

# Removal and Remand - Are You In Or Are You Out?

By Jeffrey R. Blackwood

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## STATUTORY SCHEME

### I. REMOVAL:

- 28 U.S.C. § 1441(a) - Any civil action brought in a state court of which the district courts of the United States have original jurisdiction may be removed by the defendant or defendants to the district court of the United States for the district and division embracing the place where such action is pending.
- § 1441(b) - Right to remove a case based on diversity of citizenship arises only if none of the properly-joined defendants are citizens of the state in which the action is brought.
- § 1452 - A party may remove a case if the district court would have original bankruptcy jurisdiction; the court may remand such a case "on any equitable ground."

### II. ORIGINAL JURISDICTION:

- 28 U.S.C. § 1331 - The district courts have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.
- § 1332 - The district court shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum of \$75,000, exclusive of interest and costs, and is between citizens of different states. Complete diversity necessary; no plaintiff can be a citizen of the same state as any defendant.
- § 1334 - Bankruptcy jurisdiction.
- § 1334(b) District courts have original but not exclusive jurisdiction over all

civil proceedings arising under the bankruptcy laws or arising in or related to a case under the bankruptcy laws.

- § 1334(c)(1) A District Court may, in the interest of justice or in the interest of comity with state courts or respect for state law, abstain from hearing a proceeding arising under the bankruptcy laws or arising in or related to a case under the bankruptcy laws.
- § 1334(c)(2) In a case based upon state law claims or causes of action in which jurisdiction is based on the case's relation to a bankruptcy case, but the case itself does not arise under the bankruptcy laws or arise in a case under the bankruptcy laws, upon timely motion of a party, the court "shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a state forum of appropriate jurisdiction." This is so-called "mandatory abstention."
- § 1334(e) The district court for the district in which a bankruptcy is commenced or is pending has exclusive jurisdiction of all the property of the debtor as of the commencement of the bankruptcy and of all property of the estate.

NOTE - The All Writs Act does not supply an independent basis of jurisdiction and will not support removal. *Syngenta Crop Protection, Inc. v. Henson*, 123 S. Ct. 366 (2002).

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## III. MECHANICS OF REMOVAL:

- 28 U.S.C. § 1446 - Removal is accomplished by filing a notice of removal in the district court for the district and division within which the state court action is pending, attaching a copy of all process, pleadings, and orders served upon the defendant. File a copy of the notice of removal with the state court in which the case is pending.
- All properly joined and served defendants must join in, or consent to, the notice of removal.
- The notice of removal must be filed within 30 days after service on the defendant of the complaint OR, if the case is not originally removable, within 30 days after the receipt of an amended pleading, motion, order, or other paper from which it may first be ascertained that the case has become removable.
- For a removal based on diversity of citizenship jurisdiction, the removal must occur within one year of the commencement of the action. This limitation may be waived, and the plaintiff

may be equitably estopped from raising it, under very limited circumstances. *Tedford v. Warner-Lambert Co.*, 327 F.3d 423 (5th Cir. 2003).

## IV. REMAND MOTIONS:

- 28 U.S.C. § 1447 - A motion to remand based on any defect other than lack of subject matter jurisdiction must be made within 30 days of the filing of the notice of removal.

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- An order remanding a case to state court is not reviewable on appeal, except that remand orders in civil rights cases may be reviewed on appeal.
- If the plaintiff, after removal, seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court can deny joinder or permit joinder and remand the case to state court.

## FIFTH CIRCUIT AND MISSISSIPPI DISTRICT COURT CASE LAW 2003-2004

### V. DIVERSITY JURISDICTION REMOVAL ISSUES

#### A. Fraudulent Joinder

If the reported cases are any indication, the vast majority of removals are diversity jurisdiction removals in which the removing defendants allege that the resident or non-diverse defendant has been fraudulently joined.

A defendant may remove a case that is otherwise not removable because of the presence of non-diverse defendants on the basis that the non-diverse defendants have been fraudulently joined by the plaintiff to defeat diversity jurisdiction. A defendant alleging fraudulent joinder must establish

either that the plaintiff has engaged in actual fraud in pleading the jurisdictional facts, or that the plaintiff will be unable to establish a cause of action against the non-diverse defendant. The standard is whether there is a possibility that the plaintiff has set forth a valid cause of action against the non-diverse defendant. *McKee v. Kansas City Southern Railway Co.*, 358 F.3d 329 (5th Cir. 2004).

Perhaps the most significant development in the fraudulent joinder arena, which remains unresolved at the moment, is the impact of the Fifth Circuit's decision in *Smallwood v. Illinois Central Railway Co.*, 342 F.3d 400 (5th Cir. 2003), *petition for panel rehearing denied*, 352 F.3d 220 (5th Cir. 2003), *petition for rehearing en banc granted*, 355 F.3d 357 (5th Cir. 2003). On August 7, 2003, a panel of the Fifth Circuit, relying on a nearly 100-year-old Supreme Court case, *Chesapeake & Ohio Railway Co. v. Cockrell*, 232 U.S. 146 (1914), held that a claim of fraudulent joinder cannot be based on a defense that is equally dispositive of the claims against all the defendants. There, Illinois Central removed the case on the basis of diversity jurisdiction, alleging that the resident defendant - MDOT - was fraudulently joined because the claims against him were due to be dismissed on the basis of federal preemption. The plaintiff moved to remand, but the district court agreed that MDOT was fraudulently joined because the plaintiff could prove no set of facts in support of her state-law claims against MDOT because those claims were preempted by the Federal Railroad Safety Act. Illinois Central, the only remaining defendant, then moved for summary judgment on the federal preemption defense; the District Court granted the motion and entered judgment in favor of Illinois Central. The plaintiff appealed and alleged that the District Court erred in denying her motion to remand, and the Fifth Circuit reversed, concluding that the District Court did not have jurisdiction over the case because MDOT was not fraudulently joined because the preemption defense urged as the basis for the fraudulent joinder argument applied equally to both defendants.

Subsequent to the publication of *Smallwood*, on August 29, 2003, a differ-

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ent panel of the Fifth Circuit published its decision in *Ross v. Citifinancial, Inc.*, 344 F.3d 458 (5th Cir. 2003). In *Ross*, the Fifth Circuit held that there was no arguably reasonable basis for predicting that the nondiverse defendants could be liable under Mississippi law, and that they were therefore fraudulently joined, where the (arguably common) defenses of the statute of limitations and the absence of a fiduciary duty between the defendant-insurance agents and the plaintiffs-insureds, barred the plaintiffs' claims against the non-diverse defendants. The *Ross* court did not mention the common defense rule set forth in *Smallwood*, perhaps indicating that *Smallwood* was limited to its facts.

On December 1, 2003, original panel of judges in *Smallwood* denied Illinois Central's motion for panel rehearing, holding that "[w]hen the only proffered justification for fraudulent joinder is that there is no reasonable basis for predicting recovery against the local defendant and that showing is a fortiori applicable to all defendants, rather than to the local defendants alone, the requisite showing has not been made." *Smallwood*, 352 F.3d at 222.

However, on December 19, 2003, the Fifth Circuit granted Illinois Central's petition for rehearing en banc. Under Fifth Circuit Local Rule 41.3, "the granting of a rehearing en banc vacates the panel opinion and judgment of the Court and stays the mandate." Thus, until the Fifth Circuit issues an opinion on en banc rehearing, *Smallwood* is no longer the law in the Fifth Circuit.

District Judge Mills in the Northern District of Mississippi and District Judge Barbour in the Southern District of Mississippi (who was the underlying judge in *Smallwood*) have both weighed in on their interpretations of *Smallwood*. Judge Mills interprets *Smallwood* as requiring the District Court, "in considering allegations of fraudulent joinder, [to] ignore any common defenses raised by defendants but [to] consider any non-common defenses which might serve to preclude recovery against non-diverse defendants." *Walker v. City Finance Co.*, 4:01CV189-M-B, 2004 WL 943913, at \*2 (N.D. Miss. Mar. 29, 2004). Judge Mills's

approach appears to go too far, though, because if *Smallwood* stands, it should only apply to common defenses that are *dispositive* of all claims against all defendants. There could be a situation where a common defense will dispose of all the claims against the non-resident defendants, and dispose of some, but not all, of the claims against the resident defendants. A removing defendant should still be able to establish fraudulent joinder under those circumstances.

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*It is clear that the Fifth Circuit's en banc resolution of Smallwood could significantly affect the ability of defendants to succeed in future fraudulent joinder removals.*

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Judge Barbour's take on *Smallwood* is considerably more restrictive than Judge Mills's: Judge Barbour has concluded that *Smallwood* only applies to common federal defenses. *Brumfited v. Pioneer Credit Co.*, 291 F. Supp. 2d 432 (S.D. Miss. 2003); *Smith v. Union National Life Ins. Co.*, 286 F. Supp. 2d 782 (S.D. Miss. 2003). It is clear that the Fifth Circuit's en banc resolution of *Smallwood* could significantly affect the ability of defendants to succeed in future fraudulent joinder removals.

### **B. Fraudulent Misjoinder**

Another basis for removal of cases in which the Complaint does not reveal complete diversity between the plaintiffs and defendants is the fraudulent misjoinder theory. A removing defendant asserting this basis for diversity jurisdiction essentially alleges that the claims against the defendants were not properly joined under Mississippi Rule 20 and are due to be severed from one another. The resulting severed claims between completely diverse parties, the theory goes, are removable. *Smith v. Nationwide Mutual Insurance Co.*, 286 F. Supp. 2d 777 (S.D. Miss. 2003); *Duffin v. Honeywell International, Inc.*, No. Civ. A. 4:03CV389, 2004 WL 765961 (N.D.

Miss. 2004). This tool may be employed more frequently by defendants with the recent Mississippi Supreme Court decisions restricting Rule 20 joinder and the recent amendments to that Rule.

### **C. Amount in Controversy**

In a case seeking an equitable accounting, the Fifth Circuit held that the cost of producing the requested accounting could not be considered towards meeting the \$75,000.00 amount in controversy requirement. *Garcia v. Koch Oil Co. of Tex., Inc.*, 351 F.3d 636 (5th Cir. 2003). The amount in controversy is measured by the value of the object of the litigation, and the costs associated with performing the accounting were collateral to the true object of the litigation: reimbursement to the plaintiffs in an amount determined by the accounting.

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### D. Dismissal of Non-diverse Defendant in State Court

A case becomes removable on the basis of diversity jurisdiction if the plaintiff voluntarily dismisses the non-diverse defendant. If the state court dismisses the claims against the nondiverse defendant, however, the case does not become removable, and there is no fraudulent joinder exception to this rule. *Cleveland v. Central United Life Insurance Co.*, No. Civ. A. 3:03CV1326BN, 2004 WL 826027 (S.D. Miss. Apr. 13, 2004).

### VI. FEDERAL QUESTION JURISDICTION REMOVAL ISSUES

Generally, a case is removable under federal question jurisdiction only if the Complaint affirmatively alleges a federal claim. *Beneficial National Bank v. Anderson*, 123 S. Ct. 2058 (2003). Two exceptions apply: complete preemption and substantial federal question.

Complete preemption applies to make all state law claims seeking relief for violation of contracts between an employer and a labor organization removable as federal LMRA claims; it applies to make all claims related to an employer-provided benefit plan regulated by ERISA removable as federal ERISA claims; and it applies to make all claims for usury

removable as federal claims under the National Bank Act. *Beneficial National Bank*, 123 S. Ct. 2058.

The Fifth Circuit has developed another way that a Complaint alleging only state law claims may be removed under federal question jurisdiction: the Complaint raises a substantial question of federal law. To remove a case on this basis, a threepart test must be met: (1) a federal right is an essential element of the state claim, (2) interpretation of the federal right is necessary to resolve the case, and (3) the question of federal law is substantial. *Moncure v. Olympus American, Inc.*, 290 F. Supp. 2d 726 (S.D. Miss. 2003). In June 2003, Judge Barbour denied a plaintiffs motion to remand on the basis that a substantial federal question existed. *Winkler v. State Farm Fire & Cas. Co.*, 266 F. Supp. 2d 509 (S.D. Miss. 2003). The Complaint in that case alleged only state law claims, but the Court concluded that because resolution of Plaintiff's claims for breach of her Standard Flood Insurance Policy involved the interpretation of the policy, and because Standard Flood Insurance Policies are interpreted according to federal common law, a substantial federal question existed.

### VII. BANKRUPTCY REMOVAL ISSUES

In *Reed v. Mississippi Farm Bureau Mutual Insurance Co.*, 299 B.R. 804 (S.D. Miss. 2003), the court discussed the contours of mandatory abstention under 28 U.S.C. § 1334(c)(2). Mandatory abstention applies to non-core bankruptcy proceedings, which are those proceedings that are merely related to bankruptcy. Courts in the Fifth Circuit apply a five-part test prior to applying mandatory abstention; all five of the requirements must be met: (1) a motion has been timely filed requesting abstention; (2) the cause of action is premised on state law; (3) the proceeding is non-core or merely related to the bankruptcy case; (4) the proceeding could not otherwise have been commenced in federal court absent the existence of the bankruptcy case; and (5) the proceeding has already been commenced and can be timely adjudicated in a state court forum. The Court held that abstention was appropriate, even though under 28 U.S.C. § 1334(e), the Court had exclusive jurisdiction over the property of the bankruptcy estate.

The Court held, alternatively, that discretionary abstention, under § 1334(c)(1) would be appropriate, even if mandatory abstention did not apply, notwithstanding the apparent conflict between that section and § 1334(e). ■

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