



Eighth Circuit En Banc Upholds Diversity Jurisdiction Despite Improper Removal

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On December 30, 2020, the United States Court of Appeals for the Eighth Circuit reversed its long-standing precedent and joined other circuits in holding that the forum-defendant rule is not jurisdictional. State diversity cases removed to federal court contrary to that rule will now remain in federal court absent timely objection by the plaintiff.

Diversity jurisdiction

Federal statutes define the limited jurisdiction of federal courts. One of the most common forms of jurisdiction is known as "diversity jurisdiction" under 28 U.S.C. § 1332. It enables federal courts to decide a civil lawsuit between citizens of different states where the amount in controversy exceeds \$75,000.

Removal of state diversity cases to federal court and the forum-defendant rule

If a \$75,000+ case between citizens of different states is filed in state court, then the defendant generally has a right to "remove" the case to federal court unless precluded by the "forum-defendant rule" under 28 U.S.C. § 1441(b)(2): if any defendant is a citizen of the state where the action was filed, then the case may not be removed despite the diversity of citizenship.

The Eighth Circuit has long held the forum-defendant rule is jurisdictional, meaning that a federal court had no power to hear a case removed in violation of the rule. This defect could not be waived — even after the case had already been decided and was on appeal. The court or the plaintiff could raise the defect at any time.

This made it possible for a plaintiff to acquiesce in the removal and then wait and see. If the plaintiff didn't like how the case was going in federal court, the plaintiff could later raise the rule to force a remand to state court.

Evolving views on the forum-defendant rule

Over several decades, nine federal circuits around the country have concluded the forum-defendant rule is procedural rather than jurisdictional — the rule prohibits a litigant from removing a case involving a forum



defendant but does not strip a federal court of diversity jurisdiction to decide the case. Because the defect is merely procedural, the plaintiff must challenge the improper removal within 30 days under 28 U.S.C. § 1447 (c) or the defect is waived and the case remains in federal court.

Only the Eighth Circuit continued to treat the rule as jurisdictional.

The *Holbein* decision

In *Holbein v. TAW Enterprises, Inc.*, --- F.3d ---, No. 18-2892, 2020 WL 7755451 at *3 (8th Cir. Dec. 30, 2020) (en banc), the Eighth Circuit unanimously decided to "eliminate this lopsided circuit split and conclude that violation of the forum-defendant rule is a nonjurisdictional defect in removal that is waived if not raised in '[a] motion to remand ... made within 30 days after the filing of the notice of removal.'"

The case arose when the Arizona plaintiff Holbein sued his former Nebraska employer in Nebraska state court, asserting federal question jurisdiction for one of his claims. The defendant employer removed the case to federal court without objection from Holbein. The federal court then dismissed Holbein's two claims on the merits, and Holbein appealed the dismissal of his alleged federal claim.

The forum-defendant rule first surfaced when a judge on the Eighth Circuit panel raised it during oral argument, and Holbein indicated the court did not have diversity jurisdiction. The panel found there was no federal question jurisdiction and then dismissed the case for lack of diversity jurisdiction based on existing Eighth Circuit precedent. The defendant-employer later persuaded the court en banc to rehear the case and reconsider circuit law on the forum-defendant rule.

In a thorough opinion, the full court agreed with other circuits that the forum-defendant rule is not jurisdictional and can be waived by a plaintiff's failure to timely object. As part of its analysis, the court examined the statutory phrasing of the forum-defendant rule and observed that it is codified with removal and procedural statutes rather than statutes defining federal court jurisdiction. The court also found support for its decision in the evolving language of 28 U.S.C. § 1447(c) regarding motions to remand cases to state court. Finally, the court looked to caselaw from the Supreme Court and other circuits to support its conclusion.

What this means for litigants

The decision directly impacts plaintiffs who commence a diversity action in state court only to see it removed to federal court contrary to the forum-defendant rule. A plaintiff can no longer choose to ignore the removal defect and raise it later if desired. Instead, the plaintiff must raise the procedural defect within 30 days under 28 U.S.C. § 1447(c), or it will be waived.



The take-away for defendants is not as clear-cut. If a case was removed to federal court contrary to the forum-defendant rule but without timely objection within 30 days, then the defendant has some assurance that the case will remain in federal court.

But a defendant contemplating removal may be facing an impending removal deadline with less than perfect information. It may be unclear whether the case includes a forum defendant, or the plaintiff's suit papers could inaccurately allege there is no forum defendant. Further uncertainty may exist if one or more defendants is a non-corporation entity, such as a limited liability company. For diversity purposes, such entities are considered a citizen of every state in which any member resides. So if any LLC defendant has even one member who resides in the forum state, then the forum-defendant rule would prohibit removal.

The potential risks and benefits of removal must be evaluated for each case, and *Holbein* could affect that balance. But *Holbein* should not be construed as an invitation to defendants to remove a case without regard to the forum-defendant rule. A defendant who does so could well face a motion to remand to state court and be required to pay costs and attorney's fees incurred from the improper removal under 28 U.S.C. § 1447(c).

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