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REMOVAL AND REMAND: SIMPLE YET COMPLEX

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EVERY FIRST-YEAR LAW STUDENT KNOWS THE BASICS of removal and remand. Generally speaking, a defendant can remove from state court to federal court any civil action of which the federal courts have original jurisdiction. A plaintiff can then move to remand the case back to state court if it believes federal jurisdiction is lacking. *See* 28 U.S.C. §§1441, 1446, 1447.

Sounds simple enough. But like the old board game Othello, removal and remand takes "a minute to learn, and a lifetime to master." Dozens of federal statutes address whether federal courts have original jurisdiction, on grounds ranging from well-known (*e.g.*, federal-question jurisdiction, *id.* §1331, and diversity jurisdiction, *id.* §1332) to obscure (*e.g.*, actions "brought for the protection of jurors' employment," *id.* §1363). And an entirely separate chapter of the U.S. Code governs the *process* of removal and remand. *See* 28 U.S.C. §§1441-1455. Add to all that the unique—and frequently complex—facts of every case, and three conclusions become apparent. First, a substantial body of case law has developed regarding removal and remand issues. Second, such issues nevertheless remain the subject of significant dispute and uncertainty. And third, practitioners who stay abreast of removal and remand issues maximize their chances of success: for defense lawyers, keeping a case in federal court; for plaintiffs' attorneys, returning that case to state court.

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This article addresses three ongoing controversies in the removal/remand field that demonstrate not only the intricacies of such law but the strategic possibilities for practitioners. They show that judges can take starkly differing views of the same statutory language. And they establish that even after the Supreme Court itself has intervened, resolution of one dispute may yield an entirely new set of unanswered questions and accordant opportunities.

Snap Removal

One of the most frequently invoked bases for federal jurisdiction is diversity jurisdiction, under which federal jurisdiction exists if there is complete diversity between the parties and the amount in controversy exceeds $75,000. But under the "forum-defendant rule," a defendant cannot remove on the basis of diversity jurisdiction "if any of the parties properly joined and served as defendants is a citizen of the State in which [the] action is brought." 28 U.S.C. §1441(b)(2). The rule is grounded in fairness: suing a defendant in its own forum ostensibly nullifies any prejudice inherent in litigating in a foreign jurisdiction, eliminating the need for removal.

To circumvent the forum-defendant rule, removing defendants have employed so-called "snap removal," under which a defendant removes a case prior to service on all defendants. In *Texas Brine Co., L.L.C. v. American Arbitration Ass'n, Inc.*, 955 F.3d 482 (5th Cir. 2020), the Fifth Circuit upheld this practice, holding that removal was appropriate where a non-forum defendant removed a case before a forum co-defendant (whose presence would trigger the forum-defendant rule) was served. The Fifth Circuit held that §1441(b)(2) was inapplicable because the only defendant "properly joined and served" at the time of removal was the non-forum defendant; by its plain language, §1441(b)(2) applies only once "a home-state defendant has been served." *Id.* at 486. The Fifth Circuit joined the Second and Third Circuits, both of which have also upheld snap removal. *See Gibbons v. Bristol-Myers Squibb Co.*, 919 F.3d 699 (2d Cir. 2019); *Encompass Ins. Co. v. Stone Mansion Rest. Inc.*, 902 F.3d 147 (3d Cir. 2018).

The Fifth Circuit has not yet addressed, however, whether a *forum defendant* may engage in "snap removal" to defeat the forum-defendant rule—for example, if a Louisiana plaintiff sued a Texas defendant in Texas state court. The Second and Third Circuit decisions embracing snap removal did so in the context of forum defendants and have thus upheld that application of the practice. Some district courts have declined to extend snap removal to forum defendants, claiming that it would create an "absurd" process by which in-state defendants

could sidestep the forum-defendant rule, contrary to Congress' intent. The Fifth Circuit's decision in *Texas Brine* gestures in that direction, specifically noting that the removing party was "not a forum defendant" and that "[d]iversity jurisdiction and removal exist to protect out-of-state defendants from in-state prejudices." 955 F.3d at 487.

At the end of the day, though, appeals to absurdity and statutory purpose are unlikely to prevail in the face of the statutory text. As the Fifth Circuit observed in *Texas Brine*, "When the plain language of a statute is unambiguous and does not lead to an absurd result, our inquiry begins and ends with the plain meaning of that language." *Id.* at 486 (brackets omitted). The court added that "[t]he absurdity bar is high, as it should be," and "[t]he result must be preposterous." *Id.* These considerations are likely to lead to the Fifth Circuit's adoption of snap removal even when invoked by forum defendants, just as in the Second and Third Circuits.

That said, quoting §1441(b)(2)'s text, the Fifth Circuit also made clear in *Texas Brine* that a case must be "*otherwise removable*" for snap removal to succeed. *Id.* (emphasis added). Therefore, as district courts have held, snap removal may not be used where the parties are not completely diverse and federal jurisdiction under §1332(a) is lacking—even if the non-diverse defendant has not yet been served. *See, e.g.*, *Cox v. J.B. Hunt Transp., Inc.*, 2020 WL 3288090, at *2 (S.D. Tex. June 17, 2020). While the Fifth Circuit has not addressed this specific issue, the same fidelity to statutory text underlying *Texas Brine* will likely result in the rejection of efforts to evade §1332(a)'s language in this manner.

"Untimely" Removal Challenges Based on Procedural Defect

Under 28 U.S.C. §1447(c), "a motion to remand the case on the basis of any defect other than lack of jurisdiction must be made within 30 days after the filing of the notice of removal." Like many removal/remand provisions, this seemingly straightforward language has generated uncertainty, with the courts of appeals split over whether a district court has authority to remand a case when a plaintiff's *remand motion* is filed within 30 days after the notice of removal, but the specific procedural *defect* warranting remand is raised after that time period—for example, in a reply supporting the motion. The Fifth Circuit has answered that question yes, while the Eleventh Circuit—employing the same textualist approach—has answered that question no, joining the Ninth Circuit.

In *BEPCO, L.P. v. Santa Fe Minerals, Inc.*, 675 F.3d 466 (5th Cir. 2012), the plaintiff filed a remand motion within thirty days of removal and raised two grounds for remand. After the defendant opposed, the plaintiff's reply (filed more than thirty days after removal) raised a third ground—that removal was untimely. The district court remanded based on untimeliness, and the Fifth Circuit upheld this exercise of authority. The court cited the "unambiguous statutory language" of §1447(c), which "[o]n its face" establishes a 30-day time limit for "the filing of a motion to remand," not "for the presentation of a removal defect." *Id.* at 471. What "matter[s] is the timing of the remand motion," the Court explained, not whether the "removal defect" was raised within thirty days of removal. *Id.*

The Eleventh Circuit recently took the contrary view in *Shipley v. Helping Hands Therapy*, 996 F.3d 1157 (11th Cir. 2021). As in *BEPCO*, the plaintiff filed a timely remand motion raising one ground for remand, and then filed a reply brief (outside the thirty-day window) raising an untimeliness argument as well. The Eleventh Circuit held that a district court lacks authority to remand based on a procedural defect first raised outside the 30-day window—for example, in a reply supporting remand—even if a timely motion was filed. The court invoked the "plain statutory language" of §1447(c) and concluded that neither the plaintiff's initial motion nor her reply brief was "[a] motion to remand the case on the basis of any defect other than lack of jurisdiction … made within 30 days after the filing of the notice of removal." *Id.* at 1160. In so holding, the Eleventh Circuit joined the Ninth Circuit, which held in *Northern California District Council of Laborers v. Pittsburg–Des Moines Steel Co.*, 69 F.3d 1034 (9th Cir. 1995), that §1447(c) "prohibits a defect in removal procedure from being raised later than 30 days after the filing of the notice of removal, regardless of whether a timely remand motion has been filed." *Id.* at 1038.

This issue will remain unsettled absent Supreme Court intervention. It underscores the hard questions that removal and remand can present: Even where courts utilize the same interpretive approach—here, fealty to the statutory text—they can nevertheless reach diametrically different outcomes.

Appealability of remand orders after *BP v. Baltimore*

The federal courts of appeals generally lack jurisdiction to review a district court order remanding a case. But the Supreme Court's recent decision in *BP P.L.C. v. Mayor and City Council of Baltimore*, 141 S. Ct. 1532 (2021), may have expanded the opportunities for all-important appellate review of remand orders, depending on the facts of a case, the claimed grounds for federal jurisdiction—and the craftiness of counsel.

BP addressed 28 U.S.C. §1447(d), which provides: "An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1442 or 1443 of this title shall be reviewable by appeal or otherwise." Section 1442, known as the "federal-officer removal statute," permits removal for any action against "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." 28 U.S.C. §1442(a)(1). Section 1443 permits removal for certain federal civil rights claims. *Id.* §1443.

In *BP*, the defendants removed to district court, alleging numerous grounds for federal jurisdiction, including the federal-question statute, admiralty jurisdiction, and the federal-officer statute. The district court remanded, rejecting all of the cited bases for removal. The court of appeals held that, under §1447(d), it could only review the federal-officer removal issue—not any of the other bases for removal. The Supreme Court reversed, holding that §1447(d)'s references to an "order" means that a court of appeals can review *any* issue in a remand order provided the defendant premised removal in part on the federal-officer removal statute or the civil-rights removal statute. *Id.* at 1537-38. In so concluding, the Court rejected the plaintiffs' (and dissent's) warning of potential "gamesmanship": that defendants "may frivolously add §1442 or §1443 to their other grounds for removal, all with an eye to ensuring appellate review down the line if the case is remanded." *Id.* at 1542. That possible consequence, the Court observed, must yield to the "plain meaning" of the statutory text, with Congress "free to revise" the statute. *Id.* at 1542-43. The Court added that §1447(c) authorizes costs and fees for "frivolous[]" removals, and Rule 11 authorizes sanctions for "frivolous arguments." *Id.* at 1543.

BP thus offers a roadmap for defendants who want to obtain otherwise-unavailable appellate review of *all* their arguments for removal: In the removal notice and when opposing remand, defendants should include as one basis for removal (among others) the federal-officer or civil-rights removal statute. If the district court remands, the court of appeals can address *all* asserted bases for removal—including, *e.g.*, federal-question or diversity jurisdiction. Defendants need not even press the federal-officer/civil-rights removal argument on appeal. *See id.* at 1544 (Sotomayor, J., dissenting).

There are few realistic safeguards against this tactic. While §1447(c) authorizes fees for "frivolous[]" removals, the standard is stringent: "attorney's fees should not be awarded under § 1447(c) when the removing party has an objectively reasonable basis for removal." *Admiral Ins. Co. v. Abshire*, 574 F.3d 267, 280 (5th Cir. 2009). Similarly, Rule 11 sanctions require that a claim be "so obviously foreclosed by precedent as to make [it] legally indefensible." *Snow Ingredients, Inc. v. SnoWizard, Inc.*, 833 F.3d 512, 529 (5th Cir. 2016). For many defendants, formulating a non-frivolous argument for federal-officer removal may not be demanding. Although the Supreme Court has held that "the fact of federal regulation alone" does not justify §1442(a)(1), *Watson v. Philip Morris Cos., Inc.*, 551 U.S. 142, 153 (2007), the test is otherwise flexible; a defendant must show, *inter alia*, that it "acted pursuant to a federal officer's directions" and the alleged conduct is "connected or associated with an act pursuant to a federal officer's directions," *Latiolais v. Huntington Ingalls, Inc.*, 951 F.3d 286, 296 (5th Cir. 2020) (en banc)—conditions that are not uncommon in an age of pervasive federal oversight.

Even if a federal-officer argument for removal is unquestionably frivolous, defendants could be able to avoid fees or sanctions by asserting another removal ground that is "objectively reasonable." Suppose a defendant raises a frivolous federal-officer ground but a plainly correct federal-question ground, the district court rejects both in a remand order, and the court imposes fees. The defendant then appeals to the court of appeals, which (per *BP*) reviews both grounds for removal, concluding there is clearly federal-question jurisdiction. Despite the frivolousness of the federal-officer argument, it is hard to see why the defendant should still pay fees if removal is obviously warranted—or even if the appellate court concludes removal is unwarranted but the federal-question argument is "objectively reasonable." At a minimum, defendants may view the slight downside risk of fees worth the significant upside of appellate review of all bases for removal and potentially keeping a case in the federal system.

The *BP* decision thus exemplifies removal/remand law. Although the Court settled one issue, its textually driven decision produced more questions than it answered, and it generated further uncertainty for practitioners to exploit and lower courts to resolve in the years to come.

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