

The Latest Remand and Removal Issues in Fifth Circuit

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This outline covers key Fifth Circuit cases, as well as two notable Supreme Court opinions, from the past three years.

How can removal be based on involvement of federal official?

- *Zeringue v. Crane Co.*, 846 F.3d 785 (5th Cir. 2017): Scope of the “casual nexus” requirement in § 1442 is broad; § 1442 permits removal when a federal defense is raised in the officer’s removal petition; the “acting under” requirement of § 1442 does not require that the government directly oversaw the specific acts alleged.
- *Crutchfield v. Sewerage and Water Bd. of New Orleans*, 829 F.3d 370 (5th Cir. 2016): To establish federal jurisdiction under the federal officer removal statute, 28 U.S.C. § 1442, it is sufficient that the removing party “has a colorable argument that it is entitled to the government contractor defense.”
- *Decatur Hospital Auth. v. Aetna Health, Inc.*, 854 F.3d 292 (5th Cir. 2017): Though orders remanding a case are generally not reviewable, there is an exception under 28 U.S.C. § 1447(d) for remand orders involving the federal officer removal statute, 28 U.S.C. § 1442.

When is federal preemption a basis for removal?

- *Spear Marketing, Inc. v. BanskorpSouth Bank*, 791 F.3d 586 (5th Cir. 2015):
 - Usually preemption is a defense and not a basis for removal; however, when “the pre-emptive force of a [federal] statute is so ‘extraordinary’ that it converts an ordinary state-law complaint into one stating a federal claim for purposes of the well-plead complaint rule,” removal is proper.”
 - State law claims based on ideas fixed in tangible media are preempted by the Copyright Act.
 - Jurisdictional facts are determined *at the time of removal*; consequently, post-removal events, such as amending a complaint to drop federal claims, do not affect jurisdiction if jurisdiction was properly established at the time of removal.

Does a “sue-and-be-sued” clause create federal removal jurisdiction?

- *Lightfoot v. Cendant Mortg. Co.*, 137 S.Ct. 553 (2017): A sue-and-be-sued clause does not grant federal courts subject-matter jurisdiction when it contains qualifying language, such as “any court of competent jurisdiction.” Fannie Mae charter grants it authority “to sue and to be sued, and to complain and to defend, *in any court of competent jurisdiction*, State or Federal.” Because the Supreme Court understood the phrase “in any court of competent jurisdiction” as a reference to a court with an existing source of jurisdiction, it

held that the Fannie Mae clause did not grant jurisdiction. In contrast, the language of the Red Cross charter, which the Court has held grants federal jurisdiction, states that it can “sue and be sued *in courts of law and equity*, State or Federal, within the jurisdiction of the United States.”

Can one waive removal rights by contract?

- *Grand View PV Solar Two, LLC v. Helix Electric, Inc.*, 847 F.3d 255 (5th Cir. 2017): A forum selection clause may prevent removal if it amounts to a “clear and unequivocal waiver of removal rights.” A party to a contract may waive its right to remove by “explicitly stating that it is doing so, by allowing the other party the right to choose venue, or by establishing an exclusive venue within the contract.”

Does a well-pleaded complaint matter in determining improper joinder for diversity?

- *International Energy Ventures Mgmt. v. United Energy Group, Ltd.*, 818 F.3d 193 (5th Cir. 2016): Federal well-plead complaint rule from *Twombly* is a necessary part of the court’s analysis when deciding improper joinder.

What evidence of amount in controversy is required in Notice of Removal?

- *Dart Cherokee Basin Operating Co. v. Owens*, 135 S.Ct. 547 (2014): 28 U.S.C. § 1146(a) only requires that Notice of Removal contain “a short and plain statement of the grounds of removal.” It does not require a defendant to provide evidentiary support for the amount in the Notice.

When does a controversy fall under the “truly localized” exception to CAFA?

- *Arbuckle Mountain Ranch of Texas v. Chesapeake Energy Corp.*, 810 F.3d 335 (5th Cir. 2016), *remanded to* 2017 WL 4155255 (N.D. Tex. Sept. 18, 2017): Fifth Circuit follows approach of other circuits that only a narrow category of “truly localized” controversies are excluded from CAFA. “Truly localized” refers to controversies that “uniquely affect[] a particular locality to the exclusion of all others.” Fifth Circuit held that the controversy did not fall under the exception because *Arbuckle* did not present sufficient evidence that the proposed class consisted of over two-thirds Texas citizens. The dissenting judge believed the majority created a new rule that “if the applicability of an exception is not shown with reasonable certainty, federal jurisdiction should be retained.”

If federal claims are dismissed, are state law claims remanded?

- *Watson v. City of Allen, et al.*, 821 F.3d 634 (5th Cir. 2016): Comity favors remand when the federal claims are dismissed, and only state law claims that are a matter of significant state importance are left. The federal claims in this case were dismissed following a 12(b)(1) motion to dismiss for lack of standing. The district court, however, did not remand the remaining state claims because it held the motion to remand was “untimely” and the exercise of supplemental jurisdiction was warranted. The Fifth Circuit disagreed and held that the exercise of jurisdiction over the remaining state law claims was an abuse of discretion because the claims “substantially predominated” over the federal claims and because they concerned matters of significant state importance.