supp. 2d 631 (M.D. N.C. 2005) (Civil Rule 60(b) motion).

Rabbi Jacob Joseph School v. Province of Mendoza, 342 F. Supp. 2d 124 (E.D. N.Y. 2004), **citing Wright, Miller & Cooper**.

Breedlove v. Cabou, 296 F. Supp. 2d 253 (N.D. N.Y. 2003) (defendants had timely moved under federal law for reconsideration of pre-removal state court order and that any untimeliness of the motion under state law was irrelevant).

North Dakota v. U.S. Army Corps of Engineers, 264 F. Supp. 2d 871 (D.N.D. 2003) (Civil Rule 65(b)).

Curtis v. Norfolk Southern Ry. Co., 206 F.R.D. 548 (M.D. N.C. 2002) (period set by local federal rule for plaintiff to file a motion for class certification).

Flying Cross Check, L.L.C. v. Central Hockey League, Inc., 153 F. Supp. 2d 1253 (D. Kan. 2001) (Civil Rule 65(b)).

Varney v. R.J. Reynolds Tobacco Company, 118 F. Supp. 2d 63 (D. Mass. 2000) (adequacy of pleadings measured by Federal Civil Rules).

Williams v. J.F.K. Intern. Carting Co., 164 F.R.D. 340 (S.D. N.Y. 1996) (demand for jury trial).

Summerchase Condominium Owners Assn., Inc. v. Resolution Trust Corp., 145 F.R.D. 583 (S.D. Ala. 1993) (Civil Rules 59 and 60).

Bruley v. Lincoln Property Co., N.C., Inc., 140 F.R.D. 452 (D. Colo. 1991), **citing Wright, Miller & Cooper** (service of process must be made in accordance with Federal Civil Rules).

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Compare
Although in theory a party need not file a second notice of appeal in a federal court if the first notice in the removed case was adequate in state court: "In practice, a party should do so as filing an additional notice of appeal would facilitate the administrative processing of the case in the federal system." F.D.I.C. v. Keating, 12 F.3d 314, 317 n.5 (1st Cir. 1993).

In re Darvocet, Darvon and Propoxyphene Products Liability Litigation, 889 F. Supp. 2d 931 (E.D. Ky. 2012) (although federal fraudulent joinder law would govern, state pleading rules were applied to determine the sufficiency of the factual allegations, because federal Civil Rule 81 provides for the federal civil rules to apply to a civil action after it has been removed from state court, but fraudulent-joinder analysis tests the validity of the removal itself.

Sun Forest Corp. v. Shvili, 152 F. Supp. 2d 367 (S.D. N.Y. 2001) (although Federal Civil Rules govern procedure subsequent to removal, the district court would evaluate plaintiff's motion for summary judgment filed in lieu of a complaint, in accordance with state-court procedure).

4 **Records and proceedings**
28 U.S.C.A. § 1447(b).

Usatorres v. Marina Mercante Nicaraguenses, S.A., 768 F.2d 1285 (11th Cir. 1985), **citing Wright, Miller & Cooper**.

Doe v. Bayer Corp., 367 F. Supp. 2d 904 (M.D. N.C. 2005) (denying as moot defendant's motion for plaintiff to supplement the record by filing copies of all documents sealed by state court prior to removal, because prior federal court order commanded plaintiff to submit all those filings under seal).

Kisor v. Collins, 338 F. Supp. 2d 1279 (N.D. Ala. 2004) (plaintiff's motion for remand based on procedural defect in removal in that notice was not accompanied by a copy of summons papers filed in stte court to become part of the federal district court's record, and they may be supplied later if not filed with the petition).

Littleton v. American Bankers Life Ins. Co. of Florida, 289 F. Supp. 2d 776 (S.D. Miss. 2003) (denying remand, finding non-prejudicial any omission of documents that should have been filed along with the removal notice, and ordering defendants to ensure that all required documents would be filed).

The plaintiff is not entitled to an order directing the clerk of the state court to produce a document not in the state-court record. Smith v. Philadelphia Police 39th District Spec. Invest. Squad, 48 F.R.D. 341 (E.D. Pa. 1969).

5 **Failure to produce**
28 U.S.C.A. § 1449.

6 **Repleading not required**
People of State of Ill. ex rel. Barra v. Archer Daniels Midland Co., 704 F.2d 935 (7th Cir. 1983) (plaintiff not required to amend complaint to ask for relief under federal Declaratory Judgment Act when claim had been made under comparable state law).

Compare
Just as the federal court does not require repleading according to federal form upon removal, the state court should not require repleading on remand and instead should adopt federal pleadings to avoid needless waste of time, effort, and expense. Edward Hansen, Inc. v. Kearny Post Office Associates, 166 N.J. Super. 161, 399 A.2d 319 (Ch. Div. 1979).

7 **Repleading required**
Foust v. Baltimore & O.R. Co., 91 F. Supp. 817 (S.D. Ohio 1950) (court ordered repleading and suggested that Form 9 on negligence was appropriate).

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The initial pleading, as well as other pleadings, filed after removal must conform to the spirit and letter of the Federal Civil Rules so that the declarations were stricken and repleading ordered within fifteen days. Wild v. Knudsen, 1 F.R.D. 646 (E.D. Tenn. 1941).

Shell Petroleum Corp. v. Stueve, 25 F. Supp. 879 (D. Minn. 1938) (court ordered repleading of counterclaim filed before removal as it did not set forth short, simple, and plain claim for relief).

8 **May amend complaint**

The plaintiff's amended complaint, filed after removal, conferred federal-question jurisdiction on the district court, even though federal jurisdiction did not exist over the plaintiff's original complaint. Kidd v. Southwest Airlines, Co., 891 F.2d 540 (5th Cir. 1990).

Naylor v. Case and McGrath, Inc., 585 F.2d 557 (2d Cir. 1978).

Feil v. MBNA America Bank, N.A., 417 F. Supp. 2d 1214 (D. Kan. 2006) (adjudicating the propriety of removal using credit-card holder's post-removal amended complaint in action against credit-card insurer and debt collection agency because defendant had not yet filed an answer so amendment was of right).

Mullaly v. Insurance Services Office, Inc., 395 F. Supp. 2d 290 (M.D. N.C. 2005) (granting plaintiff leave to amend to seek relief available under ERISA).

Whitehead v. Viacom, 233 F. Supp. 2d 715 (D. Md. 2002) (in light of plaintiff's pre-removal amendment as of right in state court, plaintiff needed leave of court), order aff'd, 63 Fed. Appx. 175 (4th Cir. 2003).

Singh v. Prudential Ins. Co. of America, Inc., 200 F. Supp. 2d 193 (E.D. N.Y. 2002) (permitting plaintiff to amend her complaint to add non-diverse defendants and drop federal claims when defendant had not yet filed any responsive pleadings and Civil Rule 15(a) allowed plaintiff to amend her complaint as of right).

Erbaugh v. Anthem Blue Cross and Blue Shield, 126 F. Supp. 2d 1079 (S.D. Ohio 2000) (allowing plaintiff to amend preempted state law complaint and recast claim as an ERISA cause of action).

If the federal court has jurisdiction over the removed case and if the amendment to the complaint could have been made had the suit originated in the federal court, the fact that the federal court acquired jurisdiction by removal does not deprive it of power to allow the amendment. Fruin-Colnon Corp. v. M. G. Transport Service, Inc., 79 F.R.D. 674 (S.D. Ill. 1978).

Compare

Taylor v. Bailey Tool Mfg. Co., 744 F.3d 944 (5th Cir. 2014) (the Texas relation-back statute—which barred state law claims asserted in an amended complaint that were subject to a limitations plea when the case was filed—rather than the federal relation-back rule—which permits claims in amended complaint to relate back to the date of the original complaint—applied to determine whether plaintiff's amended petition, filed in state court prior to removal, related back to the date of plaintiff's original petition, and the claim was not revived when the case was removed because the federal Civil Rules apply to a civil action after it is removed and do not apply to the procedural aspects of a case that occurred in state court prior to removal).

9 **Section 1447(e)**

Section 1447(e) amendments are discussed in § 3723.

10 **May not oust jurisdiction**

This point is discussed in greater detail in § 3721 at notes 56–62, and in §§ 3723 and 3725.2.

11 **Exclusively federal claim permitted**

Freeman v. Bee Mach. Co., 319 U.S. 448, 63 S. Ct. 1146, 87 L. Ed. 1509 (1943) (complaint amended to claim treble damages under Clayton Act).

12 **Service completed in federal court**

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Plaintiffs could perfect service on a defendant after removal of its action from state court to federal court, even though the purchaser's time to perfect service in state court under state law had expired prior to removal and the statute of limitations for the action had run because, although the action would have been dismissed for insufficient service. the dismissal would have been without prejudice and the plaintiffs would have had a year from dismissal to refile their claims under the state's savings statute. Barner v. Thompson/Center Arms Co. Inc., 796 F.3d 897 (8th Cir. 2015).

Rice v. Alpha Sec., Inc., 556 Fed. Appx. 257 (4th Cir. 2014).

Gerena v. Korb, 617 F.3d 197 (2d Cir. 2010) (district court had erred in concluding, as to one defendant, that service was untimely, because an order directing service on that defendant by United States marshals operated as an extension of time to serve, when the order was entered almost a year after service originally should have been effected and, although the order did not explicitly state that there was good cause to extend time for service, decision to allow service by marshal at that point in the litigation implicitly included a decision to allow late service).

Wallace v. Microsoft Corp., 596 F.3d 703 (10th Cir. 2010) (district court erred in dismissing plaintiff's tort claims as barred by the statute of limitations when defendant removed the suit before service had been perfected under state law but while service still could have been perfected, with the effect that the suit would have been timely commenced).

City of Clarksdale v. BellSouth Telecommunications, Inc., 428 F.3d 206 (5th Cir. 2005).

Lewis v. Rego Co., 757 F.2d 66 (3d Cir. 1985).

Savarese v. Edrick Transfer & Storage, Inc., 513 F.2d 140 (9th Cir. 1975).

Carden v. Wal-Mart Stores, Inc., 574 F. Supp. 2d 582 (S.D. W. Va. 2008) (although service of process was not perfected or in conformity with state law while case was in state court, after removal, plaintiff completed service utilizing state-court process, in compliance with 28 U.S.C.A. § 1448 and Federal Civil Rule 4(e)(1)).

Tadco Constr. Corp. v. Peri Framework Systems, Inc., 460 F. Supp. 2d 408 (E.D. N.Y. 2006), **quoting Wright & Miller** (declining to determine whether service on the defendant's salesperson was disputed, satisfied state law or to hold a hearing to establish facts related to the service because the issue could be resolved more efficiently by allowing plaintiff to correct any defect in service by reserving the defendant pursuant to Federal Civil Rule 4(h)).

Cowen v. American Medical Systems, Inc., 411 F. Supp. 2d 717 (E.D. Mich. 2006).

McKinnis v. Hartford Life, 217 F.R.D. 359 (E.D. Pa. 2003) (denying motion to dismiss removed action for lack of timely service, because there was good cause to extend time to perfect service when plaintiff reasonably believed that individual served was an appropriate agent for service upon corporate defendant and had timely served summons and complaint after filing complaint in federal court).

Schmude v. Sheahan, 214 F.R.D. 487 (N.D. Ill. 2003).

Thompson v. Jasas Corp., 212 F. Supp. 2d 21 (D.D.C. 2002) (extending the time for proper service until the date when defendant conceded it had been properly served by the pro se plaintiff, after removal).

A plaintiff who has not perfected service prior to removal need not have new process issued under Federal Civil Rule 4; the post-removal attempt at service is merely a continuation of prior service, and Section 1448 allows completion of service to be made in accordance with state law. Listle v. Milwaukee County, 926 F. Supp. 826 (E.D. Wis. 1996).

Compare

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A statute providing that service of process may be completed or new process issued in a case removed from state court cannot be applied in a removed case to avoid a state statute of limitations defense. Witherow v. Firestone Tire & Rubber Co., 530 F.2d 160 (3d Cir. 1976).

Morton v. Meagher, 171 F. Supp. 2d 611 (E.D. Va. 2001) (28 U.S.C.A. § 1448 could not be used to perfect service when the case would have been dismissed had it remained in Virginia state court, and the federal statute was not intended to revive a legally dead state action).

13 **Service sufficiency pre-removal**

Mechanical Appliance Co. v. Castleman, 215 U.S. 437, 30 S. Ct. 125, 54 L. Ed. 272 (1910).

Gerena v. Korb, 617 F.3d 197, 202 (2d Cir. 2010) (pre-removal service was not effective under New York law when defendant obtained a copy of the state-court complaint against it before the case was removed to federal court, and even if service of a state-court summons after removal to federal court could be sufficient to effect service, service of that summons outside the 120-day period prescribed for service was ineffective, absent any indication that plaintiffs sought or that district court ever granted an extension of the time to effect service).

Norsyn, Inc. v. Desai, 351 F.3d 825 (8th Cir. 2003) (upholding propriety of removal and denial of motion for default judgment when defendants never had been properly served under state law, prior to removal).

Aanestad v. Beech Aircraft Corp., 521 F.2d 1298 (9th Cir. 1974).

Walker v. Savell, 335 F.2d 536 (5th Cir. 1964).

Safeway, Inc. v. Sugarloaf Partnership, LLC., 423 F. Supp. 2d 531 (D. Md. 2006) (removal was timely when defendant removed the case within 30 days of receiving actual notice of it, although defendant had been given constructive notice approximately two months earlier, when plaintiff failed to comply with the minimum notice requirements set forth by Maryland law, which required service via first class mail).

Fields v. Keith, 174 F. Supp. 2d 464 (N.D. Tex. 2001) (reviewing pre-removal service of complaint on defendant and finding that, under Texas law, defendant had not been properly served, and therefore was not under the state court's jurisdiction when the action was removed and dismissing the action without prejudice, for lack of personal jurisdiction), aff'd, 273 F.3d 1099 (5th Cir. 2001).

Following removal, a defendant may submit a motion to vacate service of process, and the motion, if properly filed, will be considered by the court. Pennebaker v. Kawasaki Motors Corp., U.S.A., 155 F.R.D. 153 (S.D. Miss. 1994).

14 **State law governs**

Cardenas v. City of Chicago, 646 F.3d 1001 (7th Cir. 2011).

Lang v. Social Sec. Admin., 612 F.3d 960 (8th Cir. 2010) (garnishor did not have to comply with Federal Civil Rule 4, governing service of process, when serving the defendant Social Security Administration (SSA) with a copy of a supplemental complaint that was filed in a state-court garnishment action brought under Minnesota law to have state-court judgment for unpaid child support satisfied out of ex-husband's social-security payments so that garnishor's failure to serve pursuant to Federal Civil Rule 4 did not delay the start of the 30-day period for SSA to remove the action to federal court as the supplemental complaint did not convert the state-court proceeding into a federal court proceeding).

Wallace v. Microsoft Corp., 596 F.3d 703 (10th Cir. 2010) (district court erred in dismissing plaintiff's tort claims as barred by the statute of limitations when defendant removed the suit before service had been perfected under state law but while service still could have been perfected, with the effect that the suit would have been timely commenced).

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Norsyn, Inc. v. Desai, 351 F.3d 825 (8th Cir. 2003) (upholding propriety of removal and denial of motion for default judgment when defendants never had been properly served under state law, prior to removal).

Romo v. Gulf Stream Coach, Inc., 250 F.3d 1119 (7th Cir. 2001) (applying state procedural rules to pre-removal conduct, the court affirmed dismissal for failure of plaintiff to exercise reasonable diligence in having defendant served).

Easley v. Pettibone Michigan Corp., 990 F.2d 905 (6th Cir. 1993).

Usatorres v. Marina Mercante Nicaraguenses, S.A., 768 F.2d 1285 (11th Cir. 1985), **citing Wright, Miller & Cooper**.

Moreno v. Taos County Bd. of Com'rs, 778 F. Supp. 2d 1139 (D.N.M. 2011) (defendant deputy's consent to removal was not required when deputy had not been properly served with process under New Mexico law).

Crear v. Mortgage Electronic Registration Systems, Inc., 733 F. Supp. 2d 757 (N.D. Tex. 2010) (dismissing removed case for failure to effect proper service in state court and in light of plaintiff's failure to request an opportunity to cure defects in service).

Wolfe v. Green, 660 F. Supp. 2d 738 (S.D. W. Va. 2009) (whether service was properly effectuated before case was removed is governed by state law and service of process on attorney for West Virginia State Police (WVSP) and its superintendent by mail, rather than by personal service, was insufficient, as a result of which that service did not trigger the period for the WVSP and its superintendent to consent to removal of action to federal court).

Fisher v. Dakota Community Bank, 405 F. Supp. 2d 1089 (D.N.D. 2005) (rejecting steel buyer's argument that steel merchant waived its right to service by making a general appearance in state court when state court had implicitly rejected the argument).

Wolfe Cycle Sports, Inc. v. Yamaha Motor Corp., 366 F. Supp. 2d 885 (D. Neb. 2005) (although defendant had been properly served after removal, plaintiff's failure to properly serve defendant within six months of filing the complaint in state court, as required by state law, required dismissal because action was barred under state law before removal was effected).

Jindal v. D.O.C. Optics Corp., 208 F. Supp. 2d 855 (N.D. Ohio 2002) (under Ohio law, the non-diverse defendant voluntarily submitted to the state court's personal jurisdiction by appearing in court).

Compare

The Federal Civil Rules governing the timing of service of process do not apply to cases removed to federal court after service of process has been accomplished. Russo v. Prudential Ins. Co. of America, 116 F.R.D. 10 (E.D. Pa. 1986).

15 **Federal procedure governs post-removal service**

Cardenas v. City of Chicago, 646 F.3d 1001 (7th Cir. 2011) (period under federal Civil Rules for service of process commences upon date of removal).

Defendant did not waive the sufficiency of process by not filing that motion to dismiss with the district court, since after removal, the action was governed by the Federal Rules of Civil Procedure and the defendant raised the defense of sufficiency of process in the answer to the complaint, which was filed in the district court and was filed before the district court deemed the state-court motion denied. Usatorres v. Marina Mercante Nicaraguenses, S.A., 768 F.2d 1285 (11th Cir. 1985).

A defendant not served before removal must be served with new process by the federal court according to the Federal Civil Rules for service of process. Beecher v. Wallace, 381 F.2d 372 (9th Cir. 1967).

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In a removed action, a motion under Civil Rule 12 to dismiss for want of service of process was not waived by failing to join it with two prior filings, one a demand for a jury trial and the other a request for a stay of proceedings under the Soldiers' and Sailors' Civil Relief Act of 1940. Moore v. Dunham, 240 F.2d 198 (10th Cir. 1956).

Cowen v. American Medical Systems, Inc., 411 F. Supp. 2d 717 (E.D. Mich. 2006).

In Nahigian v. Leonard, 233 F. Supp. 2d 151 (D. Mass. 2002), the court purported to uphold personal jurisdiction over defendants, reasoning that ERISA provides for nationwide service of process in an ERISA action brought in a district court and the removal of the action and its framing wholly in state-law terms did not make the ERISA provision for nationwide service inapplicable.

16 **No consent by removal**

Gerena v. Korb, 617 F.3d 197 (2d Cir. 2010) (defendant did not waive any jurisdictional objections by removing action from state to federal court, or by commencing discovery in federal court, when defendant had promptly and repeatedly raised the defense of defective service of process).

Harlow v. Children's Hosp., 432 F.3d 50 (1st Cir. 2005).

Lolavar v. de Santibanes, 430 F.3d 221 (4th Cir. 2005).

City of Clarksdale v. BellSouth Telecommunications, Inc., 428 F.3d 206 (5th Cir. 2005) (removal does not waive a defendant's right to object to service of process, but defendant's voluntary appearance before the federal court submitted it to the court's jurisdiction).

Silva v. City of Madison, 69 F.3d 1368 (7th Cir. 1995).

WMCV Phase 3, LLC v. Shushok & McCoy, Inc., 750 F. Supp. 2d 1180 (D. Nev. 2010).

White v. Bombardier Corp., 313 F. Supp. 2d 1295 (N.D. Fla. 2004), **citing Wright, Miller & Cooper**.

S.M.W. Seiko, Inc. v. Howard Concrete Pumping Co., Inc., 170 F. Supp. 2d 152 (D.N.H. 2001) (after removal, defendant may assert a lack of personal jurisdiction defense, but defendant had waived that defense in state court, and removal did not resurrect the defense).

Ditkof v. Owens-Illinois, Inc., 114 F.R.D. 104 (E.D. Mich. 1987), **quoting Wright, Miller & Cooper**.

Removal from state to federal court does not constitute a waiver of subject-matter jurisdiction or an admission of the propriety of a particular claim. Bottos v. Beamer, 399 F. Supp. 999 (N.D. Ind. 1973).

But compare

Zeigler v. Beers, 412 F. Supp. 2d 746 (N.D. Ohio 2005) (United States waived defense of insufficiency of service of process in state court where its notice of removal was untimely).

WRS Motion Picture and Video Laboratory v. Post Modern Edit, Inc., 33 F. Supp. 2d 876 (C.D. Cal. 1999), **citing Wright, Miller & Cooper** (jurisdictional defect may be waived if the case proceeds to judgment on the merits and the case could have been initiated in federal court).

17 **21 days**

Prior to 2009, Rule 81(c)'s time periods were 20 days and 5 days, respectively. These periods were extended to 21 days and 7 days by the general time computation amendments made to the Civil Rules in 2009.

18 **Pleading following removal**

Norsyn, Inc. v. Desai, 351 F.3d 825 (8th Cir. 2003) (upholding propriety of removal and denial of motion for default judgment where, under Civil Rule 81(c), defendants had no obligation to plead following removal because they never had been properly served).

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Silva v. City of Madison, 69 F.3d 1368 (7th Cir. 1995).

Finley v. Kondaur Capital Corp., 909 F. Supp. 2d 969 (W.D. Tenn. 2012) (a mortgagee's attorneys untimely filed a motion to dismiss the mortgagor's complaint for failure to state a claim when it failed to file its motion within 21 days following receipt or service of the complaint or within 7 days following removal of the case, as required by civil Rule 81(c)(2)(A) to (C)).

See also

Speiser, Krause & Madole P.C. v. Ortiz, 271 F.3d 884 (9th Cir. 2001) (attorney-litigant's failure to understand and comply with Civil Rule 81(c), governing the time to answer complaint after removal, did not constitute "excusable neglect" or "good cause" entitling him to relief from default judgment and to enlargement of time within which to answer).

Busey v. Board of County Com'rs of County of Shawnee, Kansas, 163 F. Supp. 2d 1291 (D. Kan. 2001) (default judgment not warranted, despite defendant's failure to timely file responsive pleading after removal, when defendant did not willfully disregard court's authority, and filed answer within extension of time granted by state court).

But see

Bletter v. Incorporated Village of Westhampton Beach, 88 F. Supp. 2d 21 (E.D. N.Y. 2000) (defendant would be allowed to answer complaint four months after case was removed from state court, because defendant had not acted willfully in delaying filing of answer, plaintiff was not prejudiced, and defendant had meritorious defenses).

19 **Pre-1963 uncertainty**

Compare Rehrer v. Service Trucking Co, 15 F.R.D. 113 (D. Del. 1953) (no redundant demand necessary), with Petsel v. Chicago, B. & Q.R. Co., 101 F. Supp. 1006 (S.D. Iowa 1951) (intimation that second demand necessary).

20 **1955 proposals**

See § 1006.

21 **Jury demand not required**

Lutz v. Glendale Union High School, 403 F.3d 1061 (9th Cir. 2005) (plaintiff had not demanded trial by jury separately from any filed motion or pleading and therefore had not properly requested a jury under state law before removal).

Winter v. Minnesota Mut. Life Ins. Co., 199 F.3d 399 (7th Cir. 1999) (plaintiff's jury demand, filed in state court before removal, was preserved if it complied with Illinois law).

A party who was granted a jury trial under a state-court rule as an exercise of discretion, even though the demand had been untimely, made the demand "in accordance with state law" for purposes of Federal Civil Rule 81(c), so that no further demand was required in federal court after removal. Myers v. U.S. Dist. Court for Dist. of Montana, 620 F.2d 741 (9th Cir. 1980).

Wilhelm v. Wilhelm, 662 F. Supp. 2d 424 (D. Md. 2009) (because state law required a party to make a written jury demand, defendant who had not demanded a jury before removal did have to make a jury demand in federal court, but because all relevant pleadings, i.e. an answer to the complaint, had not been filed when the case was removed, the jury demand did not have to be filed within 10 days after the filing of the notice of removal).

Breedlove v. Cabou, 296 F. Supp. 2d 253 (N.D. N.Y. 2003) (granting plaintiff's motion to file jury demand, although plaintiff had not filed a jury demand prior to removal, citing state court's broad discretion to grant even untimely jury request and defendant's failure to object or to claim prejudice).

Because New York state law permits a court to grant jury trial despite a party's failure to comply with the state's notice requirements, the district court read this right into Federal Civil Rule 81(c) and permitted jury

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trial in National Union Fire Ins. Co. of Pittsburgh, Pa. v. L.E. Myers Co. Group, 928 F. Supp. 394 (S.D. N.Y. 1996).

Credit Bureau of Council Bluffs, Inc. v. Credit Bureau Data Centers, Inc., 143 F.R.D. 206 (S.D. Iowa 1992) (when pre-removal jury demand would satisfy federal but not state requirements, that demand is incorporated into federal record upon removal and is deemed to satisfy Federal Civil Rule 38).

Compare

Civil Rule 81(c) has been extended to allow a jury trial request after removal even if a party expressly requested a nonjury trial at the state court, provided the mistake has been "perfected" prior to removal by another party's request for a jury. Marcella v. Brandywine Hosp., 47 F.3d 618 (3d Cir. 1995).

Vincent v. AST Research, Inc., 199 F.R.D. 95, 96–97 (N.D. N.Y. 2001) (exercising discretion to grant untimely jury demand when the matter traditionally would have been tried by jury and defendant would not be prejudiced by the grant, where none of the situations concerning jury demand provided for by Civil Rule 81(c) were present).

Liriano v. Hobart Corp., 162 F.R.D. 453 (S.D. N.Y. 1995) (jury demand granted in light of traditional jury triability of cause of action, no untimeliness prejudice, and negligible imposition on defendant).

The rule governing the preservation of a state-court jury demand after the removal of a case to federal court did not operate when the plaintiff, prior to the commencement of a case removed from state court, changed the basis of its claim from negligence to admiralty, and thus obviated its own earlier request for a jury trial. Fruin-Colnon Corp. v. M. G. Transport Service, Inc., 79 F.R.D. 674 (S.D. Ill. 1978).

22 **Demand for jury ordered**

Resolution Trust Corp. v. Security Town Co., 745 F. Supp. 1216 (E.D. La. 1990), **citing Wright, Miller & Cooper**.

Madron v. Thomas, 38 F.R.D. 177 (E.D. Tenn. 1965).

23 **Waiver absent new demand**

Lutz v. Glendale Union High School, 403 F.3d 1061 (9th Cir. 2005) (plaintiff had not demanded trial by jury separately from any filed motion or pleading and therefore had not properly requested a jury under state law before removal, and plaintiff's state-court complaint did not contain a jury demand for all jury-triable issues that would have satisfied Federal Civil Rule 38(b), and therefore the district court erred in submitting the question of liability to the jury).

Hogue v. United Olympic Life Ins. Co., 39 F.3d 98 (5th Cir. 1994).

Davis v. Nationwide Mut. Fire Ins. Co., 783 F. Supp. 2d 825 (E.D. Va. 2011) (plaintiff timely filed and served his written jury demand, in accord with federal Civil Rule 38, by filing and serving his brief in opposition to a motion to dismiss his original complaint, which brief contained a written demand for jury trial).

Wave House Belmont Park, LLC v. Travelers Property Cas. Co. of America, 244 F.R.D. 608 (S.D. Cal. 2007) (plaintiff's jury demand was untimely when California law required a plaintiff to make an express jury demand and plaintiff did not make one prior to removal nor serve a jury demand within 10 days after service of the removal notice).

Shoals v. Home Depot, Inc., 422 F. Supp. 2d 1183 (E.D. Cal. 2006) (denying request for jury trial in removed case when plaintiff had neither requested jury trial in state court, requested jury trial within 10 days of service of removal notice, nor presented evidence that failure to make timely request was due to any reason besides inadvertence).

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Ansley v. Metropolitan Life Ins. Co., 215 F.R.D. 575 (D. Ariz. 2003) (plaintiff's jury demand was untimely, when it was not filed within 10 days of service of the removal notice and plaintiff had not filed a jury demand in state court).

Compare
Moldenhauer v. U.S., 958 F. Supp. 394 (C.D. Ill. 1996) (United States does not waive right to demand judge-tried case by removing to federal court).

Serafino v. Hasbro, Inc., 893 F. Supp. 104 (D. Mass. 1995), aff'd, 82 F.3d 515 (1st Cir. 1996) (whether state jury waiver is reversible on remand is question for state courts).

But compare
Wyatt v. Hunt Plywood Co., Inc., 297 F.3d 405 (5th Cir. 2002), **citing Wright, Miller & Cooper** (the waiver of plaintiff's right to a jury trial in state court, caused by her failure to post a required bond, did not undermine her right to a jury trial in federal court, derived from her making a timely demand there following removal).

A saving provision in a New York statute that authorized a court to relieve a party from the effects of failing to comply with a jury-demand requirement broadens the discretion of the federal district court under the Federal Rules of Civil Procedure so that the court ordered a trial by jury, despite the plaintiff's failure to make a timely demand, since no undue prejudice would result to the defendant. Van Zandt v. Uniroyal, Inc., Peerless Tire Division, 529 F. Supp. 482 (W.D. N.Y. 1982).

24 **State-court rulings binding**
"The provision * * * declares orders of the State court, in a case afterwards removed, to be in force until dissolved or modified by the Circuit Court. This fully recognizes the power of the latter court over such orders." Ex parte Fisk, 113 U.S. 713, 725, 5 S. Ct. 724, 729–730, 28 L. Ed. 1117 (1885) (Miller, J.).

Escanio v. United Parcel Service, 538 Fed. Appx. 195 (3d Cir. 2013) (the doctrines of claim and issue preclusion did not preclude the district court from granting summary judgment to an employer on a discharged employee's retaliation and discrimination claims, even though the state court had previously denied the employer's summary-judgment motion on the same claims, and on the basis of the same evidence, when there was no second case, but only the same case that had been removed from state court, and removal did not change the interlocutory nature of the state court's denial of summary judgment—leaving it open to reconsideration).

Johnston v. Tampa Sports Authority, 530 F.3d 1320 (11th Cir. 2008).

Louisiana v. Guidry, 489 F.3d 692 (5th Cir. 2007) (interlocutory pre-removal state-court order was transformed into order of the federal district court to which action was removed and the law of the case doctrine did not preclude the district court from considering and granting defendant's motion for summary judgment despite state court's earlier denial of defendant's peremptory exception of no cause of action and state appellate court's denial of supervisory review).

In re Minnesota Mut. Life Ins. Co. Sales Practices Litigation, 346 F.3d 830 (8th Cir. 2003) (state court's dismissal of non-diverse defendant was law of the case).

Smith v. Amedisys Inc., 298 F.3d 434 (5th Cir. 2002), **citing Wright, Miller & Cooper** (even if state court had ruled in removed case that supervisory employees could be held liable under state statutes, that ruling did not bind the district court as law of the case, which in any event permits erroneous decisions to be corrected).

Palmisano v. Allina Health Systems, Inc., 190 F.3d 881 (8th Cir. 1999).

Jackson v. American Sav. Mortg. Corp., 924 F.2d 195 (11th Cir. 1991) (when case contains order of state trial judge at time of removal that, had it been entered by federal district judge, would be appealable, parties

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seeking appeal must first move to modify or vacate state order, and only if that motion is denied may appeal be taken).

Hyde Park Partners, L.P. v. Connolly, 839 F.2d 837 (1st Cir. 1988).

The federal court following removal was free to examine the state-court decision denying the defendant's motion to dismiss, despite the plaintiff's contention that the decision was binding as law of the case. Quinn v. Aetna Life & Cas. Co., 616 F.2d 38 (2d Cir. 1980).

A state court's denial of summary judgment on a products-liability claim was an interlocutory order as to a single count of the complaint so that a federal court following removal was free to reconsider the denial. Daniels v. McKay Machine Co., 607 F.2d 771 (7th Cir. 1979).

Syeed v. Bloomberg L.P., 568 F. Supp. 3d 314, 321 (S.D. N.Y. 2021) ("Because Ms. Syeed amended her complaint once in state court on her own initiative and without the consent of the defendants, and because that amendment would have exhausted her right to amend under Rule 15(a)(1) if it had been made in federal court, Plaintiffs failed to comply with Rule 15(a)(2) when they filed the [Second Amended Complaint] without the consent of Defendant or leave of the Court. Nonetheless, the Court will treat the SAC as the operative complaint. The Court has discretion to grant requests for leave to amend nunc pro tunc when parties file amended pleadings without complying with Rule 15(a)(2).") (citation omitted), **citing Wright & Miller**.

Killmeyer v. Oglebay Norton Co., 817 F. Supp. 2d 681, 687 (W.D. Pa. 2011) (state court's dismissal of manufacturer of asbestos-related products from widow's wrongful-death action prior to removal was binding on federal court as plaintiff provided no reason to revisit it).

Pantoja v. Countrywide Home Loans, Inc., 640 F. Supp. 2d 1177 (N.D. Cal. 2009) (temporary restraining order (TRO) entered by state court prior to case's removal—which enjoined defendants from conducting a foreclosure sale on plaintiff's home—remained in effect after removal).

Eberspaecher North America, Inc. v. Van-Rob, Inc., 544 F. Supp. 2d 592 (E.D. Mich. 2008) (granting motion to dissolve preliminary injunction entered by state court, noting that federal district court can dissolve or modify state court injunctions issued prior to removal).

Pebble Creek Homes, LLC v. Upstream Images, LLC, 547 F. Supp. 2d 1214 (D. Utah 2007) (state-court judge's post-removal signing and entering of order that memorialized oral ruling that had been made on the record nearly two weeks before filing of removal notice was only ministerial act that did not involve “further proceedings” within meaning of federal removal statute, and thus was valid).

Aginsky v. Farmers Ins. Exchange, 409 F. Supp. 2d 1230 (D. Or. 2005) (granting summary judgment for defendant, despite the state court having denied the same motion prior to removal, noting the federal court's power to revisit the issue and discretion to grant the motion despite the earlier denial).

Hawes v. Cart Products, Inc., 386 F. Supp. 2d 681 (D.S.C. 2005) (federal court had authority to grant relief from an entry of default entered by the state court).

Dow v. Jones, 311 F. Supp. 2d 461 (D. Md. 2004) (law-of-the-case doctrine preserves pre-removal rulings of the state court, but declining to apply the doctrine to uphold the state court's denial of a defendant's summary-judgment motion when the extent to which the evidence and arguments presented to the state court were the same as those presented to the federal court was unclear).

Breedlove v. Cabou, 296 F. Supp. 2d 253 (N.D. N.Y. 2003) (Rooker-Feldman doctrine did not preclude reconsideration of a pre-removal state-court order entered in terminated employee's action against employer because 28 U.S.C.A. § 1450 provides that all orders in place prior to removal remain in full force and effect until dissolved or modified by the district court).

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Torah Soft Ltd. v. Drosnin, 224 F. Supp. 2d 704 (S.D. N.Y. 2002) (applying law-of-the-case doctrine in support of following pre-removal state-court determination that contract was governed by Israeli law, noting that there was nothing anomalous about following that determination and that no reason to reconsider the ruling was present).

McClelland v. Gronwaldt, 958 F. Supp. 280 (E.D. Tex. 1997) (removal does not affect certification of class that occurred previously in state court).

When a case was removed on the basis of federal-question jurisdiction, the removal court was not required to follow the law of the case as declared by the state court. Local 1 of United Food and Commercial Workers v. Heinrich Motors, Inc., 559 F. Supp. 192 (W.D. N.Y. 1983).

The oral order of a state court that a temporary injunction be issued against the defendants and that counsel for the plaintiff draft an order to that effect for the judge's signature was in effect at the time of removal, and thus, it was unnecessary for the district court to issue the temporary restraining order sought by the plaintiff. Heidel v. Voight, 456 F. Supp. 959 (E.D. Wis. 1978).

If a defendant is dissatisfied with the continuation of a state restraining order granted by the state court before removal, the defendant may apply to the federal court under Section 1450 for dissolution or modification of the state order. Standard Forms Co. v. Nave, 422 F. Supp. 619 (E.D. Tenn. 1976).

Compare

Because a partial summary judgment was considered a final, appealable judgment under state law at the time of removal, a district court held that the only proper mode of action for the parties was to appeal or file post-trial motions in federal court. Resolution Trust Corp. v. U.S. Fidelity & Guar. Co., 838 F. Supp. 276 (M.D. La. 1993).

25 **Federal court modifies**

Knudsen v. Liberty Mut. Ins. Co., 435 F.3d 755 (7th Cir. 2006) (post-CAFA certification of expanded plaintiff class, asserting new claims for relief, constituted commencement of new action rendering suit removable under CAFA though defendant remained the same, opining that the district court should not give any weight to a default sanction entered by the state court pre-removal or to the scope of the class certification, all questions being open to independent resolution in federal court).

Harlow v. Children's Hosp., 432 F.3d 50 (1st Cir. 2005) (district court did not abuse its discretion under the "law of the case" doctrine in reconsidering the state court's pre-removal denial of a like motion).

The federal court is not bound by any state-court rulings that conflict with the Federal Civil Rules. Redfield v. Continental Cas. Corp., 818 F.2d 596 (7th Cir., 1987).

Laney ex rel. Laney v. Schneider Nat. Carriers, Inc., 259 F.R.D. 562 (N.D. Okla. 2009) (dissolving the state-court discovery order on ground that witness statements in question were work product and that plaintiffs failed to show substantial need and inability without undue hardship to acquire their substantial equivalent).

Cooper Health System v. Virtua Health, Inc., 259 F.R.D. 208 (D.N.J. 2009) (court would reexamine state court's discovery orders when the case now was subject to the federal discovery rules and, in the six months since the case had been filed, the claims and defenses had become more focused than when state court held a hearing on a motion for a temporary restraining order).

Griffin v. JTSI, Inc., 654 F. Supp. 2d 1122 (D. Haw. 2008).

Wolk v. Teledyne Industries, Inc., 475 F. Supp. 2d 491 (E.D. Pa. 2007) (in light of subsequent development of the case, law of the case doctrine would not preclude the federal court from revisiting the sufficiency of the amended complaint or from ruling on the summary-judgment motion even if the state-court judge had upheld the sufficiency of the amended complaint).

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Bernath v. Potato Services of Michigan, 300 F. Supp. 2d 175 (D. Me. 2004) (transferee federal court declined to follow state-court ruling that forum-selection clause was unconscionable when federal transferor court to which action had been removed had held that law-of-the-case doctrine did not require it to accept the state court's ruling and transferee federal court agreed that state-court ruling was clearly erroneous under state law).

After a federal district court refused to appoint a receiver ex parte in an action in rem, the plaintiff filed an identical action in state court and had a receiver appointed. When the latter case was removed, the federal court vacated the receivership, holding that the state court had lacked jurisdiction to enter the order. Gaskin v. Hand, 560 F. Supp. 930 (S.D. Tex. 1983).

26 **Redetermine service**

General Inv. Co. v. Lake Shore & M.S. Ry. Co., 260 U.S. 261, 43 S. Ct. 106, 67 L. Ed. 244 (1922).

The denial by an inferior state court of a motion to vacate the service of summons is not res judicata on the question of the validity of service, when raised in the federal court to which the cause has been removed. Remington v. Central Pac. R. Co., 198 U.S. 95, 25 S. Ct. 577, 49 L. Ed. 959 (1905).

Pacific Employers Ins. Co. v. Sav-a-Lot of Winchester, 291 F.3d 392 (6th Cir. 2002) (neither law-of-the-case doctrine, res judicata, nor collateral estoppel, precluded district court from reconsidering pre-removal state-court decision that incorrectly-named defendant shared identity of interest with newly-named defendant so as to permit relation back under state doctrine).

27 **Default judgments reconsidered**

Murray v. Ford Motor Co., 770 F.2d 461 (5th Cir. 1985).

Butner v. Neustadter, 324 F.2d 783 (9th Cir. 1963).

Sawyer v. USAA Ins. Co., 839 F. Supp. 2d 1189 (D.N.M. 2012) (case or controversy existed for court to resolve in insured's action against insurers for breach of motor vehicle insurance contract and bad faith, even though New Mexico state court had entered default judgment, when court set aside the default judgment as void because the state court lacked personal jurisdiction over the defendants, who had not been properly served).

Cox v. Sprung's Transport & Movers, Ltd., 407 F. Supp. 2d 754 (D.S.C. 2006) (re-evaluating and setting aside state court entry of default under Federal Civil Rule 55(c), finding good cause to do so and excusable neglect by defendant).

See also

Zolman v. U.S., 170 F. Supp. 2d 746 (W.D. Mich. 2001) (granting defendant relief from a state-court default judgment because, upon removal, Federal Civil Rule 60(b)(1) applied and permitted set aside of default judgment where motion for relief was timely, the default not willful, and no prejudice would result).

Compare

After removal and on appeal from the federal district court, the federal court of appeals could examine all antecedent interlocutory rulings, including those rendered by the state judge and absorbed into the district court's final judgment. Reilly v. Waukesha County, Wis., 993 F.2d 1284 (7th Cir. 1993).

28 **Fairbank case**

212 F.3d 528 (9th Cir. 2000).

29 **TRO expiration prevented**

Morning Telegraph v. Powers, 450 F.2d 97 (2d Cir. 1971).

Appalachian Volunteers, Inc. v. Clark, 432 F.2d 530 (6th Cir. 1970).

30 **Granny Goose case**

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415 U.S. 423, 94 S. Ct. 1113, 39 L. Ed. 2d 435 (1974).

31 **Justice Marshall**
415 U.S. at 435–436, 94 S. Ct. at 1122–1123.

32 **Federal time limits protect**
After the maximum time limits under Federal Rule of Civil Procedure 65(b) had expired federal district court was required to dissolve an ex parte injunction, which the Commonwealth of Puerto Rico court had issued before the case was removed to federal court. Biomedical Instrument and Equipment Corp. v. Cordis Corp., 797 F.2d 16 (1st Cir. 1986).

Gil Pharmaceutical Corp. v. Advanced Generic Corp., 692 F. Supp. 2d 212 (D.P.R. 2010) (once the trademark-infringement action was removed to federal district court from a Puerto Rico court, federal law governed the proceedings, including management of the TRO entered prior to removal, and the district court had to dissolve an ex parte state-court temporary restraining order once the maximum time limits that the Federal Civil Rules authorize for an ex parte order had expired).

North Dakota v. U.S. Army Corps of Engineers, 264 F. Supp. 2d 871 (D.N.D. 2003) (applying Civil Rule 65(b), governing temporary restraining orders, to removed case in which such an order had been entered by state court, and dissolving the order pending a hearing on plaintiffs' motion for preliminary injunction).

See § 2953 for a discussion of Rule 65(b).

33 **Accommodated**
415 U.S. at 438–439, 94 S. Ct. at 1124.

34 **Attachment remains effective**
A lien of attachment may be extended to other property after removal. Rorick v. Devon Syndicate, 307 U.S. 299, 59 S. Ct. 877, 83 L. Ed. 1303 (1939).

An attachment may be perfected after removal in accord with state law. Clark v. Wells, 203 U.S. 164, 27 S. Ct. 43, 51 L. Ed. 138 (1906).

An attachment may be expanded to other property after removal if the procedure would have been available in state court. Dry Clime Lamp Corp. v. Edwards, 389 F.2d 590 (5th Cir. 1968).

A federal court has possession of previously-attached property after removal, and any attempt by a state court to attach the property again is null and void. Bower v. Garnier Const. Co., 285 F. Supp. 50 (D. Nev. 1967).

The federal court may question the continuation of a writ of attachment after removal. Allied Tire Sales, Inc. v. Kelly-Springfield Tire Co., 277 F. Supp. 21 (E.D. Pa. 1967), order vacated on other grounds, 396 F.2d 704 (3d Cir. 1968).

35 **Bonds, undertakings, or security**
Network Intern. L.C. v. Worldcom Technologies, Inc., 133 F. Supp. 2d 713 (D. Md. 2001) (proceedings to obtain payment from a state-filed injunction bond for temporary restraining order issued by a state court are to be governed by state law).

Standard Forms Co. v. Nave, 422 F. Supp. 619 (E.D. Tenn. 1976) (security bond).

Fleetwood v. Milwaukee Mechanics Ins. Co., 88 F. Supp. 474 (W.D. Mo. 1950) (costs).

36 **Section 2283 prohibits injunction**
Pipes v. Life Investors Ins. Co. of America, 711 F. Supp. 2d 964 (E.D. Ark. 2009) (denying motion of class member in state-court action that was related to suit that had been removed to federal court to enjoin state court from granting final approval to settlement agreement in that related action, because Anti-Injunction Act prohibited federal court from issuing such an injunction as the state court proceedings presented no threat

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to the federal court's jurisdiction when the federal court had not certified a class or conditionally approved any class settlement, and the federal court's determination that the requirements for class certification were not met did not have res judicata effect in the state-court action).

Billy Jack for Her, Inc. v. New York Coat, Suit, Dress, Rainwear and Allied Workers' Union, ILGWU, AFL-CIO, Local 1–35, 10, 22, 48, 77, 89 and 189, 515 F. Supp. 456 (S.D. N.Y. 1981) (Billy Jack II) (federal court refused to remove or enjoin subsequent suit based purely on state claim).

But compare

Moore v. Louisiana ex rel. Insurance Rating Com'n (LIRC), 459 F. Supp. 2d 504 (M.D. La. 2006), **citing Wright, Miller & Cooper** (although courts construe 28 U.S.C.A. § 1446(d) as an express authorization to enjoin state-court proceedings within the meaning of an exception to the anti-injunction act, 28 U.S.C.A. § 2283, the court declined to enjoin the state court proceedings or the litigants when the state court had not purported to assert jurisdiction over or move forward with the claims, and plaintiff in the federal suit—an intervenor in related state-court litigation—would not suffer irreparable harm if no injunction was issued).

37 **State-court action enjoined**

Kansas Public Employees Retirement System v. Reimer & Koger Associates, Inc., 77 F.3d 1063 (8th Cir. 1996) (after removal, plaintiff cannot file essentially same case in second state action to subvert federal action).

Morris v. Long, 233 F.R.D. 620 (W.D. Okla. 2005) (granting mobile home buyer's motion to voluntarily dismiss their complaint after removal in order to refile in state court and join non-diverse mobile home retailer as a defendant).

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