

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

NORNANDEZ MCGHEE	:	CIVIL ACTION
	:	
v.	:	
	:	
ALLSTATE INSURANCE CO.	:	No. 05-1813

**MEMORANDUM**

**Baylson, J.**

**August 22, 2005**

**I. Introduction**

On March 1, 2005, Plaintiff Nornandez McGhee filed the complaint in this action against Defendant Allstate Insurance Company (“Allstate”) in the Court of Common Pleas of Philadelphia. On April 20, 2005, Defendant filed a Notice of Removal, removing the action to federal court pursuant to 28 U.S.C. § 1441, due to the diversity of citizenship of the parties. Presently before the Court is Plaintiff’s Motion to Remand, filed on April 24, 2004. Defendant’s response was filed on August 8, 2005.

Plaintiff argues that remand is appropriate because Defendant’s Notice of Removal, filed on April 20, 2005, was filed more than thirty days after Plaintiff’s complaint was served on Defendants on March 7, 2005, and therefore failed to comply with 28 U.S.C. §1446(b).<sup>1</sup>

Defendant argues that the Notice of Removal was timely, because it was filed within thirty days of April 13, 2005, the date on which Allstate received Plaintiff’s response to Allstate’s Request for Admissions, in which Plaintiff indicated that the total damages might

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<sup>1</sup>Defendant asserts that the complaint was served on Allstate on March 10, 2005. However, the Affidavit of Service indicates that the date was in fact March 7, 2005, as Plaintiff asserts, and regardless of whether service was made on March 7 or 10, the same issue regarding the timeliness of the Notice of Removal arises.

exceed the amount in controversy required for federal court jurisdiction. According to Allstate, this response was the first document received by Allstate from which Allstate could ascertain that the case was removable, and therefore the filing of its Notice of Removal within thirty days of the receipt of the response was in accordance with 28 U.S.C. §1446(b).

## **II. Legal Standard**

28 U.S.C. §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.

The statute therefore provides that when the “initial pleading” gives notice of the grounds for federal diversity jurisdiction, the second paragraph of §1446(b) does not apply.

Sikirica v. Nationwide Insur. Co., 2005 WL 1837010 \*7 (3d Cir. Aug. 4, 2005). In cases such as this, however, where the “initial pleading” – Plaintiff’s complaint – does not provide notice of the grounds for federal diversity jurisdiction, the second paragraph of §1446(b) must be applied, and the Court must determine if Defendant filed the Notice of Removal within thirty days after Defendant’s receipt 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.” 28 U.S.C.

§1446(b). Defendant bears the burden of establishing that the notice of removal was filed in a timely manner. Yorker v. Manalapan Police Dept., 2005 WL 1429879 \*2 (E.D. N.J. 2005).

### **III. Discussion**

Removal to federal court on the basis of diversity of citizenship of the parties is only appropriate when the amount in controversy exceeds \$75,000.00. 28 U.S.C. §1332(a). Plaintiff's complaint indicates, in accordance state court procedure, that for each of the two counts, Plaintiff demands judgment in an amount not in excess of \$50,000.00. From the face of the complaint, therefore, Allstate could not determine whether the damages sought exceeded the amount in controversy required for removal to federal court on the basis of diversity of citizenship.

In a Request for Admissions, dated March 30, 2005, Allstate requested Plaintiff's admission that the total damages sought did not exceed \$50,000.00, that the total damages sought did not exceed \$75,000.00, and that the total damages sought did not exceed \$150,000.00. (Exhibit B to Defendant's Notice for Removal). In Plaintiff's Response to Defendant's Request for Admissions, dated April 13, 2005, Plaintiff denied that the damages sought were less than \$50,000.00, \$75,000.00, or \$150,000.00. (Exhibit C to Defendant's Notice for Removal). Defendant argues that this Response constituted the "other paper" from which Defendant could "ascertain[] that the case is one which is or has become removable," after which the Defendant had thirty days to file the Notice of Removal. 28 U.S.C. §1446(b).

While the Third Circuit has not decided what constitutes "other paper" under § 1446(b), "cases from other circuits have dealt with the issue, and while some courts have concluded that

‘other paper’ must be those actually filed in the case, the majority of courts have ‘given the reference to ‘other paper’ an embracive construction and have included a wide array of documents within its scope.’” Efford v. Milam, 368 F.Supp.2d 380, 384 (E.D. Pa. 2005)(quoting 14C Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3732 (3d ed.1998)).

In Efford, Judge Yohn noted that in their analysis of §1446(b)’s second paragraph, the Fifth and Tenth Circuits “have held that such documents trigger that paragraph’s thirty-day removal period only when they are the result of ‘a voluntary act of the plaintiff which effects a change rendering a case subject to removal (by defendant) which had not been removable before the change.’” Id. at 385 (quoting DeBry v. Transamerica Corp., 601 F.2d 480, 487 (10<sup>th</sup> Cir. 1979)). These circuits have also made it clear that the “other paper” must “make it ‘unequivocally clear and certain’ that federal jurisdiction lies.” Id. (quoting Bosky v. Kroger Tex., L.P., 288 F.3d 208, 212 (5<sup>th</sup> Cir. 2002)). Plaintiff’s Response to Defendant’s Request for Admissions satisfies both of these requirements.

Therefore, noting that the purpose of the second paragraph of §1442(b) “‘is to commence the running of the thirty day period once the defendant receives actual notice that the case has become removable, which may be communicated in a formal or informal manner,’” Broderick v. Dellasandro, 859 F.Supp. 176, 178 (E.D.Pa.1994)(quoting 14C Wright, Miller & Cooper, Federal Practice and Procedure § 3732), the Court finds that Plaintiff’s Response to Defendant’s Request for Admissions constituted the “other paper” which put Defendant on notice that the case was removable. Therefore, the Notice of Removal filed by Defendant on April 20, 2005, was timely.

**IV. Conclusion**

For the foregoing reasons, the Court finds that the Notice of Removal was timely filed in accordance with the Federal Rules of Civil Procedure, and accordingly, Plaintiff's Motion to Remand is denied.

An appropriate order follows.

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	:	

**ORDER**

AND NOW this 22<sup>nd</sup> day of August, 2005, upon consideration of Plaintiff's Motion to Remand (Docket No. 2), and the response thereto, it is ORDERED that the motion is DENIED.

**BY THE COURT:**

/s/ Michael M. Baylson  
**Michael M. Baylson, U.S.D.J.**