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A Costly Reminder to Mind Your Civ Pro: Fee Sanctions for Improper Removal

Last March, this blog presented a case out of the Southern District of New York, in which Judge Cathy Seibel addressed the fundamental principles of removing a case to federal court on the basis of federal question jurisdiction and ultimately remanded the case to state court. As an update, we return to the case for a reminder from Judge Seibel that the improper removal of a case from state court can be costly. This recent decision explores when fee-shifting is appropriate because of improper removal, and how the court calculates a reasonable fee award.

The Case: *Gondolfo et al. v. Town of Carmel*

To recap, the case of Gondolfo v. Town of Carmel, No. 20-CV-9060 (CS), 2021 WL 431148 (S.D.N.Y. Feb. 08, 2021), involved a dispute over the construction of wireless towers in the town of Caramel. The plaintiffs, Caramel residents, brought an Article 78 proceeding against the town and wireless providers in state court, seeking to challenge a consent order under which the town had approved the construction of the towers. The wireless providers removed the action to federal court based on federal question jurisdiction. As we learned in Judge Seibel's February 8, 2021, decision, which was the subject of an earlier blog entry, the removal was found to be improper because it was based solely on the anticipated federal defense of preemption.

In an opinion and order issued on January 3, 2022, Judge Seibel considered a motion for attorneys' fees filed by the plaintiffs pursuant to 28 U.S.C. § 1447(c). *See Gondolfo v. Town of Carmel,* No. 20-CV-9060 (CS), 2022 WL 19183. As explained by Judge Seibel in her decision, district courts are afforded significant discretion when considering whether to award fees for the improper removal of a case to federal court. Importantly, courts are not constrained to award fees only where removal is "frivolous, unreasonable, or without foundation." The purpose of fee-shifting in the removal context is to "reduce[] the attractiveness of removal as a method for delaying litigation and imposing costs on the plaintiff." Accordingly, courts can award attorneys' fees to the non-removing party where "the removing party lacked an objectively reasonable basis for seeking removal."

In concluding that the wireless providers lacked an objectively reasonable basis for seeking removal in *Gondolfo*, Judge Seibel explained that, since the 1980s at least, the Supreme Court has clearly articulated that, "a case may not be removed to federal court on the basis of a federal defense, including the defense of preemption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties admit that the defense is the only question truly at issue in the case." In acknowledging this clear point of law, Judge Siebel found that the wireless providers' removal was objectively unreasonable, stating "[e]ven the most basic preliminary research should have alerted the Wireless Defendants' counsel to the lack of federal jurisdiction."

Having found fee-shifting to be appropriate, Judge Siebel turned to the calculation of the "reasonable" fees to be awarded. The prevailing lodestar method provides that a presumptively reasonable fee results from the product of a reasonable hourly rate and the reasonable number of hours required by the case. The court is to consider all relevant factors in the exercise of its equitable discretion. This discretion necessarily extends to "trim[ming] the fat" in a fee application and removing "excessive, redundant, or otherwise unnecessary" time. Fee applications must provide enough information to allow the court to "assess the reasonableness of the hours worked on each discrete project." If the court finds excess in a fee application, it may "decrease or disallow certain hours, or order an across-the-board percentage reduction."

Judge Seibel "trim[med] the fat" in the plaintiffs' application by deducting time that was spent by the plaintiffs' counsel on work unrelated to their efforts to get the case remanded, and by ordering an across-the-board 40% reduction for vague and block billed entries.

Takeaway

First, before removing a case to federal court, make sure there is a proper basis for doing so. As Judge Seibel said in *Gondolfo*, "[a] fee award here would encourage litigants to more thoroughly research the legal basis for removal before acting." Removal based solely on an anticipated federal defense has been found to be objectively unreasonable and risks costly fee-shifting. Second, the audience for your billing practices is not always just your clients. Fee applications require a court to determine a reasonable fee award by analyzing a firm's billing entries. The more specific and discrete your billing entries are, the more likely they are to be included in a reasonable fee award, as opposed to being trimmed with the fat.