

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
GENERAL ORDER 08-008

The full Court met in executive session on Thursday, February 28, 2008 and approved an amendment to Local Rule 81.2 Removals; Remands of Removals. The proposed amendment replaced language that was previously deleted. The proposed amendment was published, with comments due on January 11, 2008. No comments were received.

The Rules Advisory Committee on Local Rules and Procedures was also solicited for comment, but was satisfied with the proposed amendment as published.

The Court's Rules Committee discussed LR81.2 at its meeting on February 14, 2008. The Committee recommended that the full Court adopt the proposed amendment as published.

The full Court approved the proposed rule at its meeting on Thursday, February 28, 2008; Therefore,

By direction of the full Court, which met in executive session on Thursday, February 28, 2008,

IT IS HEREBY ORDERED that amended Local Rule 81.2 Removals; Remands of Removals be adopted as follows (additions shown thus, deletions shown ~~thus~~):

LR81.2: Removals, Remands of Removals

After the entry of an order remanding a case to a state court pursuant to 28 U.S.C. §1447(c) the clerk shall not transmit the certified copy of the remand order for 14 days following the date of docketing that order unless the court ordering the remand directs the clerk to transmit the certified copy of the order at an earlier date.

The filing of a petition for reconsideration of such order shall not stop the remand of the case unless the court orders otherwise.

~~*Committee Comment.* The rule is withdrawn. It imposes burdens on the manner in which lawyers practice in state courts without significant benefit and without clear authority to do so.~~

~~———— 1. The Background of the Rule~~

~~———— “A local rule of a federal district court is written by and for district judges to deal with the special problems of their court.” *Bell, Boyd, & Lloyd v. Tapy*, 896 F.2d 1101, 1103 (7th Cir. 1990).~~

~~———— LR 81.2 was adopted because the interaction of Illinois and federal rules creates uncertainty as to the removability of many cases filed in state courts. 735 ILCS 5/2-604 prohibits lawyers from specifying the amount of damages sought in personal injury cases “except to the minimum extent necessary to comply with the circuit rules of assignment where the claim is filed.”~~

~~———— The assignment rules of various Illinois courts require plaintiffs to state (by pleading or affidavit) whether their damages meet thresholds to determine whether certain procedures apply or to what division a case is assigned. A sample of these rules is set out in the Appendices A and B. The amounts in these rules do not correspond to the diversity jurisdiction threshold set out in 28 U.S.C. § 1332 (a)~~

~~———— This restriction on pleading damages sometimes created difficulties for both defendants and plaintiffs in case that might be removable.~~

~~———— A defendant “interested in removal is forced to speculate . . . as to the amount of plaintiff’s likely recovery — and if defendant does prefer a federal forum it must err on the side of seeking removal, lest the 30-day time limit for such removal under Section 1446(b) were to expire before defendant could gain any greater certainty in that respect.” *Sawisch v. Circuit City Stores*, 960 F.Supp. 154, 155 (N.D. Ill. 1997).~~

~~———— A plaintiff is ordinarily entitled to choose a state forum and preclude a federal forum by limiting damages to amounts below the diversity jurisdiction minimum. *See St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283 (1938); *The Fair v. Kohler Die & Speciality Co.*, 228 U.S. 22, 25 (1913). An Illinois personal injury plaintiff could achieve this only when circuit court rule allowed the plaintiff to specify a damages category entirely below the federal jurisdictional floor. *See, e.g., Tokarz v. Texaco Pipeline, Inc.*, 856 F.Supp. 403, 403-04 (N.D. Ill. 1993) (claims under \$30,000 to enable filing in Cook County’s Municipal Department).~~

~~———— A plaintiff willing to restrict a claim to \$75,000 has no way to plead this in the complaint. Whether removal is appropriate must be determined at the point at which the notice of removal is submitted. *See In re Shell Oil Co.*, 966 F.2d 1130 (7th Cir. 1992) and 970 F.2d 355 (7th Cir. 1992) (per curiam); *Chase v. Shop ‘N Save Warehouse Foods*, 110 F.3d 424 (7th Cir. 1997); *see also Grupo Dataflux v. Atlas Global Group, L.P.*, 124 S.Ct. 1920 (2004).~~

~~———— The rule prohibiting specific money damage claims in personal injury cases has had an~~

effect on other cases. It has become "custom" to avoid specific claims of damages in many other kinds of cases, and the many state court rules manifest the pervasive nature of this custom. See, e.g., Eighteenth Judicial Circuit Rule 13.02(d) (provides different arbitration practice of cases above \$30,000 in damages).

2. The Reconsideration of the Rule

The Court of Appeals noted, a short time ago, that the ambit of the Rule is, on its face, too broad. Complaints for equitable relief fall within the literal scope of the Rule but it is the defendant who is in the best position to assess the costs of compliance with the injunction requested by plaintiff. *Rubel v. Pfizer*, 361 F.3d 1016, 1017-20 (7th Cir. 2004).

While considering the remedy to this problem, the Court undertook to review L.R. 81.2 as a whole. The rule has not been uniformly applied. E.g. *Huntsman Chemical Corporation v. Whitehorse Technologies, Inc.* 1997 WL 548043 (N.D. Ill. 1997), *Campbell v. Bayou Steel Corp.*, 2004 WL 1125901 (N.D. Ill. 2004), *McCoy v. General Motors Corp.*, 226 F. Supp. 2d 939 (N.D. Ill. 2002).

The situation which precipitated the Rule exists only in a very narrow range of cases. All that is required for removal is "reasonable probability" that more than \$75,000 is in controversy. *Shaw v. Dow Brands*, 994 F.2d 364, 366 n.2 (7th Cir. 1993), *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178 (1936). The very nature of the harm alleged in the case will usually make it simple for a judge to determine whether it is more likely true than not that the amount in controversy exceeds the jurisdictional requirement. (E.g. *McCoy v. General Motors Corp.*), 226 F. Supp. 2d at 941-42 ("it is obvious from a common-sense reading of the complaint"). Cases for which remand is sought are not a large part of our docket. In 2003, 117 motions to remand were filed; only 22 of them were based, in whole or in part, on the failure to meet the jurisdictional amount (See Appendix C).

Only one class of plaintiffs is disadvantaged by cases in which common-sense reading of the complaint shows a reasonable probability that damages exceed \$75,000—those whose claims exceed \$75,000 but wish to remain in state court by capping damages. We think such plaintiffs will not be numerous. For the few who do exist there may be nothing to stop them from tendering to defense counsel a written admission under Illinois Supreme Court Rule 216 which binds them to seek damages of no more than \$75,000. It is true that Rule 216 contemplates a request for admission prior to an admission but nothing in the structure of the Rule suggests that a pre-request admission would not be binding.

There is no inherent flaw in a rule simply because it governs an extremely small class of cases. But such a rule must be both useful and limited in its effect on other cases. L.R. 81.2 is not so limited. It affects every money damage case in which there is diversity among parties—even when the amount in controversy is obviously in excess of \$75,000. It requires lawyers to tender one of two forms of damage discovery in hundreds of cases each year. Rarely will the results of this practice have any bearing on the decision to remand. The cost of compliance with L.R. 81.2 far outweighs its benefit to a tiny subset of plaintiffs.

The legitimate benefit to defendants is small as well and its cost is not justified by any legitimate benefit. A defendant may well worry about meeting the 30-day deadline to seek

removal if defendant is uncertain about whether the jurisdictional amount is present in the case. We reiterate that such uncertainty is not common. In any event, the defendant is free to use the interrogatory or request for admission procedure provided by Illinois rules in order to clarify the amount in controversy. We see no reason to require that all defendants do so.

— A recent Appellate Court holding creates a dilemma for any defendant who asserts lack of personal jurisdiction in state courts. Under L.R. 81.2, defendant must seek discovery of the damages to be claimed. To do so constitutes “a general appearance and a waiver of any objection to the circuit court’s in personam jurisdiction . . .” *Haubner v. Abercrombie & Kent*, 812 N.E.2d 704 (Ill App 2004). It is difficult to defend a rule which requires a defendant to submit to personal jurisdiction in order to try to remove its case to this court.

— The Rule confers an unintended benefit on defendants. L.R. 81.2 requires the defendant to proffer an interrogatory or a request for admission. It then provides that the 30-day deadline does not begin to run until there is a response or a failure to timely respond. This allows a defendant a useful gambit, unrelated to the interests of fairness. A defendant seeking delay may not want a prompt removal if it thinks that the case will linger in state court. When the absolute one-year limit for removal (28 U.S.C. § 1446 (b)) comes near, a defendant might only then submit the damage interrogatory and thereafter seeks removal. Defendant is able to do this because the 30-day deadline does not, under the Rule, begin to run as a practical matter until the defendant chooses to start it.

— The final problem with the Rule arises from the fact that no Court of Appeals has spoken to the right of a District Court to establish by Local Rule that, as a matter of law, the 30-day time limit is tolled until a damage discovery procedure is completed. *Rubel v. Pfizer*, 361 F.3d at 1020 at least suggests that our power to do so is doubtful. The prudent defense lawyer may well conclude that the only safe course is to file for removal within 30 days of the receipt of the complaint. If the case is remanded, the defense lawyer will then invoke the procedures under L.R. 81.2 hoping that the judge will abide by the timing provisions of the rule. There is no law against filing multiple petitions for removal. *Benson v. SI Handling Syst., Inc.*, 188 F.3d 780, 782 (7th Cir. 1999). So long as this Court *might* be able to control the onset of the 30-day time limit, the defense will be compelled to try removal without complying with L.R. 81.2 and try again under the Rule if the case is remanded after the first attempt. This practice cannot commend itself to anyone.

— For these reasons, we conclude that the rule ought to be withdrawn.

Appendix

A. Application of Special Procedures

— Where damages are not in excess of \$5,000 then the case is a small claim governed by special rules. Ill.S.Ct.R. 281-89. If damages range from \$5,000 to \$50,000 there is only limited and simplified discovery. Ill.S.Ct.R. 222. When damages fall within ranges (that vary among the circuit courts), the case may be subject to mandatory arbitration under Illinois Supreme Court Rule 86. See, e.g., Cir.Ct.Cook.Co.R.18.3 (all actions filed in Municipal Districts seeking damages not to exceed \$30,000); 18th.Cir.Ct.R. 13.01(b) (all actions seeking damages exceeding \$5,000 but not exceeding monetary limit authorized by Supreme Court); 12th.Cir.Ct.R. 22.02(a)

~~(all actions seeking damages exceeding \$5,000 but not exceeding \$30,000); 19th.Cir.Ct.R. 17.01(c) (Amended) (all actions seeking damages exceeding \$5,000 but not exceeding \$50,000); 17th.Cir.Ct.R. 2.07(d)-Rule 1(b)(all actions seeking damages exceeding \$5,000 but not exceeding \$50,000).~~

~~———— B. Assignment to Specific Division of the Court~~

~~———— In the Circuit Court of Cook County, a personal injury action may be filed in either the Law Division or one of six Municipal Districts. Municipal District One hears all personal injury actions seeking compensatory and money damages not in excess of \$30,000, see Cir.Ct.Cook.Co.G.O. 1-2.3(b)(1); Municipal Districts Two, Three, Four, Five and Six hear cases for money damages not in excess of \$100,000, see Cir.Ct.Cook.Co.G.O. 1-2.3(b)(2); and the Law Division hears all remaining actions, see Cir.Ct.Cook.Co.G.O. 1-2.1(a)(1)(i)-(ii). Plaintiffs must specify which division is the correct one.~~

~~———— Some circuits require personal injury plaintiffs to plead other categories of damages in their complaints. In Cook County's Municipal Department, the complaint must allege whether the amount of damages: (1) does not exceed \$2,500; (2) are not less than \$2,500 nor more than \$30,000 for actions filed in Municipal District One nor more than \$50,000 for actions filed in Municipal District Two, Three, Four, Five or Six; or (3) are not less than \$50,000 nor more than \$100,000 for actions filed in Municipal Districts Two, Three, Four, Five or Six. See Cir.Ct.Cook.Co.G.O. 1-2.3(b)(5)(i)-(iii). For all personal injury pleadings in the 18th Circuit, the complaint must allege whether the amount of damages is: (1) not greater than \$5,000; (2) greater than \$5,000 and not in excess of \$15,000; (3) greater than \$15,000 and not in excess of \$30,000; (4) greater than \$30,000 and not in excess of \$50,000; or (5) greater than \$50,000. See 18th.Cir.Ct.R. 6.03. Finally, for all personal injury pleadings in the 19th Circuit, the complaint must allege whether the amount of damages is: (1) greater than \$5,000 but not exceeding \$15,000; (2) greater than \$15,000 but not exceeding \$50,000; or (3) greater than \$50,000. See 19th.Cir.Ct.R. 17.01(d)~~

~~———— C. Motion to Remand~~

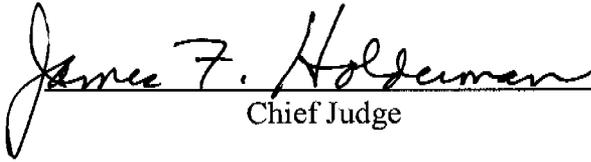
~~———— A total of 117 motions to remand to state court were filed during 2003. Fifty-six of these motions were granted, forty-seven were denied, and fourteen were disposed of in another manner, e.g., withdrawn, administratively terminated.~~

~~Twenty-six of the 117 motions reviewed (22.2%) cited a lack of diversity as a reason for seeking remand of the case. Twenty-two motions (18.8%) argued for remand because the amount in controversy was insufficient to justify the case having been removed to federal court. Only five motions (4.3%) sought remand because of incomplete consent by the defendants in the state court proceeding.~~

~~———— Thirty of the motions (25.6%) cited other jurisdictional reasons for remanding the case. Most of the motions in this category argued that, because certain issues in the case at hand had been disposed of, there was no federal jurisdiction for the remaining issues in the case. Finally, thirty-four motions (29.1%) cited a variety of other reasons for remanding the case, including the argument that the petition for removal was not filed in a timely manner, agreement by all of the parties for the return of the case to the state court, and, in one case, the observation that the~~

removal petition was filed by the plaintiff in the state case.

ENTER:
FOR THE COURT


Chief Judge

Dated at Chicago, Illinois this 30th day of March, 2008