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Removal and Remand Magic: Seven New Tricks to Make Your Case Disappear From Your Opponent's Choice of Forum



When removing an action to federal court (or in opposition seeking a remand), there is a certain “magic” to mastering this remarkable change of judicial stagecraft. Since, as they say, magic can spell the difference between mediocrity and accomplishment, let me share with you seven magic tricks based on recent case law developments to achieve good fortune in your removal and remand practice.

Before we begin with the show, let's understand the appearing and disappearing nature of federal removal jurisdiction. The plaintiff makes the case appear initially in state court, presumably choosing that sovereignty as best suited for the client. In response, and generally only if the action as filed could have been brought there originally, the defendant can unilaterally remove the action to federal court. And then if the removal was jurisdictionally or procedurally improper, the plaintiff can move to remand causing the action to disappear from the federal stage teleported back to its original forum.

So, what magic wands can you wave per the very recent case law to insure that your client's case lands in the desired state or federal court? There are seven new and improved tricks to work your removal and remand magic.

1. Plaintiffs Can Prevent Removal By Sprinkling State Court Fairy Dust in Their Forum Selection Clauses

In recent years, the U.S. Supreme Court has strongly affirmed the right of parties contractually to plan the shape and location of anticipated litigation.¹ Specifically, the parties may contractually waive the right to remove a

case by doing so in a valid forum selection clause limiting venue to state court.

For example, if the parties enter into a contract with a clause providing that all claims must be litigated exclusively in a described state court, this will constitute a waiver of the right to remove.² By the same token, if the forum selection clause designates a county in which there is no federal courthouse, this too constitutes a waiver of the right to remove.³

Significantly, if a served co-defendant (whose joinder ordinarily is required to remove) signed such a contractual removal waiver, it will also waive it for all removing parties.⁴ The tips for plaintiffs seeking to thwart removal are (1) first name and serve the defendant(s) who are parties to the contractual waiver, and (2) make any motion to remand within 30 days of removal as this waiver itself can be waived. And for a removing defendant who was not a party to the waiver agreement, remove before service on the co-defendant.

2. Plaintiffs Can Keep the State Court Rabbit in the Hat: Avoid Pleading Federal Jurisdiction in Their State Court Complaints

The magic trick for plaintiffs seeking to avoid removal of their case to federal court is to plead only state claims (to avoid federal question removal) and sue at least one party from the same state (to avoid diversity removal).

When it comes to keeping the state court complaint

jurisdictionally pristine, it is important to keep the defendant from successfully trying to make it seem like there nevertheless is a federal rabbit in the hat. With rare exceptions, even if there is a federal issue in the case, if the complaint contains only state law claims, removal on federal question grounds is not available.⁵

By the same token, plaintiffs can keep the diversity jurisdiction rabbit in the hat by being sure to include a properly named party who is nondiverse. This includes a nondiverse member of any non-corporate entity.⁶



3. Putative Plaintiffs Can Use the Magic Sauce of *Home Depot v. Jackson* By Filing Their Affirmative CAFA or Federal Claims as Third-Party Complaints

The Supreme Court in *Home Depot v. Jackson*⁷ has just confirmed that the right to remove actions to federal court is limited to defendants. In particular, the High Court ruled that even if there is a right to remove⁸, if the removing party was sued in a counterclaim or a third-party complaint, removal is not allowed.⁹

Thus, if a party wants to make the removal risk disappear, the brand new trick (called a “tactic” by the *Home Depot* dissenters) is to wait until one is sued (e.g., on a one-off collection case) and then include the otherwise removable CAFA or federal claim as a counterclaim or third party complaint. Tactical magic.

4. Defendants Can Use Procedural Sleights of Hand to Remove on Diversity Grounds

Plaintiffs often draft their complaints to include nondiverse co-defendants or include a forum-based opponent to thwart efforts to remove the action to federal court. In response, defendants desiring to remove can use two sleight of hand magic tricks to change the focus: (i) declare that the nondiverse parties are sham and can be ignored, or (ii) avoid the bar on local defendants by removing before service of process.

The first effort is to argue that the parties otherwise defeating complete diversity are sham parties who have been joined improperly because there is no basis for recovery. The sham joinder rule allows defendants to “press the delete key” on the nondiverse party only if there is no possible basis for recovery as ascertained on a summary basis.¹⁰

In these extraordinary situations, the sham party’s

citizenship is ignored, and the remaining defendant(s) “magically” can then remove the case to federal court. The examples of sham joinder, while fairly rare, find support in the recent case law.¹¹

The second sleight of hand removal tactic serves to divert attention away from the general bar on diversity removal by local defendants. Even if there is complete diversity, the removal statute provides that if one of the defendants is from the forum state (a so-called “local” defendant), then removal cannot take place.¹² The rationale for this prohibition is that even if there is complete diversity (e.g., out-of-state plaintiffs), a local defendant does not “need” removal to avoid local prejudice. *Id.*

However, the sleight of hand flows from the statutory language limiting this removal prohibition to *served* local defendants. Therefore, courts have recently authorized what is known as “snap removal”, i.e., removal by the local defendants *before* service.¹³ Thus the trick is for the local defendant to scan the filings through available litigation databases and voluntarily appear and file a notice of removal before being served.

5. Defendant’s Houdini Escape Act from Late Removal: Seize Upon Ambiguity in Complaint to Explain Delayed Removal

The normal rule is that a defendant must remove a case within 30 days of proper service.¹⁴ And if the service is proper, ordinarily removal is unavailable if not accomplished within that 30-day window.¹⁵

So, the Houdini escape act from this missed deadline is to seize upon a perceived ambiguity in the plaintiff’s complaint as to federal jurisdiction (e.g. complaint doesn’t identify parties’ citizenship, no amount in controversy stated, ambiguous reference to origin of claim), generate



a paper trail in the case (e.g., interrogatory response as to amount in controversy) and remove 30 days from receipt of that paper.¹⁶ There's no need to remove until receipt of deposition transcript. If the ambiguity is actual, the governing case law confirms that the defendant may wait to remove until receipt of the paper providing clarity.¹⁷

Importantly, this “seized upon the ambiguity” trick can be used even if the defendant subjectively knew or should have known of the basis for removal.¹⁸ The CAFA removal time is not triggered until defendant receives sufficient information from plaintiff.

6. Defendants Can Wave a “Magic Federal Wand” to Transform Seeming State Law Claims into Federal Removal Jurisdiction

Ordinarily, removal on federal question grounds is allowed only if the “well pleaded complaint” shows on its face that the action arises under federal law. However, there are several “exceptions” to this doctrine and removal can take place by defendants waving a magic federal wand to remove the action to their preferred forum. In four main circumstances, this happens when the state court claims are recharacterized as “federal” in defendant’s notice of removal.

First, there may be limited situations in which a case is removable even though only state law claims are stated because they necessarily raise a substantial and disputed federal question.¹⁹ Of course, such situations are rare and occur only when allowing removal would not disturb the federal-state balance approved by Congress.

Second, there are also limited areas where federal law completely preempts the artfully pled state law claims and replaces them with the necessary federal claim. This occurs primarily in the areas of LMRA, ERISA and copyright law.²⁰

Third, removal jurisdiction is allowed as to claims involving federally chartered corporations if they have a charter that provides that the entity may “sue and be sued” in federal court.²¹

Finally, the federal officer removal statute²² allows removal if the federal officer raises a colorable federal defense and establishes that the suit is for an act under color of office.²³ The statute also authorizes removal to federal court by persons acting under an officer or agency of the United States who are sued for acts “for or relating to any act under color of such office.” This also includes such persons raising colorable federal defenses. Thus, even private persons or corporate entities who acted under the direction of a federal officer or agency can remove actions to federal court having a causal nexus to their actions under color of federal office.²⁴

7. Plaintiff’s Post-Removal Fortune Telling Efforts to Change the Future Course of the Action

If the defendant indeed has properly removed the action, the plaintiff may still perform a sovereign-changing remand magic trick by seeking to amend the complaint post-removal. The fortune telling change-effort occurs when the plaintiff files an amendment (i) to dismiss the federal claim, or (ii) to add a nondiverse party—using either to alter the future course of the action with a

follow-up remand motion.

Section 1447(e) of Title 28 clearly authorizes the Court to consider a plaintiff's post-removal changes to the case and remand the case to state court if appropriate (e.g., by the destruction of diversity with the joinder of a nondiverse party). However, since removal jurisdiction is measured at the time of removal, the Court has discretion to deny the requested changes—especially if the plaintiff's motives are transparently unjustified.

If the plaintiffs succeed in achieving a remand, they may move for attorney's fees and costs if there was no objectively reasonable basis for the defendant to have

removed the action.²⁵ However, plaintiffs may well decide not to seek such relief as there often is no magic in sanctions because—unlike the remand decision itself—an award of sanctions is subject to an appeal. Such an appeal almost certainly will cost more than what is at stake.

Conclusion

It was Yeats who said that “the world is full of magic things patiently waiting for our senses to grow sharper.” When it comes to the magic of removal and remand, we can all use a little help in growing our senses by keeping up on the most recent case law and using helpful resources.



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.

¹ See *Atl. Marine Constr. Co., Inc. v. United States*, Dist. Court., 134 S.Ct. 568 (2013).

² See *Medtronic Sofamor Danek, Inc. v. Gannon*, 913 F.3d 704 (8th Cir. 2019)—forum selection clause providing claims must be litigated in Minnesota state court precludes removal; *FindWhere Holdings, Inc. v. Systems Environment Optimization, LLC*, 626 F.3d 752 (4th Cir. 2013)—same.

³ See *Bartels v. Saber Healthcare Group, LLC*, 880 F.3d 668 (4th Cir. 2018)—forum selection clause limiting venue to county in which there is no federal court precludes removal; *Grand View v. Helix Electric*, 847 F.3d 255 (5th Cir. 2017)—same; *City of Albany v. CH2M Hill, Inc.*, 2019 U.S. App. LEXIS 15802 (9th Cir. May 29, 2019)—same.

⁴ See *Autoridad de Energía Eléctrica v. Vital S.A.*, 859 F.3d 140 (1st Cir. 2017).

⁵ See, e.g., *Burrell v. Bayer Corp.*, 918 F.3d 372 (4th Cir. 2019)—state law claim for damages caused by sterilization product not properly removed simply because device regulated by FDA; *Estate of Cornell v. Bayview Loan Servicing*, 908 F.3d 1008 (6th Cir. 2018)—no removal of state law claim barring due on sale clauses simply because federal referenced in complaint. See also *Secretary of Veteran Affairs v. Smith*, 2018 U.S. Dist. LEXIS 48530—no removal of unlawful detainer action removed under federal Protecting At Foreclosure Act (12 U.S.C. sec. 5220); *Jackson County Bank v. Dusablon*, 915 F.3d 422 (7th Cir. 2019)—no federal jurisdiction in trade secret violation suit by bank against former employee even if implicating federal securities law; *Mays v. City of Flint*, 871 F.3d 437 (6th Cir. 2017)—no substantial federal question over tainted drinking water case simply because state officers working with EPA.

⁶ See, e.g., *Funding LLC v. Rapid Settlements*, 851 F.3d 530 (5th Cir. 2017)—any nondiverse member of LLC defeats removal; *Purchasing Power LLC v. Bluestem Brands, Inc.*, 851 F.3d 1218 (11th Cir. 2017)—same.

⁷ *Home Depot U.S.A., Inc. v. Jackson*, 139 S. Ct. 1743.

⁸ CAFA, 28 U.S.C. § 1453

⁹ See also *Renegade Swish, L.L.C. v. Wright*, 857 F.3d 692—no removal based on federal counterclaim.

¹⁰ See *Grancare, LLC v. Thrower*, 889 F.3d 543 (9th Cir. 2018)—nursing facility administrator could be personally liable and hence was not a sham defendant.

¹¹ See *Couzens v. Donahue*, 854 F.3d 508 (8th Cir. 2017)—defendant not properly sued in individual capacity; *Alviar v. Lillard*, 854 F.3d 286 (5th Cir. 2017)—no evidence of required willful intent for agent's individual liability for tortious interference; *Casias v. Wal-Mart Stores, Inc.*, 695 F.3d 428 (6th Cir. 2012)—joinder of nondiverse corporate manager a sham party in wrongful termination suit because he did not actively participate in termination decision; see also *Hoyt v. The Lane Construction Corp.*, F.3d 5th Cir. June 10, 2019)—removal permitted even if sham party “involutionarily” eliminated by summary judgment.

¹² 28 U.S.C. § 1446(b).

¹³ *Gibbons v. Bristol-Myers Squibb Co.*, 919 F.3d 699 (2d Cir. 2019); *Encompass Insur. Co. v. Stone Mansion Rest. Inc.*, 902 F.3d 147 (3d Cir. 2018); contra *Gentile v. Biogen Idec, Inc.*, 934 F.Supp. 313 (D. Mass. 2013).

¹⁴ 28 U.S.C. 1446.

¹⁵ Compare *Shakouri v. Davis*, F.3d (5th Cir. 2019)—defendant not properly served need not yet remove (although snap removal allowed); *Elliott v. American States Ins. Co.*, 883 F.3d 384 (4th Cir.

2018)—service on statutory agent does not start 30-day removal clock; *Anderson v. State Farm Mut. Auto Ins. Co.*, 917 F.3d 1126 (9th Cir. 2019)—same.

¹⁶ See *Morgan v. Huntington Ingalls*, 879 F.3d 602 (5th Cir. 2018).

¹⁷ See *Cutrone v. Mortgage Electronic Registration Systems, Inc.*, 749 F.3d 137 (2d Cir. 2014)—if plaintiff's pleading ambiguous, defendant may wait to remove until receipt of pleading or paper providing clarity; see also *Quinn v. Guerrero*, 863 F.3d 353 (5th Cir. 2017)—if state court complaint uncertain and does not clearly refer to a federal claim for relief removal need not take place until and if the claims are clarified by amendment or otherwise more certainly as arising under federal law.

¹⁸ *Harris v. Bankers Life & Cas. Co.*, 425 F.3d 689 (9th Cir. 2005); *Graiser v. Visionworks*, 819 F.3d 277 (6th Cir. 2016).

¹⁹ See *Hornish Joint Living Trust v. King County*, 899 F.3d 680 (9th Cir. 2018)—state claims to declare property rights in railway corridor raised substantial federal question under National Trails System Act due to federal interest to preserve shrinking rail trackage; *Bd. of Comm'rs v. Tenn. Gas Pipeline Co.*, 850 F.3d 714 (5th Cir. 2017)—suit by local flood protection authority alleging oil companies' activities damaged coastal lands raises substantial federal question since federal law provides standard of care; *Turbeville v. Financial Industry Regulatory Authority*, 874 F.3d 1268 (11th Cir. 2017)—removal jurisdiction existed over case against FINRA for defamation based on its federally regulated disclosure and investigation.

²⁰ See, e.g. LMRA Complete Preemption Removal-- *Cavallaro v. UMass Mem'l Healthcare, Inc.*, 678 F.3d 11st Cir. 2012)—claims for money had and received, unjust enrichment and conversion brought by union employee essentially were ones for unpaid wages, hinging on an interpretation of the CBA and hence removal proper on complete preemption doctrine; but see *Dent v. National Football League*, 902 F.3d 1109 (9th Cir. 2018)—state discrimination suit not completely preempted.

²¹ *Federal Home Loan Bank of Boston*, 821 F.3d 102 (1st Cir. 2016); also see *Lightfoot v. Cendant Mortgage Corp.*, 137 S.Ct. 553 (2017)—Fannie Mae's charter providing for jurisdiction in “any court of competent jurisdiction” does not provide for federal jurisdiction since it contemplates court in which there is an otherwise existing source of subject matter jurisdiction; see also.

²² 28 U.S.C. § 1442.

²³ *Jefferson County v. Acker*, 527 U.S. 423 (1999).

²⁴ See *Butler v. Coast Electric Power Ass'n*, F.3d (5th Cir. June 7, 2019)—federal officer removal allowed to cooperatives raising federal preemption defense arising from federal loan agreements; *Zeringue v. Crane Co.*, 846 F.3d 785 (5th Cir. 2017)—federal officer removal over asbestos claim against government contractor supplying product to Navy and lawfully assisting federal officer in performance of officer's duties; *Sawyer v. Foster Wheeler LLC*, 860 F.3d 249 (4th Cir. 2017)—same; *Hammer v. U.S. Dept. of Health and Human Services*, 905 F.3d 517 (7th Cir. 2019)—federal officer removal of “civil actions” includes motions for declaratory relief; but see *Mays v. City of Flint*, 871 F.3d 437 (6th Cir. 2017)—rejecting federal officer removal when state officials not acting under supervision of federal agency; *Fidelidad, Inc. v. Insitu, Inc.*, 904 F.3d 1095 (9th Cir. 2018)—no federal officer removal if not acting at federal officer's direction.

²⁵ *Martin v. Franklin Capital Corp.*, 546 U.S. 132 (2005).