

FORECLOSURE-RELATED LITIGATION UPDATE

52ND ANNUAL WILLIAM W. GIBSON JR. MORTGAGE LENDING AND SERVICING INSTITUTE
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JASON L. SANDERS

JSANDERS@SANDERSCOLLINS.COM

(214) 775-0631 (D) | (214) 499-7709 (C)

SANDERS
COLLINS

BENEFITS OF LITIGATING IN FEDERAL COURT

- Better developed mortgage-related case law
- More likely to dismiss a case under Rule 12 of the Federal Rules of Civil Procedure and the state counterpart is nowhere near as effective
- Less of a home-court advantage for local plaintiffs
- More consistent and predictable treatment

REMOVAL TO FEDERAL COURT

- Bases for Removal
 - Federal Question Jurisdiction - Claim arises under federal law.
 - Diversity - Complete diversity of citizenship among the parties AND amount in controversy exceeds \$75,000.
 - Bankruptcy – Arising under or arising in or related to cases under title 11 of the United States Code.
- Notice of Removal
 - Immediately removes case from state court
- Consent to Notice of Removal
 - All defendants properly joined and served must consent
 - A defendant served but fraudulently joined need not consent

REMOVAL TO FEDERAL COURT

- Deadline to Remove
 - 30 days after being served with summons and complaint. *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 347-48 (1999) ("defendant's time to remove is triggered by simultaneous service of the summons and complaint ... but not by mere receipt of the complaint unattended by any formal service") (internal quotation omitted)
 - If not immediately removable, 30 days after the receipt of the amended pleading or other paper that makes the case removable.
 - If the basis for removal is diversity jurisdiction, removal must occur within one year of the commencement of the action (unless plaintiff has acted in bad faith to prevent a defendant from removing the action).

TACTICS PLAINTIFFS USE TO PREVENT REMOVAL

- Nominal and/or Fraudulently Joined Defendants
 - Trustees, substitute trustees, and law firms/attorneys handling foreclosure
 - "Fraudulent joinder exists where a plaintiff has failed to plead under state law any specific actionable conduct against the non-diverse defendant." *Jones v. Am. Home Prods. Corp.*, 344 F. Supp. 2d 500, 502 (E.D. Tex. 2004).
 - The citizenship of "nominal" or "fraudulently joined" defendants is not considered to determine whether complete diversity exists. *See, e.g., Cuevas v. BAC Home Loans Servicing, LP*, 648 F.3d 242, 249 (5th Cir. 2011).

TACTICS PLAINTIFFS USE TO PREVENT REMOVAL

- Are Trusts, Trustees or Certificateholders Real Parties in Interest Related to Securitize Loans?
 - *Americold Realty Tr. v. Conagra Foods, Inc.*, 136 S. Ct. 1012 (2016)
 - "Navarro's rule is still good law: 'Where a trustee has been sued or files suit in her own name, the only preliminary question a court must answer is whether the party is an 'active trustee[] whose control over the assets held in [its] name[] is real and substantial.'" *Bynane v. Bank of N.Y. Mellon for CWMBS, Inc. Asset-Backed Certificates Series 2006-24*, 866 F.3d 351, 356-59 (5th Cir. 2017) (citation omitted).

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