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Modern Removal and Remand Strategies: Keeping the Case Out of (or In) Federal Court

Forum Defendant Rule, Snap Removal, Home Depot v. Jackson

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MODERN REMOVAL & REMAND STRATEGIES: KEEPING THE CASE OUT OF (OR IN) FEDERAL COURT

▣ Hosted & Coordinated by: Strafford Webinars

▣ Presented by:

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I. STATUTORY AUTHORITY & PROCEDURAL REQUIREMENTS

- *Procedure For Removal from State to Federal Court Guided by:*
 - 28 U.S. Code § 1446; § 1447; & § 1448

- *Three Important Requirements Under § 1446*
 - All parties, who have been joined and served, must **consent** to Removal. (I.E. A Removing Defendant must obtain consent from non-removing Defendants);
 - Must Remove within **30-days** after ascertaining the ability to remove. (Most commonly determined through pleadings);
 - For Diversity based Removal, the notice of removal must be filed within **1-year** of the action commencing in State Court. (Can be waived if can prove Plaintiff acted in bad faith [even unintentionally] to prevent a Defendant from ascertaining ability to Remove action).

I. STATUTORY AUTHORITY & PROCEDURAL REQUIREMENTS

MOST COMMON FORMS OF REMOVAL

□ FEDERAL QUESTION/STATUTORY REMOVAL

□ 28 U.S. Code § 1331 (Fed Ct. Jurisdiction: Federal question)

□ <https://www.law.cornell.edu/uscode/text/28/1331>

□ DIVERSITY REMOVAL

□ 28 U.S. Code § 1332 (Fed Ct. Jurisdiction: Citizenship/Amount in controversy)

□ <https://www.law.cornell.edu/uscode/text/28/1332>

I. STATUTORY AUTHORITY & PROCEDURAL REQUIREMENTS

USEFUL LINKS TO RELEVANT STATUTES

- 28 U.S. Code § 1441 (Removal of Civil Actions)
 - <https://www.law.cornell.edu/uscode/text/28/1441>

- 28 U.S. Code § 1442 & 1442(a) (Federal Officers/Agencies; Armed Forces Sued)
 - <https://www.law.cornell.edu/uscode/text/28/1442>
 - <https://www.law.cornell.edu/uscode/text/28/1442a>

- 28 U.S. Code § 1443 (Civil Rights)
 - <https://www.law.cornell.edu/uscode/text/28/1443>

I. STATUTORY AUTHORITY & PROCEDURAL REQUIREMENTS

USEFUL LINKS TO RELEVANT STATUTES (continued)

- 28 U.S. Code § 1444 (Foreclosure Action v. US)
 - <https://www.law.cornell.edu/uscode/text/28/1444>
- 28 U.S. Code § 1445 (Nonremovable Actions)
 - <https://www.law.cornell.edu/uscode/text/28/1445>
- 28 U.S. Code § 1446 (Procedure for Removal)
 - <https://www.law.cornell.edu/uscode/text/28/1446>
- 28 U.S. Code § 1447 (Procedure after Removal Generally)
 - <https://www.law.cornell.edu/uscode/text/28/1447>
- 28 U.S. Code § 1448 (Process after Removal)
 - <https://www.law.cornell.edu/uscode/text/28/1448>

II. STRATEGIES FOR PLAINTIFFS

- Avoiding Federal Question Based Removal
 - Avoiding Diversity Jurisdiction; Pre- and Post-filing
 - Federal question issues as counterclaims
 - *Home Depot v. Jackson*
 - Amending the complaint
-

Avoiding Federal Question

□ Plead Only State Law Claims

□ *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149 (1908)- Only suits based on federal law, not state law suits, are most likely to create federal question jurisdiction

□ https://www.law.cornell.edu/wex/federal_question_jurisdiction

□ NOTE: Avoid any federal law claims as where federal and state-law claims are joined, a defendant can remove the case in its entirety and ***the Court has the power to retain the federal claims while remanding the state-law claims.*** *Emrich v. Touche Ross & Co.*, 846 F.2d 1990 (9th Cir. 1988).

Avoiding Diversity, Pre- and Post-Filing

■ Add a Non-Diverse Defendant

- *Gray ex rel. Rudd v. Beverly Enterprises-Mississippi, Inc.*, 390 F.3d 400 (5th Cir. 2004)- A single valid cause of action against a non-diverse defendant requires remand of the entire case <https://www.advocatemagazine.com/article/2020-march/avoiding-removal-and-obtaining-remand>

■ Post-Removal Amendment

- 28 U.S.C. § 1447(e)- If after removal, Plaintiff seeks to join additional defendants whose joinder would destroy subject-matter jurisdiction, the court may deny joinder **or permit joinder and remand the action to the state court**

Avoiding Diversity, Pre- and Post-Filing

□ FORUM DEFENDANT RULE

- Under the forum defendant rule, a suit that is "otherwise removable solely on the basis of [diversity of citizenship] may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought." *Id.* § 1441(b)(2). "In the usual case, application of the forum defendant rule is straightforward: a defendant is sued in a diversity action in the state courts of its home state, is served in accordance with state law, attempts to remove the case, and is rebuffed by a district court applying Section 1441(b)(2)." *Gibbons v. Bristol-Myers Squibb Co.*, 919 F.3d 699, 705 (2d Cir. 2019).

Federal Question Issues as Counterclaims; *Home Depot v. Jacks*

- *Shamrock Oil & Gas Corp v. Sheets*, 310 U.S. 100 (1941)- Removal statute as formulated by § 12 of Judiciary Act of 1789 (Which has nearly same language as current statute), **allowed removal only by initial state-court defendants** and **not by plaintiffs who were the defendants to counterclaims**
 - <https://www.lexisnexis.com/community/casebrief/p/casebrief-shamrock-oil-gas-corp-v-sheets>
- *Home Depot v. Jacks*, 587 U.S. ____ (2019)- A third-party counterclaim defendant cannot invoke removal under 28 U.S.C. § 1441 (Nor Class Action Fairness Act)
 - Hon. C. Thomas (Majority)- While Home Depot was a “defendant” to a “claim,” **1441(a) refers to the defendant of a civil action NOT a claim...Interpreting 1441(a) to allow for removal by a party who was not a defendant to the original action would defy the text of the statute**
 - https://www.supremecourt.gov/opinions/18pdf/17-1471_e2p3.pdf

Amending the Complaint

- 28 U.S.C. § 1447(e)- If after removal, Plaintiff seeks to **join additional defendants** whose joinder would destroy subject-matter jurisdiction, the court may deny joinder or permit joinder and remand the action to the state court
- *Hazel Bishop, Inc. v. Perfemme, Inc.*, 314 F.2d 399 (2nd Cir. 1963)- A subsequent amendment to the complaint after removal, **designed to eliminate the federal claim**, will not defeat federal jurisdiction
 - <https://casetext.com/case/hazel-bishop-inc-v-perfemme-inc>
 - *Westmoreland Hospital Assn. v. Blue Cross*, 605 F.2d 119 (3rd Cir. 1979)- Subject matter jurisdiction is to be determined from the face of the complaint and on the basis of the record in the state court, at the time the petition for removal is presented
 - <https://casetext.com/case/westmoreland-hosp-assn-v-blue-cross-etc>
- Class Action: *Broadway Grill, Inc. v. Visa Inc., et al.*, No. 17-15499 (9th Cir. 2017)- Plaintiffs **may not divest a federal court of jurisdiction by amending their complaint** after a case has been removed to federal court **to change the definition of the class to eliminate minimal diversity**
 - <http://cdn.ca9.uscourts.gov/datastore/opinions/2017/05/18/17-15499.pdf>

III. Strategies for Defendants

- Contractual forum selection
 - Snap removal
 - Finding federal question jurisdiction
 - Preemption
 - Federal officer removal
 - Federally chartered defendants
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Contractual Forum Selection

- A first line of defense
 - Common in commercial contracts, forum selection clauses are useful in making future litigation on a contract more predictable for the parties and often less expensive.
 - Generally speaking presumptively valid and enforceable
 - Courts typically do not want to interfere with these provisions provided that they were agreed to by the parties in a valid contract
-

Contractual Forum Selection (cont'd) Mandatory vs. Permissive – Step One

- ▣ Courts will typically enforce them "absent evidence of fraud, overreaching or similar inequitable conduct." *Rucker v. Oasis Legal Finance, LLC*, 632 F.2d 1231 (11th Cir. 2011)
 - ▣ Is the clause mandatory or permissive?
 - ▣ A permissive clause permits jurisdiction in a particular venue but does not prohibit litigation elsewhere. (e.g., "shall have jurisdiction to hear..")
 - ▣ A mandatory clause requires that litigation related to the contract must occur only in the designated venue. (e.g., "...disputes shall be litigated in the Northern District of Virginia.")
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Contractual Forum Selection (cont'd) (case filed in a different federal court)

- SCOTUS in *Atlantic Marine Construction Co. v. United States District Court for the Western District of Texas* 571 U.S. 49 (2013) held that if the parties' contract specifies one federal district court as the forum for litigating any disputes between the parties, but the plaintiff files suit in a different federal district court that lawfully has venue (and therefore could be a proper place for the parties to litigate), the defendant should seek to transfer the case to the court specified in the forum-selection clause by invoking the federal statute that permits transfers of venue “[f]or the convenience of the parties and witnesses, in the interest of justice.”
- 28 U.S.C Section 1404(a): “For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented.”

Contractual Forum Selection - forum non conveniens (cont'd)

- Even if the court has federal question subject matter jurisdiction, the doctrine of forum non conveniens still applies
 - Thus, it is only in cases where subject-matter jurisdiction appears well founded that forum non conveniens comes into play. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507 (1947) (“The principle in Gulf Oil Corp. of forum non conveniens is simply that a court may resist imposition upon its jurisdiction **even when jurisdiction is authorized by the letter of a general venue statute.**”) (emphasis added).
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Contractual Forum Selection (cont'd) (filed in federal court but forum selection clause specifies a state court)

- SCOTUS further held that if the contract's forum selection clause specifies a state court as the forum for litigating disputes, the defendant may invoke a different federal statute that requires dismissal or transfer of the case. (i.e., 28 U.S.C. 1406(a): The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.)
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Snap Removal

- **What is snap removal?** It offers a potential path to federal court in spite of the forum defendant rule.
 - Derives from the language of the “forum defendant rule”, 28 U.S.C. Section 1441(b)(2), which prevents removal if any of the parties in interest “**properly joined and served** as defendants is a citizen of the State in which [the] action is brought.” Retail companies often face this scenario when sued in their home state or in another state court along with a local subsidiary or contractor.
 - Snap removal is a litigation tactic that defendants use to remove a case to federal court before any forum defendant is served.
 - **In some jurisdictions**, it can be utilized by any defendant named in the action, including in-state forum defendants, so long as the case otherwise meets all requirements of diversity jurisdiction.
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Snap Removal (cont'd)

- Circuit courts that have considered the issue [2nd and 3rd] have found that a non-forum defendant that has been served can remove a case before the forum defendant is served, **and even a forum defendant can remove a case before being served.**
- Example of the latter: Plaintiff, a citizen of Kentucky, files suit against Company A (a Florida corporation) and Company B (a Georgia corporation) in state circuit court in Florida. Company A learns through a scan of the local dockets that the suit was filed and immediately, before being served with formal service of process, files a notice of appearance in the case and a notice of removal to federal court.
- The 3rd Circuit in Encompass Insurance Company v. Stone Mansion Restaurant Incorporated, 902 F.3d 147 (2018), was the first to hold that the text of 28 U.S.C.A. § 1441(b)(2) does not prohibit snap removal.
- Section 1441(b)(2) prevents removal if any of the parties in interest “properly joined and served as defendants is a citizen of the State in which [the] action is brought.” The 3rd Circuit reasoned that the text of § 1441(b)(2) is unambiguous: “Its plain meaning precludes removal on the basis of in-state citizenship **only when the defendant has been properly joined and served.**” The court in Encompass conceded that result may be unusual but that it does not defy rationality or render the statute nonsensical.

Snap Removal (cont'd)

- The Fifth Circuit has followed suit after the Third as far as non-forum defendant removal. Texas Brine Co. v. Am. Arbitration Assoc., 955 F. 3d 482 (5th Cir. 2020) The 5th upheld snap removal when a non-forum defendant removed before the forum defendant was served. ("A non-forum defendant may remove an otherwise removable case even when a named defendant who has yet to be 'properly joined and served' is a citizen of the forum state.")
- However, there is considerable disagreement among other circuits and their district courts about whether snap removal is a permissible tactic and, if so, to what extent the text of Section 1441 (b)(2) allows removal on this basis.
- For example, the 11th Circuit has explicitly rejected snap removal where a forum defendant removed before any defendant was served. Goodwin v. Reynolds, 757 F.3d 1216, 1221 (11th Cir. 2014) However, each of the federal district courts in Florida has upheld snap removal where the non-forum defendant, **either by itself or jointly with the forum defendant**, removed before the forum defendant was served.

Snap Removal (cont'd) – Dangers and Importance of Being Proactive

- Obviously, the danger to defendants attempting this where it is unsettled is the cost of litigating the removal and the significant uncertainty as to whether their particular case will be remanded, potentially exposing the removing party to liability for the opposing party's attorney's fees and costs.
 - With such a time-sensitive tactic, it goes without saying that you should research proactively how snap removal has been handled in your federal circuit and your local federal district courts before the situation arises, in order that you can promptly advise your clients accordingly.
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Other Means of Removing Under Diversity Jurisdiction

- May be able to argue that the nondiverse parties are sham parties added solely for the purpose of defeating diversity jurisdiction and that they, therefore, can be ignored
 - Sham parties are parties who have been joined improperly where there is no basis for recovery against them
 - The sham joinder rule permits the court to ignore the nondiverse party only if there is no possible basis for recovery as ascertained on a summary basis.
 - In these rare situations, the sham party's citizenship is ignored, and the remaining defendants can then remove the case to federal court.
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Finding Federal Question Jurisdiction

- Federal question jurisdiction is one of the two ways for a federal court to gain subject-matter jurisdiction over a case (the other is via diversity jurisdiction).
 - Generally, in order for federal question jurisdiction to exist, the cause of action must arise under federal law. However, there are constitutional and statutory requirements that must be met before federal question jurisdiction can be found.
 - Do plaintiff's state law claims implicate a federal interest? And does the impact of that federal interest extend beyond the borders of the forum state?
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Federal Question, Constitutional Requirements – Step One

- Does Article III of the Constitution permit federal question jurisdiction as it relates to the original action? Is there a federal ingredient? (could be the cause of action itself, could be an element of the cause of action, could even be a defense or a counterclaim)
- Under Article III of the U.S. Constitution, federal courts can hear "all cases, in law and equity, arising under this Constitution, [and] the laws of the United States..." US Const., Art III, Sec 2.
- SCOTUS has interpreted this clause broadly, concluding that it allows federal courts to hear *any* case in which there is a **federal ingredient**. Osborn v. Bank of the United States, 9 Wheat. (22 U.S.) 738 (1824).
- If there is a "federal ingredient," move to Step Two.

Federal Question, Statutory Requirements – Step Two

- The requirements of 28 U.S.C. Section 1331 must also be met.
- Federal court subject matter jurisdiction exists only with respect to those cases which "arise under" federal law.
- More narrow requirement than the constitutional requirement. Does a "federal ingredient" exist in plaintiff's cause of action? (here you're looking **only at the plaintiff's cause of action** – the action itself or an element of the cause of action)
- The Supreme Court has found that a "suit arises under the law that creates the cause of action," American Well Works v. Layne, 241 US 257 (1916), and therefore, only suits based on federal law, not state law suits, are likely to implicate federal question jurisdiction.

Federal Question, Statutory Requirements – Step Two (cont'd)

- Holmes test (a/k/a “creation test” or American Well Works test)
 - Was the plaintiff’s **entire** cause of action created by federal law (e.g., federal trademark law)? If yes, then it meets the statutory requirements of 28 U.S.C. Section 1331.
 - If the cause of action was created by state law but has a federal ingredient, move to Step Three (*Grable/Gunn* Test)
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Grable/Gunn Test

- Does the “state-law claim necessarily raise a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities?” Grable & Sons Metal Products, Inc. v. Darue Engineering & Mfg., 545 U.S. 308 (2005).
- The interest must be substantial **to the federal system**, not just to the parties to the case.
- *Grable* involved determination as to whether a particular federal statute required personal service on a party, which implicated a broad range of potential parties to causes of action brought under that federal statute

Well-Pleaded Complaint Rule

- Usually, the plaintiff's initial complaint must contain references to the federal question and the federal issue evoked.
- **The federal question and issue cannot arise in an anticipated defense.** See Louisville & Nashville R. Co. v. Mottley, 211 U.S. 149 (1908) a/k/a the "Mottley Rule."
- Federal question jurisdiction requires the interpretation of federal law or at least the implication of federal policy.

Preemption (Does a federal statute completely displace plaintiff's state law claims?)

- Complete preemption vs. ordinary preemption
- Ordinary preemption is a defense whereby a defendant argues it is not liable for state-law claims because they are pre-empted by federal law.
- Complete preemption, on the other hand, applies when a federal statute is so broad that it wholly displaces any state-law claims relating to the same subject matter (Aetna Health Inc. v. Davila, 542 U.S. 200, 207 (2004))
- Complete preemption is an exception to the well-pleaded complaint rule, which states that a defendant may not remove a state-law action to federal court on the basis of federal question jurisdiction **unless the complaint establishes that the causes of action “arise under” federal law.**
- Complete preemption essentially transforms state-law claims into claims arising under federal law (Lontz v. Tharp, 413 F.3d 435, 440-41 (4th Cir. 2005)).

Preemption (cont'd)

- The US Supreme Court has held that complete preemption applies to state law claims relating to three federal statutes:
 - a) Section 301 of the Labor Management Relations Act.
 - b) Section 502(a)(1)(B) of the Employee Retirement Income Security Act of 1974 (ERISA)
 - c) Sections 85 and 86 of the National Bank Act.

(Sullivan v. Am. Airlines, 424 F. 3d 267, 272 (2d Cir. 2005).)

Federal Officer Removal

- Another exception to the well-pleaded complaint rule.
- Here, we can look to colorable defenses implicated by the cause of action in state court.
- The Federal Officer Removal Statute authorizes removal of a suit by the “United States or any agency thereof or any officer (or any person acting under that officer) of the United States or any agency thereof, in an official or individual capacity, for or relating to any act under color of such office” 28 U.S.C. § 1442(a)(1).
- To remove an action under Section 1442(a), a defendant must show: (1) it has asserted a colorable federal defense, (2) it is a “person” within the meaning of the statute, (3) that has acted pursuant to a federal officer’s directions, and (4) the charged conduct is connected or associated with an act pursuant to a federal officer’s directions.

Federal Officer Removal (cont'd)

■ 28 U.S.C. Section 1442(a): A civil action or criminal prosecution that is commenced in a State court and that is against or directed to any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, in an official or individual capacity, for or relating to any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

(2) A property holder whose title is derived from any such officer, where such action or prosecution affects the validity of any law of the United States.

(3) Any officer of the courts of the United States, for or relating to any act under color of office or in the performance of his duties;

(4) Any officer of either House of Congress, for or relating to any act in the discharge of his official duty under an order of such House.

Federal Officer Removal (cont'd)

■ 28 U.S.C Section 1442:

(b) A personal action commenced in any State court by an alien against any citizen of a State who is, or at the time the alleged action accrued was, a civil officer of the United States and is a nonresident of such State, wherein jurisdiction is obtained by the State court by personal service of process, may be removed by the defendant to the district court of the United States for the district and division in which the defendant was served with process.

(c) Solely for purposes of determining the propriety of removal under subsection (a), a law enforcement officer, who is the defendant in a criminal prosecution, shall be deemed to have been acting under the color of his office if the officer—

- (1) protected an individual in the presence of the officer from a crime of violence;
- (2) provided immediate assistance to an individual who suffered, or who was threatened with, bodily harm; or
- (3) prevented the escape of any individual who the officer reasonably believed to have committed, or was about to commit, in the presence of the officer, a crime of violence that resulted in, or was likely to result in, death or serious bodily injury.

Federal Officer Removal (cont'd)

- Commonly used by government contractors in product liability claims to remove to federal court
 - They often assert that the “any person acting under” language of the statute applies to them, arguing that they manufactured the allegedly defective products pursuant to detailed specifications furnished by the U.S. government
 - This use was validated by SCOTUS in Boyle v. United Technologies Corp., 487 U.S. 500 (1988) under the rationale that the contractors manufacturing to government specifications are essentially stepping into the place of the government sovereign.
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Federal Officer Removal (cont'd)

- The removing party need not prove that it will prevail on the defense, or even that it is meritorious — only that it is colorable. Mesa v. California, 489 U.S. 121, 129 (1989)
- Defenses including sovereign immunity, official justification, and reliance on regulatory prohibitions have been deemed sufficient to support federal officer removal. CRGT, Inc. v. Northrop Grumman Sys. Corp., CRGT, Inc. v. Northrop Grumman Sys. Corp., Civil Action No. 1:12-cv-554 (E.D. Va. Aug. 28, 2012) (citing Willingham v. Morgan, 395 U.S. 402, at 406-407 (1969).
- SCOTUS has opined that it should be interpreted very broadly. However, many have been slow to utilize this defense tactic beyond the classes of persons outlined above.

Federally Chartered Defendants and 28 U.S.C. Section 1332 (c)(1)

- 28 U.S.C. Section 1332(c) For the purposes of this section and section 1441 of this title—
- (1) a corporation shall be deemed to be a citizen of every State and foreign state by which it has been incorporated **and** of the State or foreign state where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of—
 - (A) every State and foreign state of which the insured is a citizen;
 - (B) every State and foreign state by which the insurer has been incorporated; and
 - (C) the State or foreign state where the insurer has its principal place of business; and

28 U.S.C. Section 1332(c)(1) (cont'd)

- 28 U.S.C. Section 1332(c)(1) defines corporate citizenship but does not apply to federal corporations. See Hancock Fin. Corp. v. Fed. Sav. & Loan Ins. Corp., 492 F.2d 1325, 1329 (9th Cir. 1974).
 - However, Congress has provided that certain types of federal corporations, such as national banks and federal savings associations, are deemed to be citizens of designated states for purposes of diversity jurisdiction.
-

Federally Chartered Defendants (cont'd)

- 28 U.S.C. Section 1349: “The district courts shall not have jurisdiction of any civil action by or against any corporation upon the ground that it was incorporated by or under an Act of Congress, **unless the United States is the owner of more than one-half of its capital stock.**”
(emphasis added)
 - i.e., If the U.S. government owns more than 50% of capital stock in a corporation, that corporation can invoke federal question jurisdiction.
-

Federally Chartered Defendants (cont'd)

- For other federally chartered corporations, the path to federal court is not as clear.
 - Bankers Trust Co. v. Texas & Pacific Railway Co., 241 U.S. 295 (1916)
 - Congress had enacted a 1915 Act that eliminated automatic federal question jurisdiction in cases involving federally chartered railway companies. This case involved a suit to foreclose a mortgage on railroad property. The plaintiff trustee was alleged to be a citizen of the State of New York. The railway company had been incorporated by Congress.
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Federally Chartered Defendants (cont'd) – The Localization Exception Today

- Navy Fed. Credit Union v. LTD Fin. Servs., LP, 972 F.3d 344 (4th Cir. 2020), held that Navy Federal, a federally chartered credit union, is a citizen of its principal place of business, Virginia. The court explained that 28 U.S.C. 1332(c)(1)'s text, structure, and context support Navy Federal's contention that a corporation shall be deemed a citizen of the state or foreign state where it has its principal place of business.
 - The court in Navy Federal further found that Section 1332(c)(1) requires the court to interpret and to give effect to the second clause of the statute even when the first clause does not specify a citizenship; the district court's and defendants' understanding of "and" conflicts with circuit precedent; and this approach to section 1332(c)(2) is supported by the Supreme Court's holding in Bankers Trust Co. v. Texas & Pacific Railway Co., 241 U.S. 295 (1916).
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IV. Consequences of Removal

- ▣ WHAT ARE THE CONSEQUENCES OF REMOVAL????
 - ▣ In the most classic legal response, “IT DEPENDS!”
 - ▣ Are you the removing or non-removing party?
 - ▣ Plaintiff or Defendant?
 - ▣ Do you have experience in Federal Court?
 - ▣ What type/area of law is the case?
-

Avoiding Remand

- Burden of proof for removal is on the party removing the case, when a plaintiff's complaint does not state the amount of damages sought, as discussed in Leonard v. Enterprise Rent a Car, 279 F.3d 967, 972 (11th Cir. 2002).
- "A removing defendant bears the burden of proving proper federal jurisdiction. Where a plaintiff fails to specify the total amount of damages demanded... a defendant seeking removal based on diversity jurisdiction must prove by a preponderance of the evidence that the amount in controversy exceeds the \$75,000 jurisdictional requirement. A conclusory allegation in the notice of removal that the jurisdictional amount is satisfied, without setting forth the underlying facts supporting such an assertion, is insufficient to meet the defendant's burden." Id. (internal citations omitted).

Avoiding Remand (cont'd)

- It should be noted that a failed removal and subsequent remand can carry significant financial penalties. See Gray v. New York Life Ins. Co., 906 F. Supp. 628 (N.D. Ala. 1995).
- Pursuant to 28 U.S.C. §1447(c) “[a]n order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal.” Those fees can be substantial and add up very quickly.
- Plaintiffs damages alleged in their complaints are often nebulous and extremely vague
- State court pleading thresholds are typically much lower (e.g., here in Florida, it was recently raised from \$15,000.00 to \$30,000.00 for complaints filed in state circuit court)

Avoiding Remand (cont'd) – Defense Strategies

- Confirm with your client whether there was any pre-suit demand, particularly with reference to specific injuries and/or including plaintiff's medical records. (e.g., the Plaintiff's known past medical specials were on the order of only approximately \$35,000.00. However, Plaintiff's pre-suit settlement demand was \$850,000.00. Though not conclusive as to an amount in controversy exceeding \$75,000.00, we successfully used it to support our position that the amount in controversy exceeded \$75,000.00.)
- In this case, Plaintiff filed a motion to remand, arguing that the demand letter we referenced in our petition for removal was inadmissible.
- Consider attempting to obtain a stipulation signed by your plaintiff that the amount in controversy has been met. Alternatively (though less likely), it is possible that Plaintiff may concede that her total amount in controversy does not exceed \$75,000.00, which would permit her to have the case remanded to state court.

Avoiding Remand (cont'd) – Defense Strategies

- Provide the court with summaries of jury verdicts in cases where the injuries are analogous to the injuries in your case
 - Conduct discovery as early as possible in order to obtain evidence to support your allegation that the amount-in-controversy has been met
 - If you have a good faith basis and information later becomes available, attempt to remove again immediately upon obtaining that evidence.
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Avoiding Remand (cont'd)

- The federal court has the ability to rely upon evidence "put forward by the removing defendant, *as well as reasonable inferences and deductions drawn from that evidence, to determine whether the defendant has carried its burden.*" South Florida Wellness, Inc. v. Allstate Ins. Co., 745 F. 3d 1312, 1315 (11th Cir. 2014).
- Further, a "removing defendant is not required to prove the amount in controversy beyond all doubt or to banish all uncertainty about it." Pretka v. Kolter City Plaza II, Inc., 608 F. 3d 744, 753 (11th Cir. 2010). Rather, the removing defendant must establish the amount in controversy **only by a preponderance of the evidence.** Williams v. Best Buy Co., 269 F.3d 1316, 1319 (11th Cir. 2001).

Avoiding Remand (cont'd)

- Defendants do not need to submit evidence with their notice of removal but rather only submit a short and plain statement regarding the amount in controversy. Dart Cherokee Basin Operating Co., LLC v. Owens, 135 S. Ct. 547 (2014)
- Defendant's amount-in-controversy allegation should be accepted when not challenged by the plaintiff or questioned by the court.
- However, if the amount-in-controversy allegation is challenged, both sides should submit proof and the court must decide the issue by a preponderance of the evidence.

Effect of Removal on Pleadings and Motion Practice

- NOTE: Once you are in federal court, it's a very different ball game.
 - Deadlines are not recommendations. Federal courts are very strict with deadlines and typically will not extend or change deadlines without good cause shown by the parties
 - Discovery (Rule 26) under Federal Rules of Civil Procedure has extensive requirements for production of documents and information which must be disclosed, including applicable insurance coverage
 - Virtually everything in federal court is done according to a scheduling order with hard deadlines
 - The timeline to a trial period is significantly shortened. Often it's half the time it takes to get to trial in state court (as little as 8-9 months, in my experience)
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Effect of Removal on Pleadings and Motion Practice (cont'd)

- Once your case is removed, you typically have **only 5 days to file a response to the complaint** (assuming you did not file a response in state court prior to removing)
 - **IMPORTANT:** Look to the applicable district court's local rules, as they differ greatly from one district to another
 - Most litigation is conducted via motion practice and written replies, upon which federal district judges will typically rule without hearing. In federal court civil practice, hearings are very rare.
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Q&A

▣ ASK US ANYTHING!

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