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# Five Battle Strategies for Capturing the Removal Flag



Choosing between state and federal court can be a critical battle for capturing the victory flag in civil litigation. The D-Day victory strategy depends on who wins the initial skirmish on removal and remand.

In light of very recent court decisions on and statutory changes to removal jurisdiction and procedure, there are five major battle--strategies for plaintiffs to keep the case in state court (i.e., by remand motions) and conversely for defendants successfully to have their removal strategies ensure federal court survival.

## I. Plant (or un-plant) the Federal Jurisdiction Flag

Advanced planning by plaintiffs can thwart removal. Plaintiffs' lawyers can pursue only alternative state law claims, eschew federal causes of action and be sure to name a non-diverse plaintiff or defendant to avoid the risk of diversity removal. Defendants, on the other hand, can tease out federal jurisdiction from uncertain state court complaints, by obtaining clarification to federal claims that are, in fact, being asserted. And, when facing a seeming absence of diversity, case law does allow the defendant to remove but only if it can show that there is no possible factual and legal basis for a claim against the non-diverse party. See [GranCare, LLC v. Thrower](#), 889 F.3d 543 (9th Cir. 2018).<sup>1</sup>

## II. The Complete Preemption Firebomb

Even if the state court complaint alleges only what appear to be state law claims, they may be in the unusual category of being completely preempted by federal law and replaced necessarily with a federal claim (e.g. ERISA, LMRA, Copyright, etc.). In such situations, the defendant can recharacterize the claims as necessarily federal and remove them to federal court. The plaintiff can do his or her best to find an independent basis for liability such as a licensing contract in a seeming copyright case or where a non-negotiable state law right (e.g. privacy) in a labor law case.

## III. The Local Defendant Booby Trap

Even if there is complete diversity of citizenship otherwise allowing removal, if the plaintiff is from out-of-state and one of the served defendants is local (i.e. from the forum state) ordinarily there is a statutory bar on removal [28 U.S.C. §1446\(b\)\(2\)](#).<sup>2</sup>

However, a brand-new case gives the battleplan to defendants for still capturing the removal flag. In [Encompass Ins. Co. v. Stone Mans. Rest.](#), 902 F.3d 147 (3d Cir. 2018)<sup>3</sup>, the Court held that if the local defendant removes before service (e.g. searches the filings online) then the statutory bar does not apply. While other district courts have disagreed, this new case certainly renders the removal in good faith.

Plaintiffs need not despair if they strategically file and serve simultaneously, thus preventing the local defendant from deploying this battle strategy. Plainly, if the local defendant has been served, removal is improper and the motion to remand for this statutory defect, if made within 30 days of removal, will result in a remand.

## IV. Timing the Removal Gambit is Where it's All At

It is a familiar rule that a defendant must remove within 30 days of service (or 30 days after the co-party is served). But we all know what happens: the defense client gets an extension and does not remove within the 30 days or a prior counsel or you simply missed it at the outset.

All is not lost. The law in virtually every circuit is that if the complaint has any genuine or not so genuine ambiguity about removability, you can seize upon that ambiguity, obtain formal information, say by way of an interrogatory or deposition response, and remove within 30 days of that clarification. See [Harris v. Bankers Life](#), 425 F.3d 689 (9th Cir. 2005)<sup>4</sup>.



For example, the state court complaint might not set forth any information about the amount of controversy, the citizenship of the parties, or even the legal basis for a generally described “due process” claim. In this situation, amount in controversy and prudent defendants will be file a notice of removal within 30 days of service and provide the jurisdictional facts.. However, if the time has passed, capturing the flag is not lost since the “seized ambiguity” strategy can be utilized. To prevent this counterattack, plaintiffs’ counsel should include, if allowed by state practice, the jurisdictional facts in the original complaint.

### V. The Changing Removal-Remand Battlefield

If there is a federal claim and the defendant timely removes the case to federal court, can the plaintiff dismiss the federal claim or upon diversity removal add a non-diverse party to effectuate a remand to state court? While a federal court can examine the jurisdictional bad motives of a plaintiff in making such changes, most courts will allow the amendment and order a remand.

Defense counsel in such situations will attempt to rely on the “snapshot” rule and correctly argue that federal jurisdiction once properly invoked can remain even if the original jurisdictional hook has been lost.

But be certain to get the time right. Removal takes place 30 days from the change in the case which might be revealed by a deposition transcript elucidating the federal nature of the claim, the jurisdictionally satisfying amount of controversy or even the citizenship of the party. See [Morgan v. Huntington Ingalls, 879 F.3d 602 \(5th Cir. 2018\)](#)<sup>5</sup>. However, as long as it is in good faith, if the change (e.g. plaintiff voluntarily dismisses or settles with the non-diverse party) takes place more than one year after commencement, diversity removal is allowed.

### Concluding Thoughts

The removal battle is all about capturing the flag of the court in which you want your clients’ case to be heard. Knowing the recent cases and statutory changes can be the difference for winning and losing this legal conflict.



### Authority you can trust, James M. Wagstaffe

Renowned author James M. Wagstaffe is a preeminent litigator, law professor and expert on pretrial federal civil procedure. He has authored and co-authored a number of publications, including *The Wagstaffe Group Practice Guide: Federal Civil Procedure Before Trial*, which includes embedded videos directly within the content on Lexis Advance. As one of the nation’s top authorities on federal civil procedure, Jim has been responsible for the development and delivery of federal law, and regularly educates federal judges and their respective clerk staffs. Jim also currently serves as the Chair of the Federal Judicial Center Foundation Board—a position appointed by the Chief Justice of the United States Supreme Court.

<sup>1</sup> *GranCare, LLC v. Thrower*, 889 F.3d 543 (9th Cir. 2018).

<sup>2</sup> 28 U.S.C. §1446(b)(2)

<sup>3</sup> *Encompass Ins. Co. v. Stone Mans. Rest.*, 902 F.3d 147 (3d Cir. 2018)

<sup>4</sup> *Harris v. Bankers Life*, 425 F.3d 689 (9th Cir. 2005).

<sup>5</sup> *Morgan v. Huntington Ingalls*, 879 F.3d 602 (5th Cir. 2018).