



Equitable considerations in removal: *is one year the final answer?*

By Amy D. Harmon

Here's the scenario: You are a defendant in North Carolina. You are sued by a plaintiff in South Carolina. Plaintiff filed the action in South Carolina state court. You think for a moment — can I remove to federal court? Then you realize there is a co-defendant from South Carolina. No diversity. But then you begin to question whether there are actual claims against that defendant. You decide to give removal a try and argue fraudulent joinder of your co-defendant. Unsuccessful. The case is remanded to state court. One year and one day after the action was filed, however, plaintiff dismisses your South Carolina co-defendant. At the time of dismissal, plaintiff has never taken discovery or involved the defendant in the litigation in any way. Now there's diversity. File for removal again? Unfortunately, the statute that provides the procedure for removal, 28 U.S.C. § 1446(b), prohibits removal of an action for diversity more than one year after the action was commenced. So you wonder, is that the end of it? Must you merely accept that you are stranded in South Carolina's state court? Many may believe the answer is an unequivocal "yes." However, recent case law around the country indicates that, like many things in the law, the answer to this question may not be black or white or yes or no, but now more of a gray "maybe."

There is a growing area of case law in other circuits that subjects the one-year removal limitation to equitable considerations. These courts, in doing so, have found the one-year limitation in § 1446(b) to be a procedural requirement, rather than a requirement that must be met in order to confer federal jurisdiction. While the Fourth Circuit has not directly ruled on this issue, several district courts in the circuit have been faced with the issue and have ruled inconsistently. The same inconsistent rulings are present across the country.

This article briefly examines this new area of case law and the legal and equitable considerations that led the courts to rule as they did. While many may think this issue is nothing more than a hyper-technical point of federal practice, it in fact can have substantial practical ramifications for where lawsuits are tried and may drastically alter the way plaintiffs and defense attorneys alike react to the possibility of removal.

28 U.S.C. § 1446(b)

Section 1446 of the United States Code sets forth the procedure for the removal of actions from state court to federal court. This section provides that a notice of removal must be filed within 30 days after the defendant receives the initial pleading, or, if it is not evident from the face of the pleading itself that the action is removable, then within 30 days after receipt by the defendant of an amended pleading, motion, order or other paper from which it may be ascertained that the case is or has in fact become removable. One exception to this rule: the case may not be removed on the basis of diversity jurisdiction more than one year after the action was commenced.

While this statute may appear on its face to clearly bar removal on the basis of diversity where more than one year has passed since the action was commenced, numerous district courts across the country have held

that this one-year limitation may be tolled by equitable considerations, such as an opposing party's purposeful manipulation of the posture of the lawsuit for the sole purpose of preventing removal. Where this conduct has become evident after the one-year period has run, and there is no other justification for the behavior, i.e. it was done in bad faith, the courts have ruled that the opposing party is equitably estopped from asserting the limitations period as a bar to removal. In order to do so, those courts have first found that the limitation in § 1446 is procedural only, rather than a requirement for jurisdiction. The Fifth Circuit Court of Appeals has recently so held.

Tedford v. Warner-Lambert Co.

In April of 2003 the Fifth Circuit Court of Appeals in *Tedford v. Warner-Lambert Co.*, held explicitly that the time limit for removal is not inflexible and the conduct of the parties may affect whether it is equitable to strictly apply the one-year limit. 327 F.3d 423 (5th Cir. 2003). In *Tedford*, the plaintiff joined an additional nondiverse defendant hours after being notified by one of the original diverse defendants via courtesy call that it intended to remove the action because its nondiverse co-defendant was not a proper party. The case remained in state court as a result of the subsequently-joined nondiverse defendant.

During the next year, the plaintiff did not take any discovery from the subsequently-joined nondiverse defendant. Then, days before the one-year anniversary of his filing suit, plaintiff signed and post-dated a Notice of Nonsuit as to the subsequently joined nondiverse defendant. Plaintiff, however, did not file the nonsuit or notify the original diverse defendant of the nonsuit until after the expiration of the one-year period. The original diverse defendant filed a removal petition upon being notified of the nonsuit 10 days after the one-year time limit

had expired. Plaintiff moved to remand based on the expiration of the one-year time period set forth in § 1446(b). Defendant argued plaintiff was equitably estopped from doing so based on his conduct.

In deciding whether the one-year limit for removal based on diversity could be subject to equitable considerations, the Fifth Circuit looked to Congress' intent in enacting § 1446 (b). The Fifth Circuit concluded that while Congress intended to reduce the opportunity for removal after substantial progress had been made in a case in state court, and also intended to limit diversity jurisdiction, Congress did not intend to allow plaintiffs to circumvent diversity jurisdiction altogether. The court reasoned that a strict application of the one-year limit would encourage plaintiffs to join nondiverse defendants for 366 days simply to avoid federal court, thereby undermining the very purpose of diversity jurisdiction. The court also noted that since time limitations in lawsuits between private litigants are customarily subject to equitable tolling, and the time limit for removal is not jurisdictional but merely modal and formal, it may be waived based on a party's conduct.

Therefore, according to *Tedford*, where a plaintiff attempts to manipulate the statutory rules for removal, preventing a defendant from exercising his rights, equity may require that the one-year limit in § 1446(b) be extended. In its opinion, the Fifth Circuit recognized the numerous district court opinions that had previously found that § 1446(b) was subject to equitable exception as well. *Tedford*, 327 F.3d at 426 n.4 (citing *Shiver v. Sprintcom, Inc.*, 167 F.Supp.2d 962, 963 (S.D.Tex. 2001); *Ferguson v. Sec. Life of Denver Ins. Co.*, 996 F.Supp. 597, 601-03 (N.D.Tex. 1998); *Kinabrew v. Emco-Wheaton, Inc.*, 936 F.Supp. 351, 353 (M.D.La. 1996); *Leslie v. BancTec Serv. Corp.*, 928 F.Supp. 341, 347 (S.D.N.Y. 1996); *Morrison v. Nat'l Benefit Life Ins. Co.*,

889 F.Supp. 945, 950-51 (S.D.Miss. 1995); *Kite v. Richard Wolf Med. Instruments Corp.*, 761 F.Supp. 597, 600-01 (S.D.Ind. 1989)).

Differences of opinion

For nearly every district court case that was cited in *Tedford* for the proposition that § 1446(b) was subject to equitable exceptions, there was another case cited for the contrary holding that the plain language of the statute and its legislative history preclude application of equitable exceptions. *Tedford*, 327 F.3d at 426 n.4 (citing *Jenkins v. Sandoz Pharms. Corp.*, 965 F.Supp. 861, 869 (N.D.Miss. 1997); *Russaw v. Voyager Life Ins. Co.*, 921 F.Supp. 723, 724-25 (M.D.Ala. 1996); *Martine v. Nat'l Tea Co.*, 841 F. Supp. 1421, 1422 (M.D.La. 1993); *Hedges v. Hedges Gauging Serv. Inc.*, 837 F.Supp. 753, 755 (M.D.La. 1993); *Cofer v. Horsehead Research & Dev. Co.*, 805 F. Supp. 541, 544 (E.D.Tenn. 1991)).

Since *Tedford*, several district courts presented with the same issue have rejected the Fifth Circuit's conclusions. Only three months after the *Tedford* decision, a district court in the Northern District of Oklahoma rejected the conclusions of *Tedford* and held in *Caudill v. Ford Motor Co.* that federal removal jurisdiction was statutory in nature and to be strictly construed. 271 F.Supp.2d 1324 (N.D.Okla.2003). The court noted the well-settled presumption against removal whereby cases that are doubtful must be resolved in favor of remand. Recognizing that the one-year limitation upon removal lends itself to abuses and inequities, the court held that the statute is nonetheless clear. The court concluded that it was for Congress to rewrite the provisions of the section to curb abuses, rather than the court. The court did note, however, that it saw no reason to "create" removal jurisdiction outside of the one-year period where the defendant in the case before it could have raised his grounds for removal sooner.

This sentiment was echoed by the

Eastern District of Tennessee in *Jones Management Services, LLC v. KES, Inc.*, where the court refused to toll the one-year removal limitation despite the Fifth Circuit's conclusions in *Tedford*. 296 F.Supp.2d 892 (E.D.Tenn. 2003). The Tennessee court stated simply that, "the statute says what it says. Any attempt to read into the statute an 'equitable' exception amounts to judicial legerdemain." *Id.* at 894.

The Fourth Circuit's ruling in *Lovern v. General Motors Corp.*

The Fourth Circuit has not addressed the precise issue of whether the one year time limit for removal may be subject to equitable tolling when, after the one year period has run, it becomes evident that a party acted in bad faith to defeat diversity and impede removal. Based on dicta in the Fourth Circuit's 1997 decision *Lovern v. General Motors Corp.*, 121 F.3d 160 (4th Cir. 1997), however, it appears unlikely that such a scenario would have any effect on the Fourth Circuit's reading of the one-year time limit for removal.

In *Lovern*, the Fourth Circuit was presented with a situation where the initial pleading that was filed by the plaintiff contained no allegation regarding the plaintiff's citizenship. The defendant, who was served with the pleading on October 21, 1994, filed its grounds for defense and interrogatories that inquired specially about the plaintiff's citizenship. On January 3, 1995, the defendant received a copy of the police report in the case, and on January 23, 1995, defendant received plaintiff's answers to its interrogatories. Both revealed that complete diversity existed as to the parties.

Eight days after the defendant received the plaintiff's interrogatory answers and 28 days after it received the police report that disclosed plaintiff's residence, the defendant filed a notice of removal based on diversity jurisdiction. Plaintiff responded with

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a motion to remand based on the fact that the defendant had been served with the complaint 88 days prior to its filing the notice of removal.

Plaintiff argued that while the face of the complaint admittedly contained nothing that revealed the diversity of the parties, diversity nonetheless existed from the time the complaint was filed. Plaintiff submitted that the provision in 28 U.S.C. § 1446(b) allowing removal "within 30 days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable," did not apply. Plaintiff maintained that this extended time limit only applied if the case stated by the initial pleading was not removable. In essence, plaintiff argued that the defendant was bound by the actual status of the parties on the date the complaint was served and had to remove the case within 30 days or lose the right to do

so. Plaintiff argued that it was not relevant that the complaint did not evidence on its face that there were grounds for federal jurisdiction.

The Fourth Circuit was called upon to review the timeliness of defendant's removal petition under 28 U.S.C. § 1446(b). The Fourth Circuit's analysis focused on the express language of § 1446, particularly the phrase:

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

Lovern, 121 F.3d at 162 (emphasis in original).

The Fourth Circuit held that, while the statute clearly provides for situations where some later development

in a case eliminates the impediment to federal jurisdiction, thus allowing for removal, the language in the statute "expressly encompasses the case in which the actual facts supporting federal jurisdiction remain unaltered from the initial pleading, but their existence has been *manifested* only by later papers, revealing the grounds for removal for the first time." *Id.* (emphasis in original). Therefore, the defendant's removal petition was timely, as it was filed within 30 days of the date defendant first received actual notice of plaintiff's residency. The court noted that this interpretation would not require a court to inquire into a defendant's subjective knowledge of the status of the case, but rather the court could rely upon the four corners of the initial pleading and the documentation exchanged in the case as evidence of when grounds for removal became apparent.

For purposes of this article, the more important language in *Lovern* follows the court's conclusion regarding the defendant's timeliness. The Fourth Circuit recognized that there is a possibility a defendant will strategically delay investigating federal jurisdiction where diversity is not evident on the face of the complaint in an attempt to determine the state court's receptivity to his position in the litigation. In response to this concern, the Fourth Circuit states:

In diversity cases, the statute explicitly safeguards against such a strategic delay by erecting an *absolute* bar to removal of cases in which jurisdiction is premised on 28 U.S.C. § 1332 'more than 1 year after commencement of the action.' This bar creates, we believe, a sufficient incentive for defendants promptly to investigate the factual requisites for diversity jurisdiction, including the citizenship of the plaintiff and the amount in controversy.



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Id. at 163 (emphasis added).

Based on this dicta in *Lovern*, it would appear that the Fourth Circuit would not find that the one year time limit is subject to equitable tolling, regardless of whether a party acted in bad faith as held in *Tedford*. In fact, in the recent case *Jones Management Services, LLC v. KES, Inc.*, noted above, the Eastern District of Tennessee cited *Lovern* in its opinion that held that district courts lack equitable power to deny a motion for remand of a state court action where the removal to federal court on the basis of diversity is filed more than one year after commencement of the action. 296 F. Supp.2d 892 Specifically, *Jones* cites *Lovern's* language of an "absolute bar." *Id.* at 894.

Contrary holdings within the Fourth Circuit

District courts within the Fourth Circuit have been presented with scenarios similar to the one discussed in *Tedford* and have reached differing conclusions. In 2002, a district court in Maryland held that the one-year time limit in § 1446(b) was subject to equitable tolling where the plaintiff had used the one-year limitation as a means of "forum manipulation." *Wise v. Gallagher Bassett Services, Inc.* 2002 WL 2001529 (D.Md. 2002). In *Wise*, the plaintiff's initial complaint sought damages of only \$75,000, which claim was repeated in subsequent amended complaints. Shortly after the one-year anniversary of the action's commencement, however, plaintiff served defendant with a fourth amended complaint seeking damages of \$750,000. Plaintiff alleged no new facts regarding her injuries.

The defendant in *Wise* responded to the new damages claim by filing a removal petition within 30 days of receiving this fourth amended complaint. Plaintiff then moved to remand, relying only on the one-year limitation in § 1446(b). Plaintiff never attempted to justify her substantial increase in damages and

never maintained that any new or additional facts were discovered concerning her injuries that led her to seek these damages for the first time just after the one-year limitation had expired. Plaintiff simply maintained that the one-year time limit had passed, and thus remand was mandated.

The district court in Maryland held very simply that the plaintiff had "obviously... engaged in 'forum manipulation' in an effort to defeat the defendant's removal right," and therefore plaintiff could not raise the one-year limit established by § 1446(b). *Id.* In so holding, the court stated, "[i]t would be disrespectful to Congress to conclude that it contemplated that a litigant's right to a federal forum could be defeated simply by an adverse party employing the stratagem of secreting the federal nature of a claim by failing to claim before the one-year limit established by § 1446(b) the true amount of damages she is seeking." *Id.*

The Maryland District Court relied in part upon a 1991 Virginia district court decision *Sheppard v. Wire Rope Corp.*, 777 F.Supp. 1285 (E.D.Va. 1991). In *Sheppard*, the district court discussed the legislative purpose of the one year limitation in § 1446(b) (to limit removal where substantial progress had been made on the case in state court) and the historical right of removal (to include holdings wherein courts have refused to permit a party's use of tactics and maneuvering to deprive another party of his legitimate right to removal) as support for its holding allowing removal.

In 2003, however, the Southern District of West Virginia, upon being presented with a fraudulent joinder scenario, reached the opposite conclusion as the court in *Wise*, and rejected the argument that the one-year limitation for removal set forth in § 1446(b) could be subject to equitable exceptions. In *Mantz v. St. Paul Fire and Marine Ins. Co.*, the Southern

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District of West Virginia recognized the holding in *Tedford*, but expressly disagreed with its reasoning and refused to adopt its holding. 2003 WL 23109773 (S.D.W.Va. 2003). In its decision, the court stated:

[n]o reasonable lawyer could believe that the Fourth Circuit Court of Appeals, or this court, would not adhere to the plain language of the statute. The Fourth Circuit has said plainly that [i]n diversity cases, the statute [28 U.S.C. § 1446(b)] . . . erect[s] an absolute bar to removal in cases in which jurisdiction is premised on 28 U.S.C. § 1332 *more than 1 year after commencement of the action. Lovern v. GMC*, 121 F.3d 160, 163 (4th Cir. 1997)(emphasis added). This blanket prohibition has been recognized repeatedly in this district, and serves the important function of fostering judicial economy. . .

Id. at 2.

The court's decision in *Mantz* also cited portions of an earlier decision in the Southern District of West Virginia, wherein the court held that the one year cap on removing diversity actions to federal court is a jurisdictional limitation that must be rigidly observed, and thus not subject to equitable considerations. See *Whisenant v. Roach*, 868 F.Supp. 177, 178 (S.D.W.Va. 1994)(citing *Rashid v. Schenck Const. Co. Inc.*, 843 F.Supp. 1081 (S.D.W.Va. 1993)).

Conclusion

While initial review of the one-year time limit for removal set forth in § 1446(b) may appear on its face to negate diversity jurisdiction where more than one year has passed since the action was filed, close analysis reveals that factual and legal grounds exist that may support a petition for removal even though the one-year limit has expired. As evidenced by the con-

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flicting authority discussed herein, this is of course a tenuous argument, and may be even more so in the Fourth Circuit because of *Lovern's* language regarding an "absolute" one-year bar. However, despite this language in *Lovern*, only the Fifth Circuit has ruled on the precise factual scenario discussed herein, and district courts within the Fourth Circuit are divided on the issue. Even in *Mantz*, where the Southern District of West Virginia rejected *Tedford*, stating so strongly that "[n]o reasonable lawyer could believe that the Fourth Circuit Court of Appeals, or this court, would not adhere to the plain language of the statute," the court on reconsideration reversed its previous award of sanctions, recognizing that another 2003 decision within the same district had acknowledged *Tedford's* equitable exception. *Mantz*, 2003 WL 23109773 at 2 (referencing *Community Health Ass'n v. Lucent Technologies, Inc.*, No. 2:03-0344 (S.D.W.Va. April 25, 2003)). In withdrawing the award of sanctions, the court in *Mantz* stated:

The court cannot find that [defendant's] second removal notice was made in bad faith in light of the current discrepancy of opinion as to the existence of an equitable exception to § 1446(b)'s one year bar within the Southern District of West Virginia.

Id.

Therefore, based upon the Fifth Circuit's holding in *Tedford* and the conflicting holdings within the Fourth Circuit, one could argue that the window is still open, even if slightly, for the possibility of removal where more than one year has passed and removal has been impeded by a party's bad faith conduct.

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