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Email Consent is Not Enough: The SDNY Reaffirms a Strict Construction of the Federal Removal Statute in the Context of the "Rule of Unanimity"

28 U.S.C. § 1446 authorizes a defendant to remove a case from state to federal court by filing a notice of removal within 30 days of receipt of the initial pleading (assuming removal is otherwise proper under the statute). In a multi-defendant case, 28 U.S.C. § 1446 (b)(2)(A) imposes the "rule of unanimity," requiring "all defendants who have been properly joined and served [to] join in or consent to the removal of the action." But what form must that consent take? In particular, is an email from one defense counsel to another sufficient or is a more formal submission to the court required? While the Second Circuit has not yet weighed in on these questions, a recent case from the Southern District of New York explores the (in)sufficiency of informal methods of consent, and whether improper consent can be cured after the fact.

The Case: *Hailemariam v. National Passenger Railroad Corporation et al.*

In *Hailemariam v. National Passenger Railroad Corporation et al.*, Index No. 22-CV-1503 (CS) (S.D.N.Y. May 19, 2022), the plaintiff brought an action in the Westchester County Supreme Court against defendants National Passenger Railroad Corporation d/b/a Amtrak ("Amtrak") and the City of New Rochelle ("the City"), arising from a slip and fall at a portion of the defendants' property located along Kings Highway in New Rochelle. Within the required 30-day period, Amtrak removed the case to the Southern District of New York, stating in its Notice of Removal that the City consented to the removal and attaching an email from the City's counsel indicating consent. Subsequently, the plaintiff moved to remand the case back to state court, arguing that the City's email was insufficient evidence of consent under the rule of unanimity. Amtrak opposed the motion, and responded that even if the email was insufficient, Amtrak cured the defect by submitting a formal declaration from the City with Amtrak's opposition brief. As of the date of the *Hailemariam* decision, the Second Circuit had not defined "consent" under the rule of unanimity or determined whether email consent sufficed. But what it *had* said is that: 1) the "rule of unanimity" must be strictly enforced, and 2) each defendant must "independently express their consent to removal." Starting from these principles and relying on factually instructive district court holdings, Judge Cathy Seibel held the City's email consent was insufficient to satisfy the rule of unanimity. The court placed great emphasis on the fact that the attached email was between the respective counsel of Amtrak and the City, rather than being directed to the court. The court declined to follow the Fourth, Sixth, Eighth and Ninth Circuits, which have held email consent to be sufficient, as none of the cases cited adopted the Second Circuit's emphasis that federal courts must "construe removal statutes strictly and resolve doubts in favor of remand."

Finally, the court was unpersuaded by Amtrak's argument that including the City's declaration of consent in Amtrak's opposition brief cured the deficiency, because the brief and declaration were filed outside of the 30-day removal window under 28 U.S.C. §

1446. Once again, the Second Circuit's strict construction of the removal statute prevailed, and the court granted the plaintiff's motion to remand.

Takeaway

While several federal circuits have held email consent to removal to be procedurally sufficient, the Second Circuit has yet to weigh in on the issue. Indeed, courts in the Southern District of New York appear to be moving in the*opposite* direction, requiring co-defendants to submit formal consent to the court to satisfy the rule of unanimity. Thus, while there are many scenarios in modern civil motion practice where informal email consent is accepted, and even preferred, practitioners in the New York federal courts should insist on formal consent to removal or risk a successful motion to remand.