
CHARGE
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Clear! Reviving the Right to Removal

JOSEPH H. VARNER III, ERICA G. BARTIMMO, AND CAMERON HALL

Imagine that your client receives notice that an investor sued them for an equitable accounting claim. You recommend that the client keep the single-count action in state court. Then, over one year later, the plaintiff amends the complaint to add claims for breach of the Florida Securities and Investor Protection Act, breach of the Florida Adult Protective Services Act, fraud, breach of fiduciary duty, and negligence. Before your eyes, this single-claim lawsuit transforms into an entirely different case.

Your client, now facing liability for monetary damages, is unsettled by the prospect of litigating this substantial action in state court. The client turns to you, demanding a solution. As the lawyer, you realize that if these claims were originally brought you would have immediately removed to federal court as the monetary damages exceed $75,000. The 30-day time limit for removing cases becomes your nemesis. The only way around the 30-day limit is an exception. One such exception that comes to mind is the judicially created revival exception. Judges have long since recognized the problem of a defendant foregoing federal court to only later find out that a plaintiff substantially changed the landscape of the case. To remedy this problem, judges created the revival exception.

This article examines the exception to the 30-day time limit for removing cases that are initially removable, which is called the revival exception. Part I explains the revival exception's development and requirements. Part II posits a series of considerations a lawyer should review in determining whether the exception applies to a particular case. Part III prepares a lawyer seeking to invoke the revival exception to rebut arguments that the U.S. Court of Appeals for the Eleventh Circuit does not recognize the revival exception. Finally, by way of summary, Part IV explains how a Federal District Court for the Middle District of Florida accepted and applied the revival exception to the accounting action described above.

Part I. The Ability to 'Revive' Your Right to Remove—the Revival Exception

Removal is the process whereby a defendant unilaterally transfers a case filed in state court to federal court. Defendants may find removal appealing for any number of reasons: a defendant may believe that federal courts have better developed case law, a defendant could expect a politically charged case to sway federal judges less than it would sway their state counterparts, a defendant may believe that removal improves its chances of prevailing in the case,[1] or a defendant may see a strategic advantage in a federal court's jury pool. Regardless of the motivation, a defendant seeking removal must determine whether its case is removable and how to effectuate that removal.

As courts of limited jurisdiction, federal courts' ability to hear cases extends only as far as authorized by Article III of the Constitution and the statutes Congress enacts.[2] The Constitution does not expressly provide for the power of removal.[3] Congress, however, has the authority to permit the removal of cases and first exercised this removal authority in the Judiciary Act of 1789. In *Tennessee v. Davis*,[4] the U.S. Supreme Court opined that "the constitutional right of Congress to authorize the removal before trial of civil cases arising under the laws of the United States has long since passed beyond doubt. It was exercised almost contemporaneously with the adoption of the Constitution, and the power has been in constant use ever since." Today, §§ 1441 through 1455 of Title 28 of the U.S. Code govern removal.[5]

Under this statutory scheme, unless otherwise provided by Congress, "any civil action brought in a state court of which the district courts of the United States have original jurisdiction … may be removed by the defendant or the defendants."[6] Congress permits the removal of a civil action on the basis of diversity jurisdiction, *unless* a defendant is a citizen of the state in which the plaintiff sued.[7] Likewise, cases may be removable if federal question jurisdiction exists[8] or if a federal statute expressly allows removal.[9]

If a civil case is removable, a defendant effectuates that removal by following the procedure established in § 1446 of Title 28 of the U.S. Code. Section 1446 creates a time limitation on removal. For cases that are initially removable, the statute in pertinent part provides:

> The notice of removal of a civil action or proceeding shall be filed *within 30 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 30 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.[10]

Conversely, if a case is not initially removable but becomes removable, the notice of removal must be filed within 30 days after receipt of a paper "from which it may first be ascertained that the case is one which is or has become removable."[11]

A defendant that abstained from removing an initially removable case within 30 days of the initial complaint may then face multiple amendments to that complaint by the plaintiff. *At that point*, the defendant may desire to remove the case, even though it did not remove beforehand. Although not provided in the statute, a judicially created exception may "revive" a defendant's opportunity to remove the case to federal court after the expiration of the 30-day limitation period: This is called the revival doctrine exception.

The revival doctrine is a judicially created exception in which a defendant's ability to remove a case is revived if plaintiff's amendment to the complaint "so changes the nature of [the] action as to constitute 'substantially a new suit begun that day.'"[12] This exception recognizes that although "a defendant has submitted himself to state court jurisdiction on one cause of action, this does not prevent his removing the cause when an entirely new and different cause of action is filed" in the same case.[13] The Fifth,[14] Seventh,[15] and presumably Eleventh Circuit[16] have recognized this judicially created exception. Other circuit courts, however, have not had the opportunity to endorse this exception.[17]

The seminal case for the revival exception is *Wilson v. Intercollegiate (Big Ten) Conference Athletic Association*.[18] In *Wilson*, renowned Seventh Circuit Judge Richard Posner thoroughly analyzed the revival doctrine. By delving into greater analysis of the doctrine than any other opinion at that time, Judge Posner's analysis was the first to fully articulate when the exception applies. Moreover, as one of the few circuit court opinions to consider the revival exception, Judge Posner's analysis carries great weight. Federal district courts in Florida rely almost unanimously on Judge Posner's opinion in considering the applicability of the revival doctrine.[19] As the benchmark for the revival exception's application, lawyers must understand this Seventh Circuit opinion.

Wilson involved a transfer student who sought a waiver of athletic eligibility rules.[20] After the Big Ten Conference denied his request, the student filed suit in state court against the Conference and its member schools.[21] The plaintiff alleged that the defendants' refusal to waive the eligibility requirements violated the due process and equal protection clauses of the United States and Illinois Constitutions.[22] Initially, despite the ability to do so, defendants did not remove the case to federal court.[23] While in state court, the case progressed favorably for plaintiff—the state court granted an injunction permitting him to play the football season.[24] Then, six months after filing the initial complaint, the plaintiff amended his complaint to include violations of federal civil rights statutes, Title IX of the Education Amendment of 1972,[25] the First Amendment of the U.S. Constitution, and the Illinois Antitrust Act.[26]

The defendants viewed removing the amended complaint as an opportunity to escape the unfavorable treatment they already received in state court.[27] Consistent with that goal, after denying a motion to remand, the federal district court inverted the outlook of the case. The court granted summary judgment in favor of the *defendants* on all counts.[28] On appeal, the plaintiff challenged the timeliness of the defendants' removal.[29]

The Seventh Circuit acknowledged the existence of a judicially created exception to the 30-day limitation period in § 1446(b).[30] Judge Posner opined that the ability to remove a case revives "where the plaintiff files an amended complaint that so changes the nature of his action as to constitute 'substantially a new suit begun that day.'"[31] Despite the existence of the exception, Judge Posner held that it *did not apply* to the facts of that case.[32]

An Amended Complaint Changes the Nature of an Action as to Constitute a Substantially New Suit

Instead of adopting a rigid test to evaluate whether an amended complaint changes the nature of an action to constitute "substantially a new suit begun that day," Judge Posner held that district courts must analyze the facts of each case "with reference to [the revival exception's] purposes and those of the 30-day limitation on removal … and against a background of general considerations relating to the proper allocation of decision-making responsibilities between state and federal courts."[33] Two purposes underlie the 30-day limitation period in § 1446(b). First, the limitation period prevents defendants from having the tactical advantage of "wait[ing] and see[ing]" how the case develops in state court before trying to remove the case to federal court.[34] Second, the limitation period promotes judicial economy by preventing parties from restarting a case in a second court after extensive proceedings have already taken place.[35]

Judge Posner suggested two scenarios where the exception's application would not contravene the 30-day limitation period's purposes. The first scenario is when a plaintiff obfuscated the true nature of a claim until after the defendant waived the opportunity to remove the case.[36] In that scenario, the limitation's enforcement does not serve the purposes that underlie the 30-day limitation period. The second scenario is when a plaintiff amends the complaint to add new facts, which may have come to light in the course of pre-trial discovery, and the new facts fundamentally alter the action.[37] When new facts are the impetus for the fundamental amendment to a complaint, a defendant gains no tactical advantage. Any previous success or hardship in the state court system should not indicate the court's future treatment of claims that are, by definition, fundamentally different.[38] Moreover, removal would not damage judicial economy because, rather than restarting an old case, a completely new case merely moves to a new court.[39]

The Facts of *Wilson* Did Not Warrant the Exception's Application

In *Wilson*, neither deception nor the discovery of new facts warranted circumventing the 30-day limitations period. Rather than downplaying the federal claims, the alleged violations of the equal protection and due process clauses of the Constitution were a central component of the initial complaint.[40] Accordingly, the defendants could not argue that the plaintiff hid the true nature of the claim. Moreover, the amended complaint "did not change the target of [the plaintiff's] attack or the nature of the relief sought."[41] Instead, the amendments merely presented additional claims to illustrate that the complained treatment was unlawful.[42] Therefore, no "abandonment of the original for a new cause of action" occurred.[43]

Conversely, the *Wilson* court stated that the case actually illustrated the *purposes* behind the 30-day limitation period.[44] The court believed it was likely that the defendants searched for any basis for removal after receiving unfavorable outcomes in state court.[45] A defendant's ability to "wait and see" how the case progresses in state court before seeking removal is an undeserved tactical advantage that the 30-day limitation period seeks to eliminate.[46] Additionally, because extensive proceedings had already occurred in state court, permitting removal would reduce judicial economy.[47]

Federalism concerns bolstered the court's conclusion that the revival exception did not apply. The Seventh Circuit stressed "the danger of encroaching unduly on the authority of the state courts."[48] In retrospect, the Seventh Circuit noted that the state court decided a state constitutional issue in favor of the plaintiff.[49] After removal, however, a federal district judge decided the *same* state constitutional issue in favor of the defendants.[50] The Seventh Circuit reasoned that this potential friction must be considered when applying the revival doctrine.[51]

Takeaways From *Wilson*

Although *Wilson* does not illustrate a scenario invoking the doctrine, Judge Posner's analysis provides the benchmark for the revival exception's application. Specifically, in considering whether to invoke the revival doctrine, courts must evaluate the facts of the case in light of the purpose of the exception and the 30-day limitation period.[52] Judge Posner suggested two scenarios where amending a complaint would be contrary to the 30-day limitation period's purposes: (1) where the plaintiff misleads a defendant as to the true nature of the case until the limitation period expires, or (2) where the plaintiff discovers new facts during the case warranting a fundamentally different claim.[53] Under either scenario, amending the complaint may "change the nature of [the] action as to constitute 'substantially a new suit begun that day.'"[54] As a final step, however, courts must also beware of "the proper allocation of decision-making responsibilities between state and federal courts."[55]

If a civil case is removable, a defendant effectuates that removal by following the procedure established in § 1446 of Title 28 of the U.S. Code. Section 1446 creates a time limitation on removal.

Part II. Finding the Right Case to Invoke the Revival Exception: What You Should Consider

Courts have opined that the revival exception does not *and should not* apply to a great number of cases. "Courts that have considered the 'revival exception' have overwhelmingly found the facts of their cases did not warrant its application."[56] Any uncertainty in removal jurisdiction is resolved in favor of remand.[57] The removing party shoulders the burden of showing that removal was proper.[58] To determine whether a case is removable under the revival doctrine, a lawyer must ask: (1) was this case initially removable, and (2) did the plaintiff deceive our client as to the true nature of the case until after the 30-day limit for removal expired, or did an amended complaint fundamentally alter the nature of the case such that it created an essentially new suit?

Case Must Be Initially Removable

The Eleventh Circuit distinguishes two categories of cases for removal under § 1446(b): "(1) those removable on the basis of an initial pleading; and (2) those that later become removable on the basis of 'a copy of an amended pleading, motion or other paper.'"[59] As the name implies, the revival exception only serves to *revive* claims that were *initially* removable.[60] For example, in *Eparvier v. Fortis Insurance Co.*,[61] the court held that the revival doctrine was inapplicable when an initial claim did not meet the $75,000 threshold to establish diversity jurisdiction. Instead, the case was only removable

when the plaintiff amended the complaint to allege four additional causes of action, thus increasing the amount in controversy.[62]

The first requisite for the revival exception's application is that the case was initially removable and that the defendant waived that opportunity. After that requisite is met, a defendant must show that either: (1) the plaintiff mislead the defendant about the true nature of the case until after the limitation period expired, or (2) the plaintiff discovered new facts during the case warranting a fundamentally different claim.[63]

Plaintiff Deceives Defendant About the True Nature of the Case

Arguably, the most antithetical use of the 30-day limitation period occurs where a plaintiff misleads a defendant about the true nature of the case until after the defendant waives the opportunity for removal.[64] In such a situation, reviving the 30-day limitation period for fundamentally different claims would not counter the policies behind the limitation. Presumably, defendants will have difficulty showing that a plaintiff *intentionally* concealed the nature of the case.

Only one case in the federal district courts in Florida considered whether deception warranted revival of the 30-day limitation period.[65] In *Jia Wang v. American National Property & Casualties Company*,[66] the defendant argued that its ability to remove the case was revived because the plaintiffs "deliberately misled" the defendant about the amount in controversy. The initial complaint alleged that damages exceeded $15,000 but were less than $75,000.[67] For over one year, the plaintiffs claimed that the damages totaled $62,019.76.[68] Eventually, the plaintiffs' expert recalculated the damages at over $100,000.[69] The court held that the revival doctrine was inapplicable, opining that the defendant showed no plausible evidence that the plaintiffs deliberately concealed the amount in controversy.

In determining that the exception did not apply, the court's analysis hints to the difficulty that a party may have in producing indicia of deception. The court stated: "The only arguable obfuscation by the plaintiffs occurred … when … the plaintiffs hesitated to increase the damage claim based on the expert's new opinion. Thus, the defendant shows plausible evidence demonstrating deliberate concealment of the amount in controversy."[70] Moreover, as the court decided, the doctrine could not apply because the case was not initially removable.[71] Only when the expert recalculated damages to exceed $75,000 did the case become removable on the basis of diversity jurisdiction. Notably, at the time the plaintiffs' expert discovered the amount in controversy exceeded $75,000, the one-year repose of 28 U.S.C. § 1446(c) precluded removal.

If the case had been initially removable, arguably the defendant in *Jia Wang* may have been able to demonstrate deception if the plaintiff *substantially* undervalued the case. For example, if the original complaint alleged damages of $60,000, but the true claim was worth $50,000,000, the defendant would have a better argument that the plaintiff intended to deceive the defendant as to the true nature of the case until after the limitation period expired.

Another potential way a defendant may demonstrate deception is where a plaintiff includes "in his initial complaint filed in state court an inconsequential but removable federal count unlikely to induce removal and then, after the time for removal had passed without action by the defendant, amended the complaint to add the true and weighty federal grounds that he or she had been holding back."[72]

Amended Complaint Fundamentally Alters Suit

In the absence of deception, a court may nonetheless apply the revival exception in the circuits that have adopted the revival exception where an amendment *fundamentally* alters the nature of the suit. Although Judge Posner posited that such an amendment would occur when discovery reveals a different nature of the case,[73] this avenue for the exception's application may be necessary if a party cannot prove intentional deception. To determine whether an amendment fundamentally altered the nature of the suit, courts must analyze whether the amendments changed *the target of the attack* or *the nature of the relief sought*.[74]

A different party stepping in for the plaintiff does not sufficiently alter the nature of the suit to invoke the revival exception.[75] Likewise, minor alterations to the amount of the suit do not change the target of the attack or the nature of the relief sought.[76] Even the abrogation of a defense by the legislature does not make a claim fundamentally different.[77]

If, however, an amended complaint "starts a virtually new, more complex, and substantial case," the amendment may have fundamentally altered the suit sufficient for the revival exception to apply.[78] In *Johnson v. Heublein Inc.*, the Fifth Circuit, citing *Wilson*, found the revival exception applicable to a case where the amended complaint bore "no resemblance whatsoever to the allegations of the original complaint."[79] In *Johnson*, plaintiffs filed a complaint alleging that the defendants defaulted on promissory notes secured by an evaporator machine.[80] One-and-a-half years later, the complaint was amended to "assert[] for the first time … claims … for breach of contract, bad faith breach of contract, unjust enrichment, and fraud."[81] The Fifth Circuit reasoned that after the amendment, the defendants "were confronted with a suit on a construction contract involving exposure to substantial compensatory and punitive damages, instead of only a questionable conversion claim by a competing creditor with an apparently inferior lien."[82] Moreover, consistent with the policy considerations mentioned in *Wilson*, the Fifth Circuit reasoned the following:

> Because the amended complaint starts a virtually new, more complex, and substantial case against the co-defendants upon which no significant proceedings have been held, the removal will not result in delay, waste, or undue tactical advantage to a party. Nor does the removal impair proper allocation of state and federal judicial responsibilities.[83]

Based on the rationale found in *Johnson*, a lawyer can seek removal based on the amendment substantially altering the nature of the suit.

In sum, a lawyer seeking to argue that the revival exception applies to his or her case, the case must have been initially removable. Next, the lawyer must prove to the court that the plaintiff deceived the defendant about the true nature of the case or that the amended complaint fundamentally altered the nature of the suit.

Part III. Rebutting Arguments That the Eleventh Circuit Will Not Adopt the Revival Exception

Even if a lawyer convinces a court that the revival exception applies to the facts of the case, his or her opponent may argue the doctrine does not exist in the Eleventh Circuit. Admittedly, the Eleventh Circuit has neither accepted nor rejected the revival exception.[84] Accordingly, to remove a case under the revival exception, a party

must not only show that the facts of a particular case warrant the exception's application, but also that the court should or must apply the exception generally.

A number of courts in the Eleventh Circuit have questioned or rejected the revival exception.[85] For example, *Tucker v. Equifirst Corporation*,[86] Judge William Steele of the Southern District of Alabama analyzed, and ultimately rejected, the revival exception.[87] Judge Steele opined that the exception does not exist for three reasons: (1) statutory analysis of § 1446(b) does not permit an exception, (2) the authorities accepting or assuming the exception do not justify its existence, and (3) Supreme Court precedent precludes the existence of any exception.[88]

Judge Steele's Analysis of § 1446(b)

Judge Steele reasoned that a "'defendant's right to remove an action against it from state to federal court is purely statutory and therefore its scope and the terms of its availability are entirely dependent on the will of Congress.'"[89] He further reasoned that courts construe removal statutes strictly and resolve doubts in favor of remand.[90] Looking to § 1446(b), Judge Steele opined that "the term 'shall' unambiguously requires that removal of an originally removable action be accomplished within the" 30-day limitation period.[91] That 30-day limitation period starts upon receipt of the *initial* pleading, of which Judge Steele concluded occurs only once.[92] Finally, Judge Steele concluded that a "civil action" could not create ambiguity for the exception because a civil action "is a single proceeding begun with a complaint and continuing all the way through entry of judgment."[93] Altogether, Judge Steele determined the statutory language of § 1446(b)(1) "unambiguously precludes judicial recognition of a revival exception."[94]

As Judge Steele conceded, however, the revival exception is not found in the language of § 1446(b)—the revival exception does not attempt to find ambiguity in § 1446(b) because it is a *judicially created* exception. Judge Steele admitted that courts do not always comply strictly with the construction of removal statutes. Even though § 1446(b)(1) states the 30-day limitation period runs upon "the receipt by the defendant, through service *or otherwise*, of a copy of the initial pleading," the Supreme Court held that the clock cannot start running *until after service of process*.[95] The Eleventh Circuit interpreted the Supreme Court decision in *Murphy Brothers Inc. v. Michetti Pipe Stringing Inc.*[96] as "signal[ing] a slight departure from the weight courts might ordinarily put on strict construction of the removal statute."[97]

Judge Steele's Analysis of Eleventh Circuit Authority

Accepting that the revival exception need not exist in the language of § 1446(b), Judge Steele redirected his attack toward the authority supporting the exception's existence. Generally, Judge Steele's analysis determined that the cases credited with the creation of the revival exception relied on dicta or were "unreasoned" in the assumption of the exception's existence.[98]

Despite Judge Steele's analysis, he overlooks the role of district courts in the federal system and disregards the rationale behind the revival exception's creation. District courts apply the law established by the circuit courts and the Supreme Court. Although the Eleventh Circuit has not addressed the revival exception, the Fifth Circuit held that it first recognized the revival exception in 1956 in *Cliett v. Scott*.[99] Given that Fifth Circuit opinions decided prior to Oct. 1, 1981, are binding precedent for the Eleventh Circuit, the recognition of the revival exception by the *Cliett* court binds district courts in the Eleventh Circuit.[100] Unless and until the Eleventh Circuit challenges the validity of the revival exception, district courts in the Eleventh Circuit are bound like those district courts in the Fifth Circuit—to accept the existence of the revival doctrine.

Judge Steele's Analysis of Supreme Court Precedent

Of course, district courts in the Eleventh Circuit would be bound by Supreme Court precedent rejecting the revival exception. In reliance on this principle, Judge Steele cited a Supreme Court case from 1898 where the court stated that the removal statute must be construed "in intention and effect, [thereby] permitting and requiring the defendant to file a petition for removal as soon as the action assumes the shape of a removable case in the court in which it was brought."[101] This case, however, is inapplicable because it does not reference actions that were initially removable, but instead actions that *become removable*.[102] For example in *Powers v. Chesapeake & Ohio Railway Co.*, the Court stated that "when this plaintiff discontinued his action as against the individual defendants, the case *for the first time became* such a one as, by the express terms of the statute, the defendant railway company was entitled to remove; and therefore its petition for removal, filed immediately upon such discontinuance, was filed in due time."[103] Not only does the Eleventh Circuit distinguish cases that were initially removable from cases that later become removable,[104] *Congress* distinguishes the categories of cases within the removal statute.[105] The revival exception applies only to one of these categories—those that are initially removable. Judge Steele's citation to a case that applies only to the *other* category of cases—those that become removable—is utterly inapposite.

In total, although a lawyer seeking to apply the revival exception to his or her case must anticipate arguments that the Eleventh Circuit would not adopt the exception, the lawyer should be confident that arguments for its application should prevail in the absence of a contrary decision by the Eleventh Circuit.

Part IV. Reviving the Case—a Summary

If a defendant waived its ability to remove an initially removable case to federal court, plaintiff's amended complaint may "revive" the capacity for removal if the amendments "so changed the nature of [the] action as to constitute 'substantially a new suit begun that day.'"[106] To determine whether an amended complaint constitutes "substantially a new suit begun that day," federal district courts in Florida follow *Wilson*'s requirement that the court consider the policies behind the limitation period and the exception, as well as federalism concerns. With these considerations in mind, the courts may apply the revival doctrine if the plaintiff deceived the defendant as to the true nature of the suit until after the limitation period expired, or if newly discovered facts warranted adding fundamentally different claims.

Although the equitable accounting case described in the introduction may appear hypothetical, it was a real case.[107] In that case, by amending the complaint to allege additional causes of action with potentially greater liability, the court reasoned that the plaintiff's amendments "transformed what was a bench trial for an equitable accounting into a potential jury trial for multiple, alternative theories of recovery with the possibility of punitive damages. In short, Plaintiff has changed the nature of the relief sought, and the manner in which she might obtain that relief."[108] Finding the revival exception applicable, the court allowed the case to continue in federal court.[109] ⊙



Joseph H. Varner III is a partner at Holland & Knight, LLP, Erica G. Bartimmo is an associate at Holland & Knight, LLP, and Cameron Hall is a former summer associate at Holland & Knight, LLP and student at Stetson University College of Law.

Endnotes

[1]*See* Kevin M. Clermont & Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction*, 83 Cornell L. Rev. 581, 607 (1998) (concluding that "win-rate data on removal jurisdiction leads to the conclusion that forum really does affect outcome, with removal taking the defendant to a forum much more favorable in terms of biases and inconveniences").

[2]*Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541(1986) (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 173-80 (1803)).

[3]*Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat) 304, 349 (1816).

[4]100 U.S. 257, 265 (1879).

[5]28 U.S.C. §§ 1441-55.

[6]28 U.S.C. § 1441 (a).

[7]28 U.S.C. § 1441 (b)(2).

[8]*See, e.g., Bollea v. Clem*, 937 F. Supp. 2d 1344, 1351-52 (M.D. Fla. 2013) (finding that although federal question jurisdiction may support removal, the case at bar did not establish that jurisdiction).

[9]*See, e.g.*, 28 U.S.C. § 1442(a)(1) (2012) (permitting removal of civil or criminal actions against officers of federal agencies acting in an official capacity).

[10]28 U.S.C. § 1446 (b)(1) (emphasis added).

[11]28 U.S.C. § 1446 (b)(3).

[12]*Wilson v. Intercollegiate (Big Ten) Conf. Athletic Ass'n*, 668 F.2d 962, 965 (7th Cir. 1982) (citing *Fletcher v. Hamlet*, 116 U.S. 408, 410, 6 S. Ct. 426 (1886)).

[13]*Cliett v. Scott*, 233 F.2d 269, 271 (5th Cir. 1956).

[14]*See Johnson v. Heublein Inc.*, 227 F.3d 236, 241-42 (5th Cir. 2000) (noting that the Fifth Circuit recognized the exception in *Cliett v. Scott,* 233 F.2d 269 (5th Cir. 1956)); *Cliett*, 233 F.2d at 271 (applying revival doctrine).

[15]*See Wilson*, 668 F.2d at 967 (finding exception inapplicable to particular case).

[16]As discussed later in this article, the Fifth Circuit opinions prior to 1981 are binding precedent on the Eleventh Circuit.

[17]*See, e.g., Kuxhausen v. BMW Fin. Serv. NA LLC*, 707 F.3d 1136, 1142 (9th Cir. 2013) ("In light of that conclusion, we have no occasion to decide whether to join other circuits in recognizing a 'revival exception' …."); *Tucker v. Equifirst Corp.*, 57 F. Supp. 3d 1347, 1351 (S.D. Ala. 2014) ("Several sister courts have recently confirmed that 'the Eleventh Circuit has neither adopted nor rejected the so-called revival exception.").

[18]*Wilson*, 668 F.2d 962.

[19]*See, e.g., Nickle v. Israel*, No. 14-62952-CIV, 2015 WL 417828, at *2 (S.D. Fla. Jan. 30, 2015) (citing *Wilson*); *Jia Wang v. Am. Nat'l Prop. & Cas. Co.*, No. 8:10-cv-2603-T-23EAJ, 2011 WL 52869, at *2 (M.D. Fla. Jan. 7, 2011) (citing a case that cites *Wilson*); *Clayton v. EMC Mortg. Corp.*, No. 8:09-CV-2360-T-33AEP, 2010 WL 1817341, at *1 (M.D. Fla. May 5, 2010) (citing a case that cites *Wilson*); *Eparvier v. Fortis Ins. Co.*, No. 6:07-cv-1491-Orl-31GJK, 2008 WL 3367542, at *2-3 (M.D. Fla. Aug. 8, 2008) (citing a case citing *Wilson*); *Daggett v. Am. Sec. Ins. Co.*, No. 2:08-cv-46-FtM-29DNF, 2008 WL 1776576, at *2-3 (M.D. Fla. Apr. 17, 2008) (citing cases citing *Wilson*).

[20]*Id.* at 964.

[21]*Id.*

[22]*Id.*

[23]*Id.*

[24]*Id.*

[25]Title IX of the Education Amendments of 1972. Title IX protects people from discrimination based on sex in education programs or activities that receive federal financial assistance.

[26]*Id.*

[27]*Id.*

[28]*Id.*

[29]*Id.*

[30]*Id.* at 965.

[31]*Id.* (quoting *Fletcher v. Hamlet*, 116 U.S. 408, 410, 6 S. Ct. 426 (1886)); *see also Cliett*, 233 F.2d at 271 (stating exception applies when amendment makes "an entirely new and different suit").

[32]*Id.* at 967.

[33]*Id.* at 965.

[34]*Id.*

[35]*Id.*

[36]*See id.* ("These considerations might be overborne in a case where a plaintiff, seeking to mislead the defendant about the true nature of his suit and thereby dissuade him from removing it, included in his initial complaint filed in state court an inconsequential but removable federal count unlikely to induce removal and then, after the time for removal had passed without action by the defendant, amended the complaint to add the true and weighty federal grounds that he had been holding back.").

[37]*Id.* at 966.

[38]*Id.*

[39]*Id.*

[40]*Id.* at 965.

[41]*Id.* at 966.

[42]*Id.*

[43]*Id.*

[44]*Id.*

[45]*Id.*

[46]*Id.* at 965.

[47]*Id.* at 966.

[48]*Id.*

[49]*Id.*

[50]*Id.*

[51]*Id.* at 967.

[52]*Id.* at 965.

[53]*Id.* at 966.

[54]*Id.* at 965.

[55]*Id.*

[56]*See Clegg v. Bristol-Myers Squibb Co.*, 285 B.R. 23, 31 (2002).

[57]*Russell Corp. v. Am. Home Assurance Co.*, 264 F.3d 1040, 1050 (11th Cir. 2001).

[58]*Clarson v. Southern Gen. Life Ins. Co.,* 694 F. Supp. 847, 848 (M.D. Fla. 1987).
[59]*Lowery v. Ala. Power Co.*, 483 F.3d 1184, 1212 (11th Cir. 2007) (quoting 28 U.S.C. § 1446(b)).
[60]*See Essenson v. Coale*, 848 F. Supp. 987, 990 (M.D. Fla. 1994) ("However, in the case at bar, Defendants did not have the right to remove from the outset, or at any time prior to Plaintiff's Offer of Judgment. Because this case does not deal with *revival* of the right to remove, *Wilson* is inapplicable." (emphasis in original)).
[61]*Eparvier* 2008 WL 3367542, at *3-4.
[62]*Id.* at *2. For cases that are not initially but become removable, the removal procedure is governed by 28 U.S.C. § 1446(b)(3). Parties frequently attempt to invoke the revival exception in diversity jurisdiction cases that are not initially removable because, as in *Eparvier*, diversity cases may not be removed under § 1446(b)(3) more than one year after the action commences. *See Eparvier*, 2008 WL 3367542 at *4; 28 U.S.C. § 1446(c)(1).
[63]*Wilson*, 668 F.2d at 966.
[64]*Id.* at 965.
[65]*Jia Wang*, 2011 WL 52869 at *1.
[66]*Id.*
[67]*Id.*
[68]*Id.*
[69]*Id.*
[70]*Id.* at *2.
[71]*Id.*
[72]*Wilson*, 668 F.2d at 965.
[73]*Id.*
[74]*Id.*
[75]*See Clarson*, 694 F. Supp. at 848 ("The substitution of plaintiff, necessitated by the original plaintiff's death, does not go to the ground for removal, nor does it cause this action to become a new suit.").
[76]*See Jia Wang*, 2011 WL 52869 at *2 ("No fundamental change in the nature of the case results from a $40,000.00 increase in a damages claim. … [T]he argument that the plaintiffs have transformed the litigation [is] profoundly weak and utterly unpersuasive."). As stated above, however, a substantial change in the amount in dispute may be indicative of a plaintiff deceiving the defendant about the nature of the action.
[77]*See Doe v. Florida Intern. Univ. Bd. of Trs.*, 464 F. Supp. 2d 1259, 1261-62 (2006) (stating action was not fundamentally different after Congress abrogated the defense of sovereign immunity in Title IX claims).
[78]*Johnson v. Heublein Inc.,* 227 F.3d 236, 242 (2000).
[79]*Id.* at 242.
[80]*Id.* at 238.
[81]*Id.* at 239.
[82]*Id.*
[83]*Id.*; *see also Cliett*, 233 F.2d at 269-71 (holding that amendment that added claims seeking to recover title in an accounting action was "an entirely new and different suit"); *but see Nickle*, 2015 WL 417828 at *1-2 (finding that additional claims "based primarily on the same factual allegations" as the original claims did not fundamentally alter the nature of the case).
[84]*See Cancel v. Sewell*, 2011 WL 240132, No. 5-10-cv-273 (CAR), at *14 (M.D. Ga. Jan. 24, 2011) ("[T]he Eleventh Circuit has neither adopted nor rejected the so-called 'revival exception'….").
[85]*See Tucker*, 57 F. Supp. 3d at 1351 (opining that the Eleventh Circuit would not recognize a revival exception); *Daggett* 2008 WL 1776576, at *3 ("The Court doubts that a revival exception can be read into the clear dichotomy set forth in § 1446(b)."); *but see Clegg*, 285 B.R. at 30 (acknowledging the existence of the revival doctrine).
[86]*Tucker*, 57 F. Supp. 3d 1347.
[87]*Id.* at 1358.
[88]*Id.*
[89]*Id.* at 1352 (quoting *Global Satellite Commc'n Co. v. Starmill U.K. Ltd.*, 378 F.3d 1269, 1271 (11th Cir. 2004)).
[90]*Id.* (citing *Miedema v. Maytag Corp.*, 450 F.3d 1322, 1328 (11th Cir. 2006)).
[91]*Id.* at 1353.
[92]*Id.* ("There cannot be multiple 'first' pleadings against a defendant in a single civil action.").
[93]*Id.* at 1354.
[94]*Id.*
[95]*Id.* at 1352 (citing *Murphy Bros. Inc. v. Michetti Pipe Stringing Inc.*, 526 U.S. 344 (1999)) (emphasis added).
[96]*Murphy Bros.,* 526 U.S. 344.
[97]*Bailey v. Janssen Pharmaceutica Inc.*, 536 F.3d 1202, 1208 (11th Cir. 2008).
[98]*Id.* at 1355-56.
[99]*See Johnson*, 227 F.3d at 241-42.
[100]Effective on Oct. 1, 1981, the Fifth Circuit split to form the Eleventh Circuit. In *Bonner v. City of Prichard, Ala.,* 661 F. 2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all Fifth Circuit decisions handed down prior to the close of business on Sept. 30, 1981.
[101]*Tucker*, 57 F. Supp. 3d at 1357 (citing *Powers v. Chesapeake & Ohio Ry. Co.*, 169 U.S. 92, 100-01 (1898)).
[102]*Powers*, 169 U.S. at 101.
[103]*Id.* at 101 (emphasis added).
[104]*Lowery*, 483 F.3d at 1212.
[105]*Compare* 28 U.S.C. § 1446(b)(1) *with* 28 U.S.C. § 1446(b)(2).
[106]*Wilson*, 668 F.2d at 965 (citing *Fletcher*, 116 U.S. at 410).
[107]*See Green v. FCA Corp.*, No. 8:14-03089, 2015 U.S. Dist. LEXIS 50986, at *3 (M.D. Fla. Apr. 17, 2015).
[108]*Id.* at *3.
[109]*Id.*