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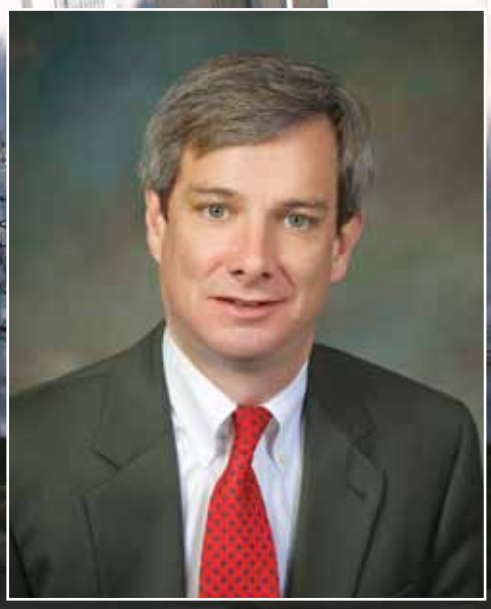

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REMOVAL AFTER LOWERY – WHAT ARE THE RULES?

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In the aftermath of *Lowery v. Alabama Power Company*, 483 F.3d 1184 (11th Cir. 2007), defendants must carefully evaluate how and when to remove a case to federal court. Working against Alabama defendants that desire to remove are deadlines, thirty days from "removability" and one year from filing, 28 U.S.C. § 1446, as well as a number of existing contradictory applications of *Lowery*. Described in one sentence, *Lowery* requires a defendant to present (1) unambiguous evidence, (2) received from the plaintiff, that the (3) amount-in-controversy is greater than $75,000. *Id.* at 1213. Unless a defendant faces claims of wrongful death or the plaintiff has made well supported pre-suit demands in writing (highly unlikely), discovery will likely be required to satisfy these requirements. A careful discovery strategy and an exhaustive understanding of the requirements of *Lowery* is crucial to successfully removing a case to federal court.

As described below, exactly when *Lowery's* requirements are met where the plaintiff has failed to state a monetary demand in his complaint is far from clear. In reliance on one district court opinion, a defendant may bolster his evidence with state court discovery, only to be remanded because the case was removable, according to the court, based on a pre-suit demand or the complaint. On the other hand, a defendant may quickly remove based on what he thinks is sufficient evidence, only to lose a motion to remand delaying state court discovery and increasing his chances of later missing the one year statutory deadline for removal. Quite simply, defendants are sailing between Scylla and Charybdis in a post-*Lowery* world. In this article, by reviewing the cases applying *Lowery* in Alabama, we hope to provide a brief overview of the removal waters and point out some particular hazards to avoid.

Is Your Evidence Sufficient Without Discovery?

Death is Different – Remove Within Thirty Days of Service

Although the jury (or judges) are still out, it is in your client's best interest to remove within thirty days of being served with a wrongful-death claim in Alabama. Although multiple opinions have declared a wrongful-death complaint that does not include specific claimed damages insufficient to satisfy the amount-in-controversy requirement of *Lowery*, *see e.g.*, *Thibodeaux v. Paccar, Inc.*, 592 F.Supp.2d 1377, 1381 (M.D. Ala. 2009); *Siniard v. Ford Motor Co.*, 554 F.Supp.2d 1276, 1278-79 (M.D. Ala. 2008), a recent decision holds otherwise. In *Roe v. Michelin North America*, the Middle District of Alabama determined that allegations of wrongful death in Alabama satisfy the amount-in-controversy requirement. 637 F.Supp.2d 995, 998 (M.D. Ala. 2009). Arguably, *Roe* tests the limits imposed by *Lowery*. The Court noted that "there is language in *Lowery* that appears to suggest that" a defendant must have documents from the plaintiff that "set forth a concrete or expressed dollar figure establishing damages over $75,000." *Id.* at 1001. However, because of the uniqueness of Alabama's wrongful-death statute and the United States Supreme Court's suggestion that trial courts "use their 'judicial experience and common sense,'" Judge Thompson denied Plaintiff's motion to remand. *Id.* at 1001-02. Not surprisingly, the Court has certified its order for appeal to the 11th Circuit. At least one Southern District decision has followed the reasoning of *Roe* in a wrongful-death case. *See e.g.*, *Nelson v. Whirlpool Corp.*, __ F.Supp.2d __, 2009 WL 3792267 (S.D. Ala. 2009) (this opinion has also been certified for appeal to the 11th Circuit). Based upon these decisions, we suggest you remove any wrongful-death case immediately upon receipt.

Absent a Demand from the Plaintiff, Immediate Removal is Difficult

In non-wrongful death cases, unless the Plaintiff makes a specific demand (and sometimes even with a demand), successful removal is fairly unlikely without discovery. However, some cases have permitted removal based solely upon the complaint's allegations, based on a settlement demand, or based upon other pre-suit evidence. It is important to carefully consider if your case is removable without discovery. If you delay removal to seek discovery, it is almost certain that the Plaintiff will argue that the case was immediately removable based on the complaint, and consequently, your notice is untimely. *See e.g.*, *Williams v. Wal-Mart Stores, Inc.*, 534 F.Supp.2d 1239, 1243 (M.D. Ala. 2008); *Middlebrooks v. Johnson & Johnson Co.*, 2008 WL 4003926, at *3 (M.D. Ga. 2008).

The Application of *Lowery* to Personal Injury Cases is Inconsistent

Under the current state of the law, a standard, undetailed personal injury complaint will likely not satisfy *Lowery*'s requirements. We have only located two cases permitting the removal of a non-death case based solely upon the allegations of the complaint. In *Sanderson v. Daimler Chrysler Motor Corp.*, the Plaintiff received "serious and permanent disfigurement and scarring to her face and body." 2007 WL 2988222, at *1 (S.D. Ala. 2007);

see also Maconeghy v. Cooper Tire & Rubber Co., 2008 WL 4811398, at *3 (S.D. Ala. 2008) (relying on *Sanderson*). The Court stated that "[c]ertain injuries are by their nature so substantial as to make it readily apparent that the amount in controversy requirement is satisfied." *Id.* at 1. However, it appears that the only injuries "substantial" enough were those in *Sanderson*. Multiple courts have held that injuries alleged in the complaint (on their face) were insufficient to satisfy *Lowery*. For example, the Middle District of Alabama has refused to "engage in the kind of 'impermissible speculation' that the Eleventh Circuit ... expressly rejected" and remanded a plaintiff's claims where the defendant had established $49,987 in out-of-pocket expenses and the plaintiff had alleged "serious and life-threatening injuries, including liver failure." *Channell v. Nutrition Distribution, LLC*, 2008 WL 5114314, at *1 (M.D. Ala. 2008). Other cases have followed *Channell's* lead and summarily remanded cases where plaintiffs did not include an ad damnum clause in their complaint. *See e.g.*, *Growe v. Weyerhauser Co., Inc.*, 2009 WL 532214, at *2 (S.D. Ala. 2009); *Elgie v. BIC USA, Inc.*, 2009 WL 3526702, at *2-3 (S.D. Ala. 2009); *Beasley v. Fred's Inc.*, 2008 WL 899249, at *1 (S.D. Ala. 2008).

Plaintiff's Demand May Support Removal

Removal after receipt of a demand presents a difficult challenge given the various district court applications of *Lowery.* Although *Lowery* clearly envisions settlement demands as qualifying "other paper," courts have cast doubt on when a demand may satisfy *Lowery*. Because "settlement offers commonly reflect puffing and posturing" they can be given little weight in the preponderance of evidence standard. *Jackson v. Select Portfolio Servicing, Inc.*, 651 F.Supp.2d 1279, 1281 (S.D. Ala. 2009). Ultimately, what a settlement offer "counts for [] depends on the circumstances." *Id.* In *Jackson*, the case was remanded because the plaintiff's $155,000 demand was "not detailed ... without the slightest suggestion of how in the world the plaintiffs could support such a figure." *Id.* Other courts, however, have found demands by the plaintiff sufficient to establish the amount-in-controversy requirement. *See e.g.*, *McCullough v. Plum Creek Timberlands, L.P.*, 2010 WL 55862 (M.D. Ala. 2010) ($110,000 demand sufficient); *Richardson v. Fort Dearborn Life Ins., Co.*, 2009 WL 3464133, at *4 (S.D. Ala. 2009) ($150,000 demand letter sufficient). One court even allowed removal of a case based on an oral demand by plaintiff's counsel verified by an affidavit from

defense counsel. *Lazo v. U.S. Airways*, 2008 WL 3926430, at *5 (S.D. Fla. 2008) ("Holding otherwise would create an unfair rule wherein a defendant would be permitted to remove an action if a plaintiff made a written demand offer but would be precluded from seeking removal when a plaintiff made a verbal demand offer.").

Pre-suit demands raise the issue of whether the case is removable as soon as it is filed, and, unfortunately, the application of *Lowery* is far from consistent. Several courts have refused to consider pre-suit settlement demands as "other paper." *See e.g. Armstrong v. Sears, Roebuck & Co.*, 2009 WL 4015563, at *1 (M.D. Fla. 2009). *Fernandes v. Home Depot, Inc.*, 2009 WL 247870, at *1 (S.D. Fla. 2009). Some opinions suggest more than a bare pre-suit demand is required. *See e.g.*, *Devore v. Howmedica Osteonics Corp*, 2009 WL 3110814, at *7 (M.D. Fla. 2009) (pre-suit demand of more than $400,000 and plaintiff's refusal to stipulate to seeking damages less than $75,000 in interrogatory responses sufficient); *Fernandes v. Home Depot U.S.A., Inc.*, 2009 WL 247870, at *1 (S.D. Fla. 2009) ($135,000 pre-suit demand and "[t]he description of the left eye injuries ... show that Defendant ... has established by a preponderance of the evidence the requisite amount in controversy"). Other courts have found the amount-in-controversy requirement satisfied based solely on pre-suit demands. *Fernandes v. Home Depot, Inc.*, 2009 WL 247870, at *1 (S.D. Fla. 2009). In *Boland v. Auto-Owners Ins. Co.*, the court "cross-referenc[ed]" lists from the complaint, pre-suit demands, and "performed basic multiplication" to find the amount-in-controversy requirement satisfied. 2009 WL 4730681, at *3 (M.D. Ala. 2009). Another opinion simply noted that the plaintiff failed to contradict the pre-suit demand and therefore the amount in controversy in the case was sufficient. *Katz v. J.C. Penney Corp*, 2009 WL 1532129, at *1 (S.D. Fla. 2009). If a defendant fails to remove within thirty days of service when a pre-suit demand has been made, the plaintiff will inevitably argue that the case was removable based upon the previous demand.

State Court Discovery Must Be Quick and Careful

Without a demand from the plaintiff in excess of $75,000 (and possibly corroborating evidence), you likely must use state court discovery to establish the federal amount-in-controversy. Because of Section 1446's one year deadline, you must commence discovery as quickly as possible. When considering your discovery strategy, consider the following:

First, use Requests for Production to get documents from the plaintiff. Do not rely solely upon subpoenas to third party medical providers or other sources. Under *Lowery*, all evidence relied on to support removal must be *received from the Plaintiff*. 483 F.3d at 1213-14, n. 63. Alabama's District Courts are strictly enforcing this requirement. *See e.g.*, *Wiltew v. Parker*, 2009 WL 3615041, at *2 (S.D. Ala. 2009) ("[A] party cannot determine the jurisdictional value of a case by gathering evidence from outside sources."). Let *Whittington v. Wilkins*, 2009 WL 3078312, at *3 (S.D. Ala. 2009), be a warning. In this case, the Court remanded the action even though it was undisputed that the plaintiff had $148,430.39 in medical expenses, because the documents attached to the notice of removal were received from an intervenor, not the plaintiff. *Id.* at 3. There appears to be a limited exception to this requirement. For example, courts have taken judicial notice of U.S. Department of Health and Human Services Tables to determine a plaintiff's life expectancy where the plaintiff had provided documentation of yearly medical expenses. *See, e.g., La Rocca v. Stahlheber*, 2009 WL 3667068, at *3 (S.D. Fla. 2009). Absent some judicially-noticeable evidence, you must attempt to obtain everything supporting your removal from the plaintiff.

Requests for Admission are useful, however, there are pitfalls that must be avoided (and still some ambiguity regarding how courts will handle them). We are all familiar with the strategy of seeking an admission either that the plaintiff is seeking more than $75,000 or that the plaintiff is seeking less than $75,000.[1] When either is admitted, removal can follow, right? Although one might think this is a distinction without a difference, courts have handled these two variations very differently. In *Harmon v. Wal-Mart Stores, Inc.*, the court remanded a case after the plaintiff repeatedly denied requests for admission that she sought less than $75,000 in damages. 2009 WL 707403, at *3-4 (M.D. Ala. 2009). The defendant's attempt "to prove the positive by eliciting a denial of the negative" proved to be insufficient. *Id.* The Court declared that because the effect of a denial "is not to admit the opposite of the proposition offered for admission, but rather ... to establish that the matter is in dispute," plaintiff's denial that she was not seeking more than $75,000 did not establish that she was seeking more than $75,000. *Id.* at 4. "Refusal to concede is not a statement of fact and cannot support jurisdiction." *Id.* Other courts, however, have found a denial that the amount-in-controversy was not less than $75,000 was sufficient for removal. *Williams v. Wal-Mart Stores, Inc.*, 534 F.Supp.2d 1230 (M.D. Ala. 2008); *see also*, *Swicord v. Wal-Mart Stores, Inc.*, 2009 WL 3063432, at *3 (M.D. Ga. 2009). To be safe, however, your Requests for Admission should ask the plaintiff to admit he is seeking more than $75,000.

Interrogatories are often not an effective method of amount-in-controversy discovery. A plaintiff can easily in-

sert ambiguity into his or her response. Finally, if you receive additional evidence after you have filed your notice of removal but within the time limits for removal, you should supplement your notice with the additional evidence because otherwise courts may not consider it during remand briefing. *See e.g., Dougherty + Chavez Architects v. Houston Cas. Co.*, 2008 WL 2439667, at *3 (N.D. Fla. 2008) ($5.6 million demand attached to response to remand was not considered).

Conclusion – Remove Early and Often

Given the uncertainty surrounding the application of *Lowery*, if you have evidence that the amount-in-controversy is satisfied, you should remove the case as soon as possible and certainly in the first thirty-day removal period. If the complaint you have received does not appear to satisfy *Lowery* as applied by Alabama's District Courts, quickly remove the case as soon as any discovery responses support removal. If you wait too long, your thirty days following the service of "other paper" may expire, leaving you with no chance of removal. If you are remanded, redouble your discovery efforts and always keep the one year deadline in mind. At the end of the day, the appeal of *Roe* and *Nelson* may bring some clarity to *Lowery's* application, but in the meantime defendants must be diligent to ensure their cases can be heard in a federal forum.

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[1]You should not ask the plaintiff both iterations of this request for admission hoping to place a plaintiff in a tough spot. The plaintiff can simply refuse to answer and a motion to deem the requests admitted almost certainly leaves you with ambiguous admissions.

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Tom Warburton is a partner, and **Brian Vines** an associate, in the Birmingham office of Bradley Arant Boult Cummings, LLP. Both are experienced civil litigators in the state and federal courts of Alabama and throughout the Southeast United States. Tom's practice includes significant trial work in the areas of products liability, business litigation, and litigation relating to natural resources. Following a clerkship with Judge William H. Pryor Jr. on the Eleventh Circuit Court of Appeals, Brian has a general litigation and appellate practice.