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# Removal jurisdiction

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In the United States, **removal jurisdiction** refers to the right of a defendant to move a lawsuit filed in state court to the federal district court for the federal judicial district in which the state court sits. This is a general exception to the usual American rule giving the plaintiff the right to make the decision on the proper forum. Removal occurs when a defendant files a "notice of removal" in the state court where the lawsuit is presently filed and the federal court to which the defendant would like to remove the case.

Removal is governed by statute, 28 U.S.C. § 1441 (<http://www.law.cornell.edu/uscode/28/1441.html>) *et seq.* With rare exceptions, a case may be removed only if, at the time of the initial filing, the case could have been filed in federal court. Removal requires an independent ground for subject-matter jurisdiction such as diversity jurisdiction or federal question jurisdiction. A case must be removed to the federal district court that encompasses the state court where the action was initiated.

Once removed, the case can be transferred to, or consolidated in, another federal court, despite the plaintiff's original intended venue.

Ordinarily, defendants face no difficulty removing claims based on federal law if every defendant desires removal (the unanimity rule). Removal of claims under state law, even when a federal court indisputably has diversity jurisdiction, is more restricted. Except in certain class actions governed by the Class Action Fairness Act of 2005 (CAFA), a plaintiff can successfully object to removal in diversity actions if any defendant is a citizen of the forum state where the suit is taking place.<sup>[1]</sup>

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## Removal and complete diversity

When there are multiple defendants in a case, if even just one is a citizen of the state where the lawsuit was filed, a plaintiff can successfully object to removal if the only basis for federal jurisdiction is based on diversity of citizenship.<sup>[2]</sup> The reason for the rule is that diversity jurisdiction was created by the Founding Fathers of the United States in the Constitution to shield defendants from possible discrimination in a foreign forum (i.e., a state not their home state).<sup>[3]</sup> When an in-state defendant is being sued in a state court, it is expected that he will not be subject to unfair prejudice. With the exception of class actions under CAFA, every defendant must agree to remove; otherwise, the plaintiff or non-removing defendants can request remand for failure to satisfy the "rule of unanimity."

Notably, there is a circuit split (and several intracircuit splits) over whether every defendant *named* in the complaint must join in the removal notice, or whether the rule of unanimity applies only to those defendants who have been properly served as of the date of removal. The reason this is important is that sometimes a plaintiff may not be able to (or may deliberately choose not to) formally serve *all* defendants on the same day, or some defendants may become aware of the existence of the complaint before it is formally served (for example, if other already-served defendants send them a "courtesy copy"). In courts that adhere to the latter rule, removal jurisdiction may be proper as long as defendants can show that all defendants who were properly served by the date of removal joined in the removal notice, even though not all named defendants joined in the notice.<sup>[4]</sup>

A plaintiff may never remove its own case, even if the defendant files counterclaims alleging violations of federal law by the plaintiff. A plaintiff must seek a dismissal without prejudice and refile in federal court.

There exists a small set of cases (e.g., workers' compensation actions and actions under the Federal Employers Liability Act) that are barred from removal under all circumstances.

## Removal of criminal cases

A statute dating back to 1815, the latest analogue of which is codified at 28 U.S.C. § 1442 (<http://www.law.cornell.edu/uscode/28/1442.html>), allows removal of state criminal cases where the defendant is a federal officer who alleges that the act was committed in carrying out his federal duties. Under this, a number of state criminal cases have been removed to federal court and there summarily

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dismissed, thus preventing trial on the merits of whether the officer or agent was in fact carrying out his official duties, or acting outside of them. A famous example of such a removal was the case of *Idaho v. Lon Horiuchi*, alleged to have committed manslaughter of Vicki Weaver in the Ruby Ridge encounter.<sup>[5]</sup>

## Timeliness of removal

When defendants want to remove, they ordinarily must do so within 30 days of receiving the complaint, "through service or otherwise," under 28 U.S.C. § 1446 (<http://www.law.cornell.edu/uscode/28/1446.html>)(b). An exception applies if diversity jurisdiction, and thus removal jurisdiction, is lacking at the time of the initial pleading in state court, but becomes available within a year after initiation of the suit. In such case, defendants may remove under 28 U.S.C. §1446(b) (second paragraph). For example, a federal court would not initially have removal jurisdiction over claims under state law brought by a Texas citizen against another Texas citizen and a New York citizen. However, should the Texas defendant be dropped from the claim, the New York citizen can remove if one year has not passed since the initiation of the suit. Some courts permit equitable tolling of the one-year limitation of §1446(b) if the original complaint was an attempt in bad faith to evade federal jurisdiction.<sup>[6]</sup>

Defendants may remove state law claims for which a federal court has only supplemental jurisdiction, if they share a common nucleus of operative fact with claims based on federal law. The federal court has the discretion to accept the case as a whole or remand the issues of state law.

## Other issues

State courts do not adjudicate whether an action could be properly removed. Once a defendant has filed a notice to remove a case, jurisdiction is transferred automatically and *immediately* by operation of law from the state court to the federal court. Any objection to removal must be presented to the federal court. If a federal court finds that the notice of removal was in fact defective or that the federal court does not have jurisdiction, the case is remanded to the state court.

Previously, a defendant had to formally petition the federal court for the right to remove, and jurisdiction was not transferred until the federal court entered a formal order to that effect. The petition procedure was abolished around 1980 by Congress and replaced with the simple filing-of-notice removal procedure, although federal courts still see the occasional petition for removal or a motion for remand due to the lack of such a petition.

There is no reverse "removal." That is, if a case originates in a federal court, there is no ability for a defendant to remove a case from federal court into state court. If the federal court lacks jurisdiction, the case is dismissed. Only cases that originate in a state court and are improperly removed to a federal court may be sent back to the state court where they started.

A defendant can waive the right to remove by contract, although courts take different positions about what language is necessary to create a waiver.<sup>[7]</sup>

Remand orders are not generally appealable, but may be appealed in the case of removals brought under the Class Action Fairness Act of 2005 or where the Federal Deposit Insurance Corporation appeals a remand order under 12 U.S.C. § 1819(b)(2)(C). An alleged waiver of removal rights is also appealable, since the issue is not jurisdiction but the legal effect of the defendant's actions and agreements.

## References

- 28 U.S.C. §§1441(b), 1453.
- Caterpillar, Inc. v. Lewis*, 519 U.S. 61 (<https://supreme.justia.com/cases/federal/us/519/61/>) (1996).
- Federalist No. 80
- Destfino v. Reiswig*, 630 F.3d 952 (9th Cir. 2011).
- Samuel S. Wilson, Criminal Power ([http://www.ca6.uscourts.gov/lib\\_hist/cases/criminal.html](http://www.ca6.uscourts.gov/lib_hist/cases/criminal.html)) , History of the Sixth Circuit
- Tedford v. Warner-Lambert Co.*, 327 F.3d 423 (5th Cir. 2003)
- Coale, Visosky & Cochrane, *Contractual Waiver of the Right to Remove to Federal Court* (<http://600camp.com/wp-content/uploads/2012/01/Right-to-Remove-Article.pdf>), 29 Rev. Litig. 327 (2010).

## External links

- 28 U.S.C § 1441 - Actions removable generally ([http://straylight.law.cornell.edu/uscode/html/uscode28/usc\\_sec\\_28\\_00001441----000-.html](http://straylight.law.cornell.edu/uscode/html/uscode28/usc_sec_28_00001441----000-.html))

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