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## LOOK BEFORE YOU LEAP: THE PUNITIVE DAMAGES CAVEAT TO REMOVING A CASE FROM STATE COURT TO FEDERAL COURT IN FLORIDA

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Often, when a defendant is served with a lawsuit filed in a state court in Florida, the immediate reaction is to instruct counsel to remove the case to federal court if diversity jurisdiction permits. This article describes a potential pitfall to this course of action if the lawsuit seeks punitive damages.

When the plaintiff has made a claim for punitive damages, as is often the case in first party bad faith actions filed under section 624.155, Florida Statutes, the decision to remove may be costly and here is why. If the case remains in state court, the plaintiff's punitive damage count is subject to dismissal under section 768.72, Florida Statutes which prohibits a plaintiff from pleading punitive damages without leave of court.

*Simeon, Inc. v. Cox*, 671 So.2d 158 (Fla. 1996) and *WFTV v. Hinn*, 705 So.2d 1010, (Fla. 5th DCA 1998) are squarely on point. These cases hold that before a claim for punitive damages is allowed, section 768.72, Florida Statutes requires a plaintiff to make an initial showing by evidence in the record or proffered by the claimant that would provide a reasonable basis for recovery of such damages.

If the case is removed to federal court, the pleading restriction of section 768.72 does not apply and the defendant is faced with the punitive damages claim right out of the box that a federal district judge may not be willing to dismiss given the somewhat liberal pleading requirements in federal court. This is so because the Eleventh Circuit Court of Appeals has rejected Florida pleading requirements for punitive damages in diversity cases. *Cohen v. Office Depot, Inc.*, 184 F.3d 1292, 1297-1299 (11th Cir. 1999), vacated in part

and reheard on other grounds, 204 F.3d 1069 (11th Cir. 2000).

See also: *BB in Technology Co., Ltd. v. JAF*, 20 Fla.L. Weekly Fed. D. 836 (Fla. S.D. 2007) (while section 768.72, Florida Statutes bars a punitive damages claim unless there is a reasonable showing by evidence in the record or proffered by the claimant which would provide a reasonable basis for recovery of such damages, the 11th Circuit has rejected Florida pleading requirements for punitive damages in diversity cases, holding that section 768.72 conflicts with Federal Rule of Civil Procedure 8(a)(3)); *Walker v. City of Orlando*, 2007 US Dis LEXIS 46129 (Fla. M.D. 2007) (Federal pleading rules, unlike those adopted by the state of Florida, allow plaintiffs to plead punitive damages in the initial complaint, before taking any discovery. A request for punitive damages is not a "claim" within the meaning of Federal Rule of Civil Procedure 8(a)(2) it is only part of the relief demanded in a claim).

The corresponding risk inherent in removing the case is that the federal district judge may permit punitive damages net worth discovery solely based upon the pleaded claim in the complaint. In contrast, if the case remains in state court in Florida, the state trial judge is bound to dismiss the punitive damages claim and bar net worth discovery unless and until the plaintiff succeeds in moving to amend. In this regard, section 768.72 states in pertinent part: "No discovery of financial worth shall proceed until after the pleading concerning punitive damages is permitted."

In *Porter v. Ogden*, 241 F.3d 1334 (11th Cir. 2001), the Eleventh Circuit Court of Appeals noted that its decision in *Cohen v.*

*Office Depot, Inc.* did not answer the question of whether federal discovery rules preempted the requirement in section 768.72 and declined to address the issue there after finding that the plaintiffs had in fact made a proffer of evidence that reasonably supported their claim for punitive damages. Thus, the defendant who has removed the case to federal court runs the risk of having to answer to punitive damages net worth discovery when it may have been able to avoid it altogether had the case remained in the Florida state court governed by section 768.72.

One final distinction in how a punitive damages claim is treated in the two forums. If the case remains in state court in Florida, and the state court judge does permit the plaintiff to amend for punitive damages, the Florida trial judge will upon a timely motion, bifurcate the determination of the amount of punitive damages from the remaining issues at trial pursuant to *W.R. Grace & Co. v. Waters*, 638 So.2d 502 (Fla. 1994). There is no corresponding guarantee of bifurcation in federal court.

In sum, before a defendant decides to remove a case to federal court and for that matter before a plaintiff decides which court to file in – state or federal – the party and lawyers should consider of how a potential punitive damage claim will play out in the respective forums.

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