

Risk Manager

Fourth Circuit Says Parties Bear the Risks of Removal to Federal Court

By: Erin McNeill. *This was posted Monday, December 14th, 2009*

Attorneys advising clients on the strategic value of [removal to Federal court](#) are free to advise their clients without risking the threat of sanctions in the event the case is remanded back to state court after removal. Instead, clients bear the risks of sect. 1447's award of costs and fees, which puts the client back in the driver's seat on this strategic decision.

In *Crescent City Estates*, No. 08-2367 (4th Cir. Dec. 7, 2009), the [United States Court of Appeals for the Fourth Circuit](#) appears to be the first federal circuit court examining the question of whether [28 U.S.C. sect. 1447\(c\)](#), which allows the imposition of fees and costs including attorneys' fees on a party who erroneously removes a case to federal court, allows the award of fees to be imposed on just the losing party, or the party and the attorney who filed the removal notice. The [Fourth Circuit](#) held because the statute was silent on whether fees awarded would be born by the party or by the attorney, the presumption was that the sanction could not be imposed on the attorneys. Thus, the risk of filing a removal notice and then having to pay the fees if the case is remanded back to state court is solely on the shoulders of the party requesting removal.

This decision is likely to impact practice in Virginia particularly, because the Eastern District of Virginia is well-known for awarding attorneys fees when remanding for state court cases that were erroneously removed to the notoriously efficient "rocket docket." By imposing fees on the party alone, attorneys will no longer share their clients' risk for making the strategic gamble on removal to federal court. In its opinion, the court noted that by imposing fee-shifting only on the parties and not on the attorneys, the attorneys can advise their clients of the benefits and risks of removing to federal court without a bias colored by their own risk of having to bear the costs if the case is remanded.

The court found that by reading the statute as only imposing the fee-shifting penalty on the parties, it would prevent the attorney's interest from diverging with his client. Thus, the attorney can act purely with regard to his client's interests and following his client's direction on how to handle the case, without having to guard his personal stake in the litigation or defend his actions in court in the middle of litigation. Litigation about the imposition of the fee on the attorney in addition to or instead of his client may also required the attorney to

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reveal protected information about his and his client's strategy and conversations: information that would be valuable to the party's opponent mid-litigation.

Another benefit the court found was that their opinion prevents opposing counsel from filing motions to remand back to state court under 1447(c) simply to drive a wedge between opposing counsel and his client as they fight over the imposition of fees in the event remand is granted. The opinion therefore preserves the right to file to remove to federal court, because attorneys will not be reluctant to follow their client's direction on the handling of the client's case. It also preserves the attorney-client relationship, allowing attorneys to continue to set aside their own interests and act purely with their client's best interests in mind when making strategic decisions in a case.

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