Suggested Strategies for Defeating Removal to Federal Court When There is Complete Diversity

Introduction

When litigation is necessary, a plaintiff has the right to choose the forum. As an initial matter, plaintiff's counsel should consider the law and facts of the case and decide whether state or federal jurisdiction is best for the client's cause. Many times, federal court will be a preferable forum. However, for a number of reasons, including litigation expenses, ease of case preparation through formal discovery, avoidance of strict federal court pleading and discovery requirements, avoidance of Daubert applications regarding expert testimony, and the opportunity for an earlier trial date, state court may be preferable. This article addresses the strategies a litigant can employ to reduce the chance of removal when there is simply no viable local defendant.

The Eleventh Circuit has released several opinions in the last few years that have had a substantial impact on the way federal district courts decide issues of removal and remand. Roe v. Michelin North America, Inc., 613 F.3d 1048 (11th Cir. 2010)[1]; Pretka v. Kolter City Plaza II, Inc., 608 F.3d 744 (11th Cir. 2010)[2]; Lowrey v. Alabama Power Co., 483 F.3d 1184 (11th Cir. 2007)[3]. The nuances and details of these opinions underscore the importance of carefully considering certain strategic issues both before and during the pendency of a lawsuit.

To successfully remove a case, the defendant must meet strict substantive and procedural requirements. Pursuant to 28 U.S.C. § 1441(a), "any civil action brought in a State court of which the district courts of the United States have original jurisdiction may be removed by the defendant. . ." Although there are various grounds for district courts to exercise original jurisdiction, the one relevant in this context is found in 28 U.S.C. § 1332(a), which requires diversity of citizenship[4] and an amount in controversy that exceeds the sum of $75,000. Together, these comprise the substantive requirements for removability.

However, there are also several procedural requirements that have been characterized as the "how" and "when" dictates of removability. 28 U.S.C. § 1446.[5] Section 1446(a) describes how removal can be accomplished (i.e., filing a notice of removal signed pursuant to Rule 11 that includes "a short and plain statement of the grounds for removal"). Much more importantly for purposes of this article, Section 1446(b) describes when removal can be accomplished. Section 1446(b) states:

> The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.
>
> If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order, or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

In short, Section 1446(b) sets forth "preconditions for removal in two different types of cases: (1) those removable on the basis of an initial pleading; and (2) those that later become removable on the basis of 'a copy of an amended pleading, motion, order, or other paper.'" Lowrey, 483 F.3d at 1212. Cases that are removable on the basis of the initial pleading are called "first paragraph" removals. Cases that are removable on the basis of some type of "other paper" that is produced after the initial 30-day period are called "second paragraph" removals.[6] Because there is different

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statutory language in these paragraphs and because of the manner in which the case law has evolved over the last few years, this distinction is critically important with respect to a litigant's strategy for defeating removal.

The litigant who intends to remain in state court should posture the case so that it if it is removed, it is done so pursuant to the second paragraph of Section 1446(b). "Although the second paragraph of § 1446(b) offers an additional avenue for removal, that road is not an easy one for defendants to travel." Pretka, 608 F.3d 760. Thus, in cases where the amount in controversy is in dispute, a motion for remand has a better chance of success if the original removal occurred pursuant to the second paragraph of Section 1446(b) rather than the first. An exploration of the differences in first and second paragraph removals will help to explain why.

Comparison of First and Second Paragraph Removals

Under either first or second paragraph removals, "[i]f a plaintiff makes 'an unspecified demand for damages in state court, a removing defendant must prove by a preponderance of the evidence that the amount in controversy more likely than not exceeds the. . .jurisdictional requirements." Tapscott v. MS Dealer Service Corp., 77 F.3d 1353, 1357 (11th Cir. 1996), abrogated on other grounds by Cohen v. Office Depot, Inc., 204 F.3d 1069 (11th Cir. 2000). Although there are several differences in first and second paragraph removals, the key difference between the two is the evidence that the court is permitted to consider when determining whether the removing party has met its burden to establish the amount in controversy.

In first paragraph removals, "the district court is not bound by the plaintiff's representations regarding its claim, nor must it assume that the plaintiff is in the best position to evaluate the amount of damages sought." Pretka, 608 F.3d at 771. Instead, the Eleventh Circuit has made clear that in first paragraph cases, defendants may submit their own evidence in order to satisfy the jurisdictional requirements for removal. Id. at 756. In fact, the type of evidence that the district court can review in a first paragraph case is not restricted. Id. at 770-71. For example, in first paragraph removals, defendants can introduce affidavits of their corporate officers and representatives, Pretka, 608 F.3d at 756, contracts between the parties, Id., or declarations of counsel attaching documents exchanged during the claims evaluation process, Brewton Iron Works, Inc. v. Continental Casualty Co., Docket No. 09-0666, 2010 WL 4269181 (S. D. Ala. Oct. 26, 2010).

In second paragraph removals, "a case becomes removable when three conditions are present: there must be (1) 'an amended pleading, motion, order or other paper,' which (2) the defendant must have received from the plaintiff (or from the court, if the document is an order), and from which (3) the defendant can 'first ascertain' that federal jurisdiction exists. Lowery, 483 F.3d at 1213 n.63 (emphasis added). The second of these requirements is primarily responsible for making second paragraph removals much more difficult for the removing party.[7]

In order to remove a case on the basis of the second paragraph of Section 1446(b), the defendant must receive a document "from the plaintiff" that is sufficient to establish federal jurisdiction. Although the Eleventh Circuit's decision in Pretka was by no means a glowing endorsement of the decision in Lowrey, the requirement that a second paragraph removal be triggered by a document "from the plaintiff" was nevertheless reaffirmed: "The traditional rule is that only a voluntary act by the plaintiff may convert a non-removable case into a removable case." 608 F.3d at 761 (citing Insinga v. LaBella, 845 F.2d 249, 252 (11th Cir. 1988)). "Thus, a defendant cannot show that a previously non-removable case 'has become removable' as a result of a document created by the defendant." Id.

The "from the plaintiff" rule often leads to remand even in cases where it is facially apparent from the "other paper" that the amount in controversy exceeds $75,000. For example, in Whittington v. Wilkins, Docket No. 1:09-cv-00352, 2009 WL 3078312 (S.D. Ala. Sept. 23, 2009), defendants in a second paragraph removal case submitted plaintiffs' medical expenses, which totaled over $148,000, in support of their contention that the amount in controversy exceeded $75,000. Defendants admitted that they did not acquire plaintiffs' medical bills from the plaintiffs. The court granted plaintiffs' motion to remand and adopted the Report and Recommendation authored by the magistrate judge, holding that because Lowery requires that the "other paper" in support of removal be provided by the plaintiff, "Defendants have not established, under Lowery, that this Court has jurisdiction over this action." Id.

The United States District Court for the Middle District of Alabama has also strictly interpreted the "from the plaintiff" requirement in second paragraph removal cases. In Peacock v. Cincinnati Ins. Co., 3:08-cv-00455, 2008 WL 5273123 (M.D. Ala. Dec. 18, 2008)[8], the defendant submitted an affidavit of one of its corporate officers in support of its removal petition. The court granted plaintiff's motion to remand, stating: "There is no indication that this information was received from [the plaintiff]. . .Accordingly, the court finds that consideration of [the defendant's] affidavit is not permitted under Lowrey."[9] Id. at * 3.

Practitioners should be aware of several recent attempts to persuade federal district courts that the lapse of an Offer of Judgment is a document "from the plaintiff" that can be used to establish that the jurisdictional amount in controversy has been

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met in second paragraph cases. In Humphries v. Anderson Trucking Service, Docket No. 10-00194-CG-N, 2010 WL 2898317 (S. D. Ala. Jun. 29, 2010), a case that our law firm handled, the defendants argued that by refusing an Offer of Judgment in the amount of $78,500, "the Plaintiff has unquestionably placed the value of her case above $75,000." Id. at *4 (quoting Notice of Removal (Doc. 1) at ¶ 18). The "refusal" upon which the defendants relied was actually the automatic expiration of the Offer of Judgment by operation of law when the plaintiff did not accept it within ten days.[10] According to the text of the rule governing offers of judgment, if the ten-day period for acceptance lapses, the offer of judgment is deemed withdrawn by the offering party, not refused by the one who ignored it.

The Court in Humphries held that defendants' argument with respect to the Offer of Judgment failed for several reasons. First, the court held that "withdrawal of an offer is entirely different from the 'refusal' with which defendants seek to bind the plaintiff." Id. at *10. Explaining the difference, the Court observed that "[a]ny assumption that the 10-day period lapsed solely because the plaintiff rejects the notion that her claim is worth less than $75,000.00 is pure speculation." Id. Second, the Court observed that Rule 68 expressly prohibited the admission of the Offer of Judgment except in a proceeding to determine cost. Id. Third, the Court held that the "Offer of Judgment relied upon by the defendants in this case was created by the defendant and not the plaintiff." Id. at 11. For all of these reasons, the Court held that "the failure of plaintiff to respond to the Offer of Judgment, and as a result, its expiration by operation of law, does not make this case removable." Id. See also Burrowes v. Swift Transportation Co., Docket No. 10-00138-CG-N, 2010 WL 2976102 (S.D. Ala. Jun. 29, 2010) (lapse of offer of judgment in second paragraph removal is not sufficient to establish jurisdiction because it is not a document from the plaintiff).

Reducing the Chance of First Paragraph Removals

Given the advantage the removing party has in first paragraph removals, what strategies can a litigant employ to limit first paragraph removals? Unfortunately, recent Eleventh Circuit precedent has made it increasingly difficult.

For example, the Eleventh Circuit recently made it much more difficult to avoid first paragraph removals in Alabama wrongful death cases. Roe v. Michelin North America, Inc., 613 F.3d 1058 (11th Cir. 2010). Roe was a first paragraph removal involving a claim for wrongful death under Alabama law, which permits plaintiffs to recover punitive, but not compensatory, damages. See Campbell v. Williams, 638 So. 2d 804, 809 (Ala. 1994) (other citations omitted)). In Roe, the personal representative for the estate of the decedent brought a case against defendants claiming that Michelin North America "was negligent and wanton in designing, developing, and selling a tire that had a tendency to fail under foreseeable driving conditions." 613 F.3d at 1060. The complaint alleged claims for wantonness and suggested that Michelin made no attempt to exercise ordinary care and concern for others. Id. at 1066. It also alleged that Michelin sold the defective tires nationwide, which endangered the lives of thousands of people. Id. at 1066. The complaint requested an unspecified amount of damages. The defendant removed the case, arguing that it was facially apparent from the complaint that the case exceeded the $75,000 amount in controversy requirement. Id. at 1060.

The Court looked to the factors that a jury is instructed to consider when contemplating a damage award under the Alabama Wrongful Death Act.[11] The Court then analyzed those factors in light of the allegations in the complaint and concluded that those factors, judicial experience, and common sense "dictate the value of Roe's claims (as pled) more likely than not exceeds the minimum jurisdictional requirement." Id. at 1066. The Court affirmed the district court's order denying plaintiff's motion to remand. Thus, in Alabama wrongful death cases, naming a local defendant has become increasingly important.

However, in personal injury cases, things are different. District courts in Alabama have held that "Roe, an Alabama wrongful death case, should not be extended to non-wrongful death cases merely on the basis that punitive damages are sought." Butler v. Charter Communications, Inc. Docket No. 3:10cv828, 2010 WL 5116139, *2 (M.D. Ala. Dec. 15, 2010) (citing SUA Ins. Co. v. Classic Home Builders, LLC, No. 10-0388-WS-C, 2010 WL 4664968, at *9 (S.D. Ala. Nov. 17, 2010)). These courts have concluded that they are not "free to simply assume" that the plaintiff in a personal injury case is likely to be awarded substantial punitive damages. Id. Thus, including a claim for punitive damages in a personal injury case will not – by itself – subject your case to a first paragraph removal.

An unspecified amount of damages in the ad damnum clause in the complaint makes it less likely that it will be "facially apparent" that the jurisdictional amount in controversy has been met. However, simply avoiding making a claim for a specified amount in the complaint will not insulate a litigant from a first paragraph removal. For example, in Roe, the Eleventh Circuit cited two cases from the Fifth Circuit in which the allegations of damages alone were sufficient to establish the jurisdictional requirement by a preponderance of the evidence.[12] In Luckett v. Delta Airlines, Inc., 171 F.3d 295, 298 (5th Cir. 1999), the Fifth Circuit found that the "complaint's allegations of property damage, travel expenses, [an] emergency ambulance trip, six days in the hospital, pain and suffering, humiliation, and a temporary inability to do house work. .

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.combined to meet the jurisdictional requirement even though no amount of damages was pled." Felton v. Greyhound Lines, Inc., 324 F.3d 771, 774 (5th Cir. 2003) (summarizing the holding in Luckett). In Gebbia, the Fifth Circuit held that allegations that a slip and fall resulted in severe physical injury, lost wages, lost enjoyment of life, and pain and suffering appeared to comprise a claim worth more than $75,000. Roe, 613 F.3d at 1063 (citing Gebbia v. Wal-Mart Stores, Inc., 233 F.3d 880, 883 (5th Cir. 2000)).[13]

By contrast, in SUA Ins. Co., the United States District Court for the Southern District of Alabama made clear that a lengthy ad damnum clause alone will not be sufficient to establish the amount in controversy by a preponderance of the evidence:

> At bottom, SUA relies on a visceral impression that, since the state complaint includes a lengthy ad damnum clause, the amount in controversy must exceed $75,000. This approach may have superficial appeal, but the jurisdictional inquiry is much more searching. It remains possible in this case, as in most, that the successful plaintiffs will be awarded more than $75,000. Possibility, however, is not probability and will not support federal jurisdiction.

SUA Ins. Co. v. Classic Home Builders, LLC, Docket No. 10-0388-WS-C, 2010 WL 4664968, *10 (S.D. Ala. Nov. 17, 2010) (emphasis added).

Removing parties have also attempted, without much success, to attach verdicts from other similar cases in an attempt to meet their burden of establishing the minimum jurisdictional amount. In Lowery, a second paragraph removal, the Eleventh Circuit questioned "whether such general evidence is ever of much use in establishing the value of claims in any one particular suit." 483 F.3d at 1221. Federal district courts in Alabama in first paragraph cases have generally followed this principle even though Lowrey's discussion of the issue is dicta.[14] For example, in Hill v. Toys "R" Us, Inc., Docket No. 10-0404-WS-B, 2010 WL 3834532 (Sep. 24, 2010), the removing party's sole basis for removal under the first paragraph was a "nationwide search" of sixteen jury verdicts exceeding $75,000 in cases involving maintenance of a defendant's premises resulting in personal injuries. The Court held that because it had been provided insufficient information to allow it to ascertain how similar the pending action was to the sixteen actions submitted by defendants with their notice of removal, "the other cases cannot support the inference that the amount in controversy here exceeds $75,000." Id. at *2. Moreover, the Court appeared to question whether Lowery even left the door open for a removing defendant to rely on (or solely on) awards in other cases as a basis for establishing jurisdiction, choosing to assume that fact without deciding it. Id.

The following are ways to reduce the chances of a first paragraph removal: (1) make an unspecified claim for damages (in most personal injury litigation, it is virtually impossible at the beginning of a case to know the extent of the plaintiff's damages, particularly if the plaintiff continues treatment with medical professionals during the pendency of the litigation); (2) list only those categories of damages about which the litigant is certain at the time the complaint is filed (e.g., in personal injury cases, it is not always clear at the beginning of the litigation whether the plaintiff has suffered a permanent injury); (3) avoid the attachment of any documents and other materials that may be used by the removing party to establish the jurisdictional amount; and (4) keep the allegations to the minimum required to meet the pleading standard. In addition, if the case is removed solely on the basis of other "similar" verdicts, remember that the federal courts are not inclined to permit such evidence to be used to establish the amount in controversy in the absence of very specific details as to how those cases are similar to the one at issue.

Reducing the Chance of Second Paragraph Removals

Even if a litigant survives the 30 day threshold window for a first paragraph removal, there is still a chance of a second paragraph removal within a year of the commencement of the action. 28 U.S.C. § 1446(b). The key advantage that a litigant has in the second paragraph removal is that the only way the case can become removable after the initial 30-day period is the receipt by the defendant from the plaintiff of a document that establishes jurisdiction. Remember, if a removing party has obtained medical bills through a non-party subpoena, they do not constitute documents from the plaintiff. If the removing party provides an offer of judgment in excess of $75,000, its lapse by operation of law does not constitute a document from the plaintiff. Affidavits and other documents in the removing party's possession do not constitute documents from the plaintiff. Thus, the astute practitioner must be diligent and careful about the types of documents that are provided to opposing counsel both in the pre-suit settlement negotiation process and during the pendency of the litigation.

Conclusion

Although recent decisions have made removing a case easier than it was several years ago, employing these strategies will help you to maximize your chances of remaining in the originally selected forum.

1 Numerous district courts in Alabama have cited or discussed Roe v. Michelin as of the date this article was written: Justice v. Jeff Lindsey Communities, Inc., 2011 WL 744773, *2 (M.D.Ala. Feb. 25, 2011); Lewis v. State Farm Fire and Cas. Co., 2011 WL 521617, * 12 (S.D.Ala. Feb. 15, 2011); Allen v. Thomas, 2011 WL 197964, *3 (M.D.Ala. Jan. 20, 2011); Weaver v. Norfolk Southern Ry. Co., 2011 WL 384046, *1 (S.D.Ala. Jan. 18, 2011); Butler v. Charter Communications, Inc., 2010 WL 5116139, *2 (M.D.Ala. Dec. 15, 2010); SUA Ins. Co. v. Classic Home Builders, LLC, 2010 WL 4664968, *6 (S.D.

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Ala. Nov. 17, 2010); Hale v. Cub Cadet, LLC, 2010 WL 4628135 (M.D. Ala. Nov. 8, 2010); Overton v. Wyeth, Inc., 2010 WL 4717048, *3 (S.D. Ala. Oct. 29, 2010); Banks v. Social Service Coordinators, Inc., 2010 WL 3947041, *4 (S.D. Ala. Oct. 6, 2010); Bender v. Mazda Motor of America, 2010 WL 3718098, *1 (S.D. Ala. Sep. 9, 2010); White-Spunner Const., Inc. v. Zurich American Ins. Co., 2010 WL 3489956, *3 (S.D. Ala. Aug. 30, 2010); Brown v. Tanner Medical Center, 2010 WL 3328500, *2 (M.D. Ala. Aug. 23, 2010);

2 Numerous district courts in Alabama have cited or discussed Pretka as of the date this article was written: Johnson Outdoors Inc. v. Navico, Inc., 2011 WL 798478, *5 (M.D. Ala. Mar. 2, 2011); Justice v. Jeff Lindsey Communities, Inc. 2011 WL 744773, *1 (M.D. Ala. Feb. 25, 2011); Bourgeois v. Wells Fargo Bank, N.A., 2011 WL 836677, *2 (S.D. Ala. Feb. 16, 2011); Williams v. Litton Loan Servicing, LP, 2011 WL 521624, *2 (M.D. Ala. Feb. 15, 2011); Lewis v. State Farm Fire and Cas. Co., 2011 WL 521617, *11 (S.D. Ala. Feb. 15, 2011); South Dallas Water Authority v. Guarantee Co. of North America, USA, 2011 WL 586083, *10 (S.D. Ala. Feb. 9, 2011); Justice v. Provident Life & Acc. Ins. Co., 2011 WL 560415, *9 (S.D. Ala. Feb. 8, 2011); Barker v. Dollar General, 2011 WL 486136, *2 (M.D. Ala. Feb. 7, 2011); Reed v. Chase Home Finance, LLC, 2011 WL 321737, *4 (S.D. Ala. Jan. 28, 2011); Allen v. Thomas, 2011 WL 197964, *2 (M.D. Ala. Jan. 20, 2011); Granger v. Croscill Home, LLC, 2011 WL 250433, *3 (S.D. Ala. Jan. 7, 2011); Mannsfeld v. Evonik Degussa Corp., 2011 WL 53098, *2 (S.D. Ala. Jan. 5, 2011); Butler v. Charter Communications, Inc., 2010 WL 5116139, *2 (M.D. Ala. Dec. 15, 2010); SUA Ins. Co. v. Classic Home Builders, LLC, 2010 WL 4664968, *3 (S.D. Ala. Nov. 17, 2010); Hale v. Cub Cadet, LLC, 2010 WL 4628135, *2 (M.D. Ala. Nov. 8, 2010); Overton v. Wyeth, Inc., 2010 WL 4717048, *3 (S.D. Ala. Oct. 29, 2010); Brewton Iron Works Inc. v. Continental Cas. Co., 2010 WL 4269181, *3 (S.D. Ala. Oct. 26, 2010); Hill v. Toys "R" Us, Inc., 2010 WL 3834532, *2 (S.D. Ala. Sep. 24, 2010); Renfroe v. Allstate Property and Cas. Ins. Co., 2010 WL 4117038, *2 (S.D. Ala. Sep. 23, 2010); Gulledge v. Gulledge, 2010 WL 3528567, *2 (S.D. Ala. Sep. 3, 2010); Nelson v. Whirlpool Corp., 727 F.Supp.2d 1294, 1304 (S.D. Ala. Aug. 4, 2010); Macks v. U.S. Bank Nat. Ass'n, 2010 WL 2976200, *1 (M.D. Ala. Jul. 23, 2010); Humphries v. Anderson Trucking Service, Inc., 2010 WL 2898317, *4 (S.D. Ala. Jun. 29, 2010); Burrowes v. Swift Transp. Co., Inc., 2010 WL 2976102, *3 (S.D. Ala. Jun. 29, 2010);

3 Because Pretka clarified the Eleventh Circuit's opinion in Lowery, all of the many Alabama district court opinions discussing Lowery are not listed here. Instead, the Alabama district court decisions interpreting Lowery after the release of Pretka and as of the date this article are as follows: Justice v. Jeff Lindsey Communities, Inc., 2011 WL 744773, *1 (M.D. Ala. Feb. 25, 2011); Bourgeois v. Wells Fargo Bank, N.A., 2011 WL 836677, *2 (S.D. Ala. Feb. 16, 2011); Williams v. Litton Loan Servicing, LP, 2011 WL 521624, *1 (M.D. Ala. Feb. 15, 2011); South Dallas Water Authority v. Guarantee Co. of North America, USA, 2011 WL 586083, *10 (S.D. Ala. Feb. 9, 2011); Allen v. Thomas, 2011 WL 197964, *2 (M.D. Ala. Jan. 20, 2011); Vision Bank v. Bama Bayou, LLC, 2011 WL 521607, *1 (S.D. Ala. Jan. 12, 2011); Granger v. Croscill Home, LLC, 2011 WL 250433, *3 (S.D. Ala. Jan. 7, 2011); Butler v. Charter Communications, Inc., 2010 WL 5116139, *2 (M.D. Ala. Dec. 15, 2010); Farkas v. Suntrust Mortg. Inc., 2010 WL 5525359, *1 (S.D. Ala. Dec. 15, 2010); Jackson v. Litton Loan Servicing, LP, 2010 WL 4923366, *2 (M.D. Ala. Nov. 29, 2010); SUA Ins. Co. v. Classic Home Builders, LLC, 2010 WL 4664968, *2 (S.D. Ala. Nov. 17, 2010); Overton v. Wyeth, Inc., 2010 WL 4717048, *5 (S.D. Ala. Oct. 29, 2010); Brewton Iron Works, Inc. v. Continental Cas. Co., 2010 WL 4269181, *2 (S.D. Ala. Oct. 26, 2010); Hill v. Toys "R" Us, Inc., 2010 WL 3834532, *2 (S.D. Ala. Sep. 24, 2010); Brown v. Tanner Medical Center, 2010 WL 3328500, *2 (M.D. Ala. Aug. 23, 2010); Jackson v. Litton Loan Servicing, LP, 2010 WL 3168117, *3 (M.D. Ala. Aug. 10, 2010); Macks v. U.S. Bank Nat. Ass'n, 2010 WL 2976200, *1 (M.D. Ala. Jul. 23, 2010); Humphries v. Anderson Trucking Service, Inc., 2010 WL 2898317, *2 (S.D. Ala. Jun. 29, 2010); Burrowes v. Swift Transp. Co., Inc., 2010 WL 2976102, *2 (S.D. Ala. Jun. 29, 2010).

4 Because this article focuses on the strategies that can be employed when there is no viable local defendant, the case law associated with diversity of citizenship and fraudulent joinder will not be discussed. However, a careful understanding of that subject matter should be another consideration when writing a motion for remand.

5 Note that both Lowrey and Pretka were cases involving removal pursuant to the Class Action Fairness Act. However, CAFA's removal provision expressly adopts the procedures of the general removal statute, 28 U.S.C. § 1446, except that the one-year limitation on removal in § 1446 does not apply to CAFA cases. Pretka, 608 F.3d at 756. Thus, the analysis in those cases applies to any case that is the subject of a removal under § 1446.

6 While not an issue in this article, "second paragraph" removals are further broken down into two types – "Type 1" cases "have always been removable but the removability was not initially ascertainable," while "Type 2" cases occur because the case has "shift[ed] from nonremovable to removable in nature." Roe v. Michelin North America, Inc., 613 F.3d 1058, 1061 fn.4 (11th Cir. 2010).

7 The first requirement – that there must be an "other paper" – has been interpreted fairly broadly, and thus does not substantially contribute to the difficulty of removal. The Eleventh Circuit has acknowledged that "[w]hat constitutes 'other paper'...has been developed judicially." Lowery, 483 F.3d at 1212 n.62. In Lowery, the Eleventh Circuit listed "numerous types of documents [that] have been held to qualify[:] 'responses to requests for admissions, settlement offers, interrogatory responses, deposition testimony, demand letters, and email estimating damages.'" Id (citations omitted).

The third requirement deals primarily with what type of information will trigger the running of the new 30-day time period. The type of information that will trigger each type of removal is different in first and second paragraph removals because of the different language in each Section 1446(b) paragraph. The Eleventh Circuit has adopted the Fifth Circuit's explanation of the difference in the language:

'Setting forth,' the key language of the first paragraph, encompasses a broader range of information that can trigger a time limit based on notice than would 'ascertained,' the pivotal term in the second paragraph. To 'set forth' means to 'publish' or 'to give an account or statement of.' 'Ascertain' means 'to make certain, exact or precise' or 'to find out or learn with certainty.' The latter, in contrast to the former, seems to require a greater level of certainty or that the facts supporting removability be stated unequivocally.

Pretka, 608 F.3d 760 (quoting Bosky v. Kroger Tex., LP, 288 F.3d 208, 211 (5th Cir. 2002) (footnotes omitted)). As a result, the 30-day window for filing a second paragraph notice of removal will only be triggered when the "other paper" unequivocally establishes the jurisdictional elements.

8 Note that Peacock was a case removed pursuant to the provisions of the Class Action Fairness Act, but that statute adopts the removal procedures in § 1446(b). See, supra, fn 5.

9 While this case and Whittington were decided prior to the Eleventh Circuit's decision in Pretka, they are nevertheless consistent with the decision in Pretka.

10 "At any time more than fifteen (15) days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property or to the effect specified in the offer, with costs then accrued. If within ten (10) days after the service of the offer, the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs..." Ala. R. Civ. P. 68 (emphasis added).

11 These factors include: (1) the finality of death; (2) the propriety of punishing the defendant; (3) whether the defendant could have prevented the victim's death; (4) how difficult it would have been for the defendant to have prevented the death; and (5) the public's interest in deterring others from engaging in conduct like the defendant's. Tillis Trucking Co., Inc. v. Moses, 748 So. 2d 874, 889 (Ala. 1999).

12 However, note that the Eleventh Circuit did not expressly adopt these holdings. Instead, it cited these cases for the proposition that a district court has the power to appraise the worth of the plaintiff's claims based on the nature of the allegations stated in their complaints, an issue critical in Roe in light of the court's holding that the wrongful death allegations alone could satisfy the removing party's burden of establishing that the substantive jurisdictional requirements have been met.

13 Note, however, that Luckett and Gebbia have been distinguished by many district courts in the Fifth Circuit. See, e.g., Seaux v. Wal-Mart Stores, Inc., 2006 WL 2460843, *2 (W.D. La. Aug. 22, 2006) ("This Court finds those cases [Luckett and Gebbia] factually distinguishable from the case at bar in that the respective petitions in those cases allege damages that are more numerous and of greater severity than the case at bar.").

14 "Because Lowrey was not a first paragraph removal case, anything the opinion says about the law applicable to cases removed under the first paragraph of § 1446(b) is dicta, and we are 'free to give that question fresh consideration.'" Pretka, 608 F.3d at 762.

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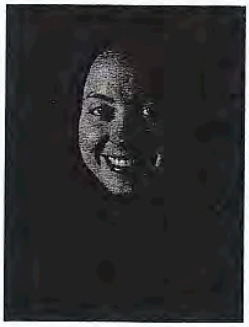

Lucy E. Tufts practices with the law firm of Cunningham Bounds, LLC in Mobile, Alabama. She graduated with honors from Georgetown University Law Center in Washington, DC and was inducted into the Order of the Coif in May 2008. She practices in the areas of products liability, industrial accidents, automobile and trucking accidents, premises liability, medical malpractice and fraud.

Ms. Tufts currently serves as the President of the Mobile Bar Association Women Lawyers and serves on the Junior Board of the Alabama Civil Justice Foundation. Ms. Tufts is a member of the Alabama State Bar Association, the Mobile Bar Association, the Alabama Association for Justice, and the American Association for Justice.

Ms. Tufts is committed to giving back to the communities in which she works and lives. She currently provides legal representation on a pro bono basis through the Volunteer Lawyers Program of Mobile and serves on the Board of Directors of the Alabama Citizens for Constitutional Reform, Inc. In addition, Ms. Tufts is a graduate of the 2010 Alabama Leadership Initiative ("ALI"), a program through which emerging leaders from across the state explore various issues associated with education, economic development and government.

A native of Alabama, Ms. Tufts grew up in Huntsville and received a Bachelor of Arts from the University of Alabama at Birmingham. Before going to law school, she served as Executive Director of Impact Alabama, a statewide nonprofit organization that manages college preparatory, healthcare and financial literacy programs designed to enable student volunteers to be part of structural and systemic change.

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