

# The Case Against Removing to Federal Court

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Defense attorneys are typically well aware of the benefits of removing a case to federal court. They include the greater potential for well-reasoned and researched decisions—leading to more predictable outcomes—and tougher standards for the admissibility of expert opinion testimony. But, removal isn't always the right answer. During a recent conversation, Carlton Fields shareholder [Bruce Berman](#), the author of *Berman's Florida Civil Procedure* and a long-time federal practitioner with a nationwide practice, explained why removal should not be an automatic response, and described some situations where state court might be the better option. **Q:** *What should defense attorneys consider before removing a case to federal court?* **Mr. Berman:** One thing they should recognize is that the federal system can get ahead of a lawyer. In federal court, scheduling orders will force the parties to jump through hoops, often holding them to arbitrarily tight deadlines for discovery and other pretrial proceedings, putting maximum pressure on the parties—and potentially creating unreasonable costs for the client. Meanwhile, there's no corresponding requirement that judges decide motions within the same time parameters. As a result, a judge may sit on a preliminary motion indefinitely, while you are forced to proceed, perhaps unnecessarily, through the entire case. **Q:** *How might that play out?* **Mr. Berman:** Let's say you are defending a federal contracts case where the defense to the claim is apparent on the face of the contract or mandated by applicable law. You file a motion to dismiss, which should be granted, ending the case. The judge enters the scheduling order, requiring you to go through costly discovery, but doesn't rule on your motion and won't stay proceedings in the case pending decision on your motion. In the most extreme situation, you could find yourself facing a summary judgment motion deadline, with the discovery deadline passed and the motion to dismiss still undecided. You file that motion, making the same argument you made in the motion to dismiss. The situation can become even more acute as the trial date approaches, where there's been no ruling on either motion and the scheduling order requires a pre-trial stipulation, organizing all the evidence and issues to be presented at the trial, including jury instructions and verdict forms. Yet because the defendant's motion to dismiss was never decided, it has never even answered the complaint—much less filed any of its own claims for relief. At some point, the judge finally considers your case and makes the expected ruling, but not until the parties

have spent potentially millions of dollars in a case that could and should have been dismissed out of the gate. **Q:** *What if the defendant had remained in state court and filed a motion to dismiss that was denied?* **Mr. Berman:** In the state court system you're not assured that a judge will grant a motion to dismiss, or that discovery will be stayed while you tee up the motion. But you've got a far better chance of that happening. And if your motion to dismiss is denied, depending on which state you're in, you might have a right to an interlocutory appeal, whether as of right (as with a jurisdictional motion) or within the appellate court's discretion. This right is extremely limited in federal court, where you usually have to wait until the end of the case. So, that may be another consideration that favors remaining in state court. Even if the state court judge is not as good as the federal one, you may do better with the state appellate court. **Q:** *In what other situations might a defendant find it advantageous to remain in state court?* **Mr. Berman:** There are many. One particularly significant situation arises where a foreign defendant has grounds to challenge a state court's personal jurisdiction. If the defendant obtains a jurisdictional dismissal, and if the statute of limitations has since expired, the case is over because the plaintiff can't refile elsewhere. But if you remove that case to federal court, and then successfully challenge personal jurisdiction, it won't end the case—even if the statute of limitations has run. That's because a federal statute requires the judge to transfer the case to another federal court, sitting in another state that does have personal jurisdiction, where it will be considered filed as of the date of the original action. And you don't have a right of immediate appeal in the federal courts from the denial of a jurisdictional challenge. Of course, if you opt to stay in state court and lose your jurisdictional challenge, you're stuck in state court and have waived your right to remove, although there, at least, you typically have the right to immediate appellate review. Bottom line: if you decide against removal you've got to be pretty sure you're going to win, particularly if, in losing, the comparative benefits of federal court are important to that case. **Q:** *Are there other contexts in which the federal system's scheduling orders may harm defendants?* **Mr. Berman:** Absolutely. When a foreign (or even a U.S.) defendant can be sued in the U.S., but the suit arises out of an accident or transaction in another country, the plaintiff will typically want to put the case before a U.S. jury, in a state court, under local law to obtain what is generally perceived as a far more favorable outcome. Where the defendant has a basis to seek dismissal under the doctrine of *forum non conveniens* or where the claim is dismissible under foreign law and initial motion practice should dispose of the case in the U.S., the defendant has the same dilemma discussed above. A federal judge might more dependably parse the issues and dismiss the case. But if initial motions are ignored and scheduling orders force a defendant who doesn't belong here to endure discovery, the cost of that case can be prohibitive, often forcing a settlement that should never have to be made. In state courts you're more likely to get those initial determinations and, if necessary, obtain appellate review before having to run the pretrial gauntlet. But again, if you lose at the dismissal stage, you lose the benefits that the federal system can provide.

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Bruce J. Berman

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