REMOVAL, REMAND AND FEDERAL JURISDICTION:

How to Get (and Keep) Your Case in the Forum of Your Choice

Litigation and Trial Tactics

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BELLUM INTER FORA, Introduction and Scope of Paper

The "war between the courts" is not so much a war of two courts competing for jurisdiction over a case as it is a war between attorneys that takes place between two courts – federal and state – when a case is removed from state to federal court. Indeed, often neither the federal court, to which a case is removed, nor the state court, from which a case is removed, has much interest in the war between the attorneys, who – for strategic reasons – are trying to place the case in one court or the other.

Many reasons exist for this war between the attorneys – specifically, a war between plaintiffs' attorneys who – historically, at least[1] – have wanted state court and defendants' attorneys who historically have wanted federal court. Whether these reasons really have merit or, instead, arise from attorneys' mis-perceptions and prejudices against certain courts this Paper does not decide. But the primary reasons[2] for the war between the courts are the following:

1. Federal courts generally require unanimous verdicts, whereas the state courts typically do not require unanimous verdicts.

2. State judges, as elected officials who are more politically sensitive than federal judges, may rule more favorably to plaintiffs than federal judges, and they may treat certain plaintiff's counsel more favorably throughout the litigation.

3. State judges, who generally lack law clerks and significant time to conduct their own research, may be less likely to grant summary judgment against plaintiffs or to make rulings that limit plaintiffs' damages.

4. State judges typically permit liberal jury voir dires, which can allow skilled plaintiffs' attorneys to persuade, early on, potential jury members of their case; federal judges typically permit limited voir dires or themselves conduct the voir dires.

5. Jury pools for federal courts are larger in geographic scope and, therefore, potentially less local and hostile to certain defendants or less friendly to certain plaintiffs or their counsel.

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[1] The late 1990s and 2000s may somewhat have changed "historical" trial-court preferences. Because of tort-reform influenced juries, conservative trial judges, and a staunchly conservative supreme court, many Texas plaintiff's attorneys are opting for federal court – if they can secure initial jurisdiction there – or, at least, are willing to accept removal jurisdiction in federal court. Nonetheless, historically in Texas, and *currently* in Louisiana and Mississippi, plaintiffs' attorneys have preferred state courts.

[2] These reasons relate to removals of run-of-the-mill civil cases and not necessarily to removals of federal-officer cases and federal-agency cases (*see* 28 U.S.C. § 1442), armed-forces cases (*see* 28 U.S.C. § 1442a), civil rights cases (*see* 28 U.S.C. § 1443), and bankruptcy-related removals (*see* 28 U.S.C. § 1452).

6. Disrupting a plaintiff's selected forum – that is, depriving a plaintiff of a particular state court that he and his counsel wanted – can remove a plaintiff and his counsel from their comfort zone and force them to learn the unfamiliar ways of a federal court.

7. Cases subject to a Multidistrict Litigation ("MDL") court are transferred significant distances away from plaintiffs and their counsel – to an MDL court where they wait in line with thousands of other transferred cases, all seeking some kind of consideration from the MDL court.

8. Certain federal courts get to trial more slowly than certain state courts.

9. Federal judges may understand, and may rule more favorably to defendants on, certain federal-law defenses, defenses having some federal-law aspect, or arbitration clauses.

The foregoing reasons cause attorneys to fight frequently over removed cases. In Section I, this Paper focuses primarily on diversity-based removals, emphasizing Fifth Circuit law.[3] Also, in Sections II and III, it outlines various issues that can arise in federal-question removals and the key procedural issues affecting all removals.

I.
ISSUES IN DIVERSITY REMOVALS

A. *B, Inc.* and the Fifth Circuit's Baseline Standards for Fraudulent Joinder[4]

The Fifth Circuit has developed rigorous standards for determining the propriety of removals based on fraudulent joinder of in-state or non-diverse defendants; these standards tend to promote remanding cases to state courts. The Circuit's most seminal case on fraudulent joinder continues to be *B., Inc. v. Miller Brewing Co.*, 663 F.2d 545 (5th Cir. 1981), a dated but thoroughly wrought and lively opinion by Judge Irving Goldberg that anticipates most fraudulent-joinder issues and generally restricts removal jurisdiction.

Under *B, Inc.* a removing defendant bears heavy burdens of proof and persuasion to establish a federal court's removal jurisdiction. *B., Inc.* articulates this burden of proof and persuasion as follows:

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[3] Arguably the Fifth Circuit outdoes all other Circuits in providing rich case law on removal-remand issues, as for many years attorneys have fought vigorously to keep cases in – or away from – certain "plaintiff friendly" state courts in Texas, Louisiana and Mississippi. Moreover, as this Paper is presented in Texas, most practitioners considering it are likely to grapple with Fifth Circuit precedents in their removal-remand battles.

[4] Judge Patrick Higginbotham, writing for an en banc court in *Smallwood v. Illinois Central R.R.*, 385 F.3d 568 (5th Cir. 2004), has urged the term "improper joinder" instead of "fraudulent joinder." *Id.* at 571 n.1. It is unclear when or whether practitioners and federal courts within the Fifth Circuit will adopt "improper joinder" in place of "fraudulent joinder," especially given the substantial prior Fifth Circuit case law using the term "fraudulent joinder," other Circuits' regular usage of that term, the Supreme Court's usage (albeit an old usage) of that term, and authoritative treatises' usage of that term. So, for the time being, this Paper will continue using the term "fraudulent joinder."

- "[W]here there have been allegations of 'fraudulent joinder,' it is clear that the burden is upon the removing party to prove the alleged 'fraud.'" *Id.* at 549 (citations omitted).

- "The burden of persuasion placed upon those who cry 'fraudulent joinder' *is indeed a heavy one*." *Id.* (emphasis added).

- "In order to establish that an in-state defendant has been fraudulently joined, the removing party must show either [1] that there is *no possibility* that the plaintiff would be able to establish a cause of action against the in-state [or non-diverse] defendant in state court; or [2] that there has been *outright fraud* in the plaintiff's pleadings of jurisdictional facts." *Id.* (emphasis added, citations & footnote omitted).

- "The district court must then evaluate all of the factual allegations *in the light most favorable to the plaintiff*, resolving all contested issues of substantive fact *in favor of the plaintiff*. Moreover, the district court *must resolve any uncertainties as to the current state of controlling substantive law in favor of the plaintiff*." *Id.* (emphasis added, & citations & footnote omitted).

The foregoing standards on the burdens of proof and persuasion are routinely employed by federal courts within the Fifth Circuit.[5] However, without overruling *B., Inc.* or expressly criticizing it, the Fifth Circuit has softened some of *B., Inc.*'s most damning language against fraudulent-joinder removals – such as the third bullet point above – by holding that "[f]raudulent joinder can be established in two ways: (1) actual fraud in the pleading of jurisdictional facts, or (2) inability of the plaintiff to establish a cause of action against the non-diverse party in state court." *Travis v. Irby*, 326 F.3d 644, 647 (5th Cir. 2003) (*citing Griggs v. State Farm Lloyds*, 181 F.3d 694, 698 (5th Cir. 1999)).

Removing defendants seldom allege "outright fraud" or "actual fraud" in plaintiffs' pleadings of jurisdictional facts, so most fraudulent joinder battles draw lines around whether "there is *no possibility* that the plaintiff would be able to establish a cause of action against the in-state defendant in state court" or, put differently, there is an "inability of the plaintiff to establish a cause of action against the non-diverse party in state court." *Compare B., Inc.*, 663 F.2d at 549, *with Travis*, 326 F.3d at 647. Consequently, this inquiry has received the Fifth Circuit's greatest attention.[6] Recently, for instance, the

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[5] *E.g.*, *Jernigan v. Ashland Oil, Inc.*, 989 F.2D 812, 815 (5th Cir. 1993) ("If the removing party alleges jurisdiction on the basis that non-diverse parties have been fraudulently joined, then the removing party must prove the existence of fraud."); *Dodson v. Spiliada Maritime Corp.*, 951 F.2d 40, 42 (5th Cir. 1992) ("Where charges of fraudulent joinder are used to establish this jurisdiction, the removing party has the burden of proving the claimed fraud."); *id.* ("In evaluating fraudulent joinder claims, we must initially resolve all disputed questions of fact and all ambiguities in the controlling state law in favor of the non-removing party."); *Ren-Dan Farms, Inc. v. Monsanto Co.*, 952 F. Supp. 370, 374-75 (W.D. La. 1997) ("The removing party bears a 'heavy' burden of persuasion to prove fraudulent joinder. All facts set forth by the plaintiffs are assumed to be true and all uncertainties as to state substantive law are resolved against the defendants." (citations omitted)); *Bolivar v. R&H Oil & Gas Co.*, 789 F. Supp. 1374, 1376 (S.D. Miss. 1991) ("The defendants bear the 'heavy' burden of demonstrating fraudulent joinder." (citations omitted)).

[6] *See generally Travis*, 326 F.3d at 647-48 (discussing the case-law history and nuances of the "possibility" inquiry as to a plaintiff's claims against a non-diverse or in-state defendant); *See Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 312 (5th Cir. 2002) ("If there is arguably a *reasonable basis* for predicting that the state law

Fifth Circuit explained that plaintiffs have "no possibility" of recovering from in-state or non-diverse defendants when the district court lacks a "reasonable basis" to predict that the plaintiff "might be able to recover against an in-state [or non-diverse] defendant":

> [T]he test for fraudulent joinder is whether the defendant has demonstrated that there is no possibility of recovery by the plaintiff against an in-state defendant, which stated differently means that there is no reasonable basis for the district court to predict that the plaintiff might be able to recover against an in-state defendant. To reduce possible confusion, we adopt this phrasing of the required proof and reject all others, whether the others appear to describe the same standard or not.

Smallwood v. Illinois Central R.R., 385 F.3d 568, 573 (5th Cir. 2004).[7]

1. Personal-to-the-Defendant Defenses Do Not Constitute "Fraudulent Joinder"

A removing defendant cannot show that a plaintiff has "no possibility" of recovering from a co-defendant (that is, an allegedly fraudulently joined defendant) merely by arguing a defense that is "personal to th[at] defendant" and that can be waived by that defendant, such as a challenge to personal jurisdiction or to defective service. *See, e.g.*, *Seguros Comercial Am. S.A. de C.V. v. American President Lines, Ltd.*, 934 F. Supp. 243, 245 (S.D. Tex. 1996) ("[Removing defendant] therefore cannot establish that [co-defendant] was fraudulently joined based upon a defense [*i.e.*, a challenge to personal jurisdiction] that is available only to [that co-defendant]."). The co-defendant *in state court* must argue such defense – and he may win or lose it – but the defense does not form a basis for the removing defendant to claim fraudulent joinder.

2. Post-Removal Joinders Do Not Constitute "Fraudulent Joinder"

The fraudulent joinder doctrine does not apply to a joinder of a defendant whose presence defeats diversity jurisdiction *after* removal has taken place: "The fraudulent joinder doctrine does not apply to joinders that occur *after* an action is removed. [The Fifth Circuit's] case law reflects that the doctrine has permitted courts to ignore (for jurisdictional purposes) only those non-diverse parties *on the record in state court at the time of removal.*" *Cobb v. Delta Exps., Inc.*, 186 F.3d 675, 677 (5th Cir. 1999) (footnote omitted).[8]

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might impose liability on the facts involved, then there is no fraudulent joinder. This *possibility, however, must be reasonable,* not merely theoretical." (emphasis added & citation omitted)).

[7] *See generally Travis*, 326 F.3d at 647-48 ("Although these tests appear dissimilar, 'absolutely no possibility' vs. 'reasonable basis,' we must assume that they are meant to be equivalent because each is presented as a restatement of the other.").

[8] *See also Cobb*, 186 F.2d at 678 ("The doctrine simply does not apply to defendants who are joined after an action is removed, for in such cases, the defendants have a chance to argue against joinder before the court grants leave to amend." (footnote omitted)).

Salazar v. Allstate Texas Lloyd's, Inc., 455 F.3d 571 (5th Cir. 2006), involved a highly unorthodox scenario in which a non-diverse defendant attempted to remove a case, replace itself with a diverse defendant (via Federal Rules of Civil Procedure 17(a), 19, and 21), and then show "fraudulent joinder." The *Salazar* court framed the issue as follows:

> The central question is whether a district court can appropriately assert removal jurisdiction by dismissing a nondiverse in-state defendant and replacing it with a diverse foreign defendant, where the nondiverse in-state defendant was the only named defendant in the action when the suit was removed.

Id. at 573. The *Salazar* court distinguished the case from the typical fraudulent-joinder case: "because there has never been more than one defendant in this suit, this is not a typical fraudulent joinder case." *Id.* at 574. Moreover, it held that "under the rubric of fraudulent joinder, . . . in a single-defendant case, a court [cannot] first join a diverse foreign defendant and then perfect jurisdiction by dismissing the problematic nondiverse/in-state defendant." *Id.* Accordingly, it remanded the original case to state court. *Cf. Lincoln Prop. Co. v. Roche*, 546 U.S. 81, 88 (2005) (addressing "whether an entity not named or joined as a defendant can nonetheless be deemed a real party in interest [pursuant to Federal Rules 17(a) and 19] whose presence would destroy diversity" and holding that "some other entity affiliated with [a named diverse defendant] should [not] have been joined as a codefendant" and "it was [not] [the named diverse defendant's] obligation to name that entity and show that its joinder would not destroy diversity"); *Freeport-McMoRan, Inc. v. K N Energy, Inc*., 498 U.S. 426, 428 (1991) (per curiam) (holding – with overly broad language[9] – that "[d]iversity jurisdiction, once established, is not defeated by the addition of a nondiverse party to the action" when a diverse plaintiff, under Rule of Civil Procedure 25, had substituted for itself a plaintiff that was non-diverse to the defendant).

3. A 12(b)(6) Analysis, or Summary Judgment-Type Analysis, Resolves "Fraudulent Joinder"

B., Inc. prescribes summary judgment-type proof for determining fraudulent joinder issues:

> In support of their removal petition, the defendants may submit affidavits and deposition transcripts; and in support of their motion for remand, the plaintiff may submit affidavits and deposition transcripts along with the factual allegations contained in the verified complaint. The district court must then evaluate all of the factual allegations in the light most favorable to the plaintiff, resolving all contested issues of substantive fact in favor of the plaintiff.

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[9] The *Freeport-McMoRan* Court wrote *too broadly* that "[d]iversity jurisdiction, once established, is not defeated by the addition of a nondiverse party to the action." This statement, applied literally, would completely undo Section 1447(e), 28 U.S.C., and its related case law, which mandate the post-removal joinders of non-diverse "additional defendants" destroy removal jurisdiction based on complete diversity. The Fifth Circuit has correctly limited this statement from *Freeport-McMoRan* to the facts of that case – meaning that joining non-diverse defendants by *substituting them in* for diverse defendants (under Rule of Civil Procedure 25) does not destroy diversity jurisdiction or diversity removal jurisdiction. *See Cobb v. Delta Exports, Inc.*, 186 F.3d 675, 680 (5th Cir. 1999) ("There are good reasons, however, to read this broad statement as *dictum* and to understand *Freeport-McMoRan* as limited to the context of an addition under Fed. R. Civ. P. 25.").