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Removing A Garnishment Proceeding To Federal Court May Be Easier Than You Think

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Abstract

Garnishment proceedings commencing after even a year of litigation between non-diverse parties in state court actions are still removable in most jurisdictions. Two recent district court opinions from Alabama and Mississippi re-affirm this prevailing view. The threshold question these courts have faced is whether the garnishment action is separate and independent, or merely ancillary, to the main civil action against the alleged insured. Here is a typical example:

A sues B in tort. B may seek insurance coverage from C, and C denies coverage for B but does not elect to file a action for declaratory judgment on the coverage issue. A obtains a judgment against B for liability in tort. A pursues C with a writ of garnishment, seeking to establish coverage and collect on the judgment against B from C.

Under the apparent prevailing view in most federal courts is that this writ of garnishment, or however it is described under state law or procedure, is a new action, separate and independent of the original action (in tort, as in the example above) against the alleged insured and, therefore, removable under federal law. Not all courts agree, and the courts reach conclusions with differing analysis. Recent opinions from Alabama and Mississippi appear to present the most logical analysis of the issue presented and shows strong support for the prevailing authorities holding that federal removal jurisdiction is proper in this typical situation, rejecting multiple attacks on jurisdiction to deny motions for remand.

The Supreme Court of the United States has established that the determination of removal jurisdiction is a question of federal law, not state law. Uniformly applying federal law to the question of removability of a garnishment proceeding, the Fifth Circuit and Eighth Circuit have held firmly for decades that a garnishment is a new action and, thus, removable. The Eighth Circuit has noted disagreement existing on whether a garnishment is a "civil action," and
presented a compelling analysis based on Supreme Court precedent that it is, indeed, a "suit or civil action which may be removed," quoting Chief Justice Marshall on the term "suit". Based on these authorities, the Eleventh Circuit and other appellate courts have agreed, "that the garnishment proceedings [are] separate cause[s] of action." These authorities support the conclusion that a garnishment proceeding is a separate and independent civil action and, therefore, removable under 28 U.S.C. § 1441(a). The most recent decisions appear to agree.

The Southern District of Alabama and Southern District of Mississippi have each recently analyzed several attacks on the courts' federal removal jurisdiction over garnishment proceedings removed under circumstances similar to those presented in the above typical example. The courts' detailed analysis in Armentrout v. Atlantic Cas. Ins. Co., 731 F. Supp. 2d 1249 (S.D. Ala. 2d 2010) and Mabins v. Alfa Ins. Co., 2010 U.S. Dist. LEXIS 70492 (S.D. Miss. June 23, 2010), may assist practitioners in support a defendant's burden of establishing federal removal jurisdiction, especially in circuits where the law on this issue is not so well-established. With the view and understanding of the majority of courts that a garnishment proceeding is a new suit or separate and independent civil action from the related action reaching judgment against an alleged insured, which is based on federal procedural law, all attempts to remand then appear flaccid.

A new action effectively arises on a writ of garnishment. So the operative commencement date is the date of filing the writ of garnishment, not when the lawsuit against the alleged insured was filed. Complete diversity often exists between a judgment creditor/plaintiff and insurer when he commences a new suit or separate and independent action for garnishment, against the insurer of diverse citizenship. The courts have held the citizenship of the original defendant, or debtor/tortfeasor, is irrelevant because he is essentially aligned (or in
fact re-aligned) with the plaintiff against the insurer, and repeated clearly by the Mississippi court in *Mabins*.

Some attack federal jurisdiction to suggest that the garnishment proceeding is a "direct action" within the meaning of 28 U.S.C. § 1332(c). This argument fails based on clear authority from across the jurisdictions. A garnishment action is not a "direct action" against an insured after the garnishor has obtained a judgment against the alleged insured because the liability the garnishor/plaintiff seeks to impose on the insurer is very different from that liability adjudicated against the insured. Complete diversity still exists despite the federal statutory mandate in 28 U.S.C. § 1332(c)(1), that the insurer generally be deemed a resident of the alleged insured/judgment debtor/co-defendant. The *Armentrout* court upheld this view based on prior Eleventh Circuit precedent.

The assertion that a garnishee is not a "defendant" entitled to remove appears unsupportable and also at odds with at least the law of the Eleventh Circuit. When argued recently in *Armentrout*, the Southern District of Alabama followed prior and quickly rejected this and other arguments.

With the added support from *Armentrout* and *Mabins*, insurance counsel should more strongly consider removal of garnishment proceedings.
**Introduction**

Garnishment proceedings commencing after even a year of litigation between non-diverse parties in state court actions are still removable in most jurisdictions. In practice, many plaintiffs continue to contest removal in these situations, and coverage counsel should be encouraged to see the courts continuing to support federal removal jurisdiction when the underlying case is complete through judgment and, effectively, a completely new action begins against an alleged insurer even if styled as the same state court civil action. Two recent district court opinions from Alabama and Mississippi re-affirm this prevailing view among and within the circuits. *Armentrout v. Atlantic Casualty Ins. Co.*, 731 F. Supp. 2d 1249 (S.D. Ala. 2010); and *Mabins v. Alfa Ins. Co.*, 2010 WL 2557743, 2010 U.S. Dist. LEXIS 70492 (S.D. Miss. June 23, 2010).

The threshold question these courts have faced is whether the garnishment action is separate and independent, or merely ancillary, to the main civil action against the alleged insured. Here is a typical example:

A sues B in tort. B may seek insurance coverage from C, and C denies coverage for B but does not elect to file a action for declaratory judgment on the coverage issue. A obtains a judgment against B for liability in tort. A pursues C with a writ of garnishment, seeking to establish coverage and collect on the judgment against B from C.

The apparent prevailing view in most federal courts is that this writ of garnishment, or however it is described under state law or procedure, is a new action, separate and independent of the original action (in tort, as in the example above) against the alleged insured and, therefore,
removable under federal law.¹ Not all courts agree, and the courts reach conclusions with differing analysis.² This article (I) presents what appears from recent opinions as the most logical analysis of the issue presented and shows strong support for the prevailing authorities holding that federal removal jurisdiction is proper in this typical situation, (II) shows how the recent opinions reject attacks on jurisdiction to re-affirm jurisdiction and deny motions for remand, and then (III) surveys the current status of the law on point among the circuits.

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¹ Wausau Ins. Cos. v. Koal Indus. Int'l, Inc., 811 F. Supp. 399, 400 (S.D. Ill. 1991) ("the prevailing standard among the circuits is to permit removal of a garnishment action"; following the majority of circuits and denying the motion to remand).

I. Threshold Analysis

Federal jurisdiction analysis begins with the present removal statute itself, in relevant part:

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

28 U.S.C. § 1441 (2010). "Any civil case filed in state court may be removed by the defendant to federal court if the case could have been brought originally in federal court."3 Two threshold issues arise in each case: (a) whether state or federal law applies in answering (b) whether the garnishment is a new action, separate and independent of the underlying claim (against the tortfeasor in the sample facts).


The Supreme Court of the United States has established that the determination of removal jurisdiction is a question of federal law, not state law:

For the purpose of removal, the federal law determines who is plaintiff and who is defendant. It is a question of the construction of the federal statute on removal, and not the state statute. The latter's procedural provisions cannot control the privilege of removal granted by the federal statute.

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Under the Constitution and laws of the United States, a citizen who is a party in a State court to a civil action which falls within the terms of the federal removal statute, has the right to have the action removed and heard by a United States Court." Uniformity in removal jurisdiction favors applying federal law wherever practicable in the procedure of removing a claim or cause of action to a federal district court. "A state statute cannot divest a federal court of diversity jurisdiction." Stabler (citing Superior Beverage Co. v. Schiefflin & Co., 448 F.3d 910, 917 (6th Cir. 2006); Nationwide Investors v. Miller, 793 F.2d 1044, 1045 (9th Cir. 1986)(repeating, "the characterization of a garnishment proceeding is a question of federal law"); Lewis v. Blackmon, 864 F. Supp. 1, 4 (S.D. Miss. 1994)("Removal is a procedural question, thus federal law governs").

B. Garnishment as a New Claim or Action.

Uniformly applying federal law to the question of removability of a garnishment proceeding, the Fifth Circuit and Eighth Circuit have held firmly for decades that a garnishment is a new action and, thus, removable. The Eighth Circuit in Stoll presents noted disagreement existing then on whether a garnishment is a "civil action," and presented a compelling analysis

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4 A minority of courts disagree, based on an Erie analysis, and apply a non-uniform approach based on each state's own description of its garnishment proceedings. See Erie R. Co. v. Tompkins, 304 U.S. 64 (1938). The Eighth Circuit in Stoll v. Hawkeye Cas. Co., 185 F.2d 96, 99 (8th Cir. 1950), cites to multiple additional authorities from the Supreme Court on this point, and notes the genesis of conflicting authorities based on misinterpretation of distinguishable Supreme Court precedents.


6 See generally Michigan v. Long, 463 U.S. 1032, 1040 (1983)("it cannot be doubted that there is an important need for uniformity in federal law"). The minority noted above in footnote 4 appears in conflict with this well-established principle.

7 See Butler v. Polk, 592 F.2d 1293 (5th Cir. 1979)( saying garnishment actions "are in effect suits involving a new party litigating the existence of a new liability."); Randolph v. Employers Mutual Liability Ins. Co. of Wisc., 260 F.2d 461 (8th Cir. 1958).
Based on Supreme Court precedent that it is, indeed, a "suit or civil action which may be removed," quoting Chief Justice Marshall on the term "suit":

> The term is certainly a very comprehensive one, and is understood to apply to any proceeding in a court of justice, by which an individual pursues that remedy in a court of justice which the law affords him. The modes of proceeding may be various, but if a right is litigated between parties in a court of justice, the proceeding by which the decision of the court is sought is a suit.\(^8\)

Based on these authorities, the Eleventh Circuit and other appellate courts have agreed, "that the garnishment proceedings [are] a separate cause of action." Wells v. Zurich Ins. Co., 200 F. 3d 759, 760 (11th Cir. 2000). These authorities support the conclusion that a garnishment proceeding is a separate and independent civil action and, therefore, removable under 28 U.S.C. § 1441(a). The most recent decisions appear to agree.

The Southern District of Alabama and Southern District of Mississippi have each recently analyzed several attacks on the courts' federal removal jurisdiction over garnishment proceedings removed under circumstances similar to those presented in the above typical example. See Armentrout, 731 F. Supp. 2d at 1258 (re-affirming federal law precedents that garnishment proceedings are separate and independent); and Mabins, 2010 U.S. Dist. LEXIS 70492 (following Butler v. Polk, supra n.7.) These courts' detailed analysis may assist practitioners in support a defendant's burden of establishing federal removal jurisdiction, especially in circuits where the law on this issue is not so well-established. With the view and understanding of the majority of courts that a garnishment proceeding is a new suit or separate and independent civil action from the related action reaching judgment against an alleged insured, which is based on federal procedural law, all attempts to remand then appear flaccid.

\(^8\) Stoll, 185 F.3d at 98 (quoting Weston v. City of Charleston, 2 Pet. 449, 464, 7 L.Ed. 481).
II. Contesting the Attacks on Federal Jurisdiction

A. More than one year - No Problem.

A new action effectively arises on a writ of garnishment. So the operative commencement date is the date of filing the writ of garnishment, not when the lawsuit against the alleged insured was filed. *Armentrout*, 731 F. Supp. 2d at 1258-1259.9

B. In-State Defendant/Insured - No Problem.

Complete diversity often exists between a judgment creditor/plaintiff and insurer when he commences a new suit or separate and independent action for garnishment, against the insurer of diverse citizenship. The courts have held the citizenship of the original defendant, or debtor/tortfeasor, is irrelevant because he is essentially aligned (or in fact re-aligned) with the plaintiff against the insurer, and repeated clearly by the Mississippi court in *Mabins*.10

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9 "The untimeliness of a removal is a procedural, instead of a jurisdictional defect." *In re Uniroyal Goodrich Tire Co.*, 104 F.3d 332, 324 (11th Cir. 1997). The procedural requirements for removal jurisdiction are met because Atlantic Casualty removed this action within 30 days (obviously less than one year) from when this separate and independent action commenced with service of the writ of garnishment upon Atlantic Casualty. *Davenport v. IBM*, 624 F.Supp.2d 542, 547 (M.D. La. 2008); *Hayes v. Pharmacists Mut. Ins. Co.*, 276 F.Supp.2d 985 (W.D. Mo. 2003)(timeline for removal begins again upon receipt of the garnishment writ, though remanding on grounds not present herein). Further, the time requirements in 28 U.S.C. § 1446(b) are "not inflexible." *See Tedford v. Warner-Lambert Co.*, 327 F.3d 423, 426 (5th Cir. 2003).

10 *Mabins*, 2010 U.S. Dist. LEXIS 70492, *7 n3("Even if [the alleged insured] remains a party in the garnishment, [he] would realign with the plaintiff judgment creditor due to its interest in having [the insurer] satisfy the judgment against it, and would be considered a party plaintiff for jurisdictional purposes.") The Supreme Court has also repeatedly held that formal or nominal parties are not considered when determining jurisdiction based on diversity of citizenship. *Wood v. Davis*, 59 U.S. 467 (1856)("formal parties, or nominal parties, or parties without interest, united with the real parties to the litigation, cannot oust the federal court of jurisdiction, if the citizenship, or character of the real parties, be such as to confer it with within the 11th section of the judiciary act"). *Bowers, infra*, supports re-alignment of the tortfeasor (in the example) or the alleged insured with the garnishor-plaintiff so that complete diversity of citizenship, and therefore federal removal jurisdiction, exists.
C. **Direct Action Fear - No Problem.**

Some plaintiffs attack Butler and Webb, to suggest that the garnishment proceeding is a "direct action" within the meaning of 28 U.S.C. § 1332(c). This argument fails based on clear authority from across the jurisdictions. A garnishment proceeding against an insurer, as a separate and independent action commenced only after judgment is entered against the tortfeasor, is not a "direct action" within the meaning of 28 U.S.C. § 1332(c), which would make the insurer share citizenship with the tortfeasor insured for purposes of any diversity analysis. *Bowers v. Continental Ins. Co.*, 753 F.2d 1574 (11th Cir. 1985), *cert. denied*, 473 U.S. 906, 87 L. Ed. 2d 655, 105 S. Ct. 3531 (1985).\(^{11}\)

In *Bowers*, the plaintiff sued his insurance company directly claiming entitlement to benefits under an insurance policy, and the insurer removed. In moving to remand, that plaintiff argued that the proceeding was a "direct action" within the meaning of 28 U.S.C. § 1332(c), which reads as follows:

> In any direct action against the insurer of a policy or contract of liability insurance . . . to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the state of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business.

28 U.S.C. § 1332(c)(quoted in *Bowers*, 753 F.2d at 1576). The Eleventh Circuit in *Bowers* affirmed the Northern District of Georgia's denial the of plaintiff's motion to remand, explaining that while at first glance the literal language of the Code suggests the plaintiff's argument, the

\(^{11}\) See also *Fortson v. St. Paul Fire and Marine Ins. Co.*, 751 F.2d 1157, 1159 (11th Cir. 1985)("We hold that unless the cause of action against the insurance company is of such a nature that the liability sought to be imposed could be imposed against the insured, the action is not a direct action"); and *John Cooper Produce, Inc. v. Paxton Nat'l Ins. Co.*, 774 F.2d 433, 435 (11th Cir. 1985)("This statutory provision does not act to destroy all diversity jurisdiction in claims arising against insurance companies").
"direct action" proviso of 28 U.S.C. § 1332(c) does not affect suits brought by an insured against his insurer. In explaining why the "direct action" limitation was added, the Eleventh Circuit stated:

The proviso was passed in response to statutes authorizing actions against the holder of a contract of indemnity for liability by a wrongdoer to the plaintiff. See S.Rep. No. 1308, 88th Cong., 2d Sess. reprinted in [1964] U.S. Code Cong. & Ad.News 2778, 2778-79; see also Spooner v. Paul Revere Life Insurance Co., 578 F. Supp. 369, 373 (E.D. Mich. 1984) (The direct action proviso is triggered when "the act for which liability is sought to be imposed against the insurance company is the same act for which liability could be imposed against the insured.").

Id. at 1577-78. The Southern District of Alabama has recently agreed in Stabler and most recently in Armentrout, following Stabler, 731 F. Supp. 2d at 1253-60.

A garnishment action is not a "direct action" against an insured after the garnishor has obtained a judgment against the alleged insured because the liability the garnishor/plaintiff seeks to impose on the insurer is very different from that liability adjudicated against the insured. Complete diversity still exists despite the federal statutory mandate in 28 U.S.C. § 1332(c)(1), that the insurer generally be deemed a resident of the alleged insured/judgment debtor/co-

12 The Bowers court also relied on the First Circuit's opinion in White v. USF&G, 356 F.2d 746 (1st Cir. 1966), for the general rule that "the direct action proviso does not affect suits brought by an insured against his own insurer." Many other circuits agree. See, e.g., Rosa v. Allstate Ins. Co., 981 F.2d 669 (2d Cir. 1992)(reversing dismissal for lack of jurisdiction); Myers v. State Farm Ins. Co., 842 F.2d 705, 707 (3d Cir. 1988); Stockton v. General Accident Ins. Co., 897 F.2d 530 (6th Cir. 1990)(finding removal proper in garnishment action); Searles v. Cincinnati Ins. Co., 998 F.2d 728 (9th Cir. 1993)(listing even more cases holding the same). See also Davis v. Carey, 149 F. Supp. 593 (S.D. Ind. 2001)(denying motion to remand and rejecting Plaintiffs' arguments); Hipke v. Kilcoin, 279 F. Supp. 2d 1089 (D. Neb. 2003)(sustaining objection to magistrate's recommendation holding that § 1332(c) does not apply as Plaintiffs argue).

defendant. The Armentrout court has said the Eleventh Circuit's opinion in Fortson v. St. Paul Fire and Marine Ins. Co., 751 F.2d 1157 (11th Cir. 1985), "clearly limits the scope of § 1332(c)." Armentrout, 731 F. Supp. 2d at 1253-54. The Mississippi federal courts have recently clarified their unanimous position "that a garnishment action such as [the typical case outlined above] is not a 'direct action' as contemplated by § 1332(c), and therefore, [the insurer] would retain its own citizenship . . . when determining diversity of citizenship." Mabins, 2010 U.S. Dist. LEXIS 70492 at *7. It is now more clear that garnishment actions are not "direct actions" for purposes of § 1332(c).

D. Yes, the Garnishee is a Defendant Entitled to Remove.

The assertion that a garnishee is not a "defendant" entitled to remove appears unsupportable and at odds with at least the law stated in Webb v. Zurich Ins. Co., 200 F.3d 759 (11th Cir. 2000) and Butler v. Polk, 592 F.2d 1293 (5th Cir. 1979). When argued recently in Armentrout, the Southern District of Alabama followed these precedents and Smotherman v. Caswell, 755 F. Supp. 346, 348 (D. Kan. 1990)(stating that § 1441(a) "affords [the garnishee] . . . the basis for removal of the case"), in quickly rejecting the argument. Armentrout, 731 F. Supp. 2d at 1258-59.

E. Federal Abstention and Comity, Controversy - Rejected.

Federal courts will not abstain where "there is no possibility of interfering with state proceedings." Armentrout, 731 F. Supp. 2d at 1259. Garnishment proceedings removed to federal courts are not "exceptional cases" requiring federal abstention. Id.

F. Statutory Changes - No Relevant Effect on Removal of Garnishment.

Section 1441 has changed over time, but not in relevant part. Opponents to removal jurisdiction may note changes to subsection (c), which now reads:
Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise nonremovable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.

28 U.S.C. § 1441 (2010)(emphasis added). These opponents to removal may point out the changes to Section 1441(c) to note the limitation for removal of claims based on federal question jurisdiction only if the claim is "a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 . . .". While statutory changes have further restricted removal of claims raising federal questions, this change to § 1441(c) has no apparent impact on removal of actions under diversity jurisdiction (and § 1441(a)), which is the case under the typical examples above. In other words, the requirement of removal of federal questions be separate and independent is a restriction on removal, not an enlargement of federal removal jurisdiction otherwise narrowed elsewhere under federal law on removal. The authority for removal of garnishment actions, therefore, is not based on the separateness or independence under § 1441(c), but based on the proceeding being a completely new action, and removable under § 1441(a), just as "any civil action brought in a State court of which the district courts of the United States have original jurisdiction . . . may be removed by the defendant or the defendants." If the garnishor could have brought the action against a diverse garnishee in federal court, then federal removal jurisdiction exists based on Sections 1332 and 1441(a).

In Stoll and Randolph, the Eighth Circuit noted then, as remains true today, that § 1441(c) is irrelevant to these issues on removal. The Stoll court noted "[t]he applicable removal statute is Sec. 1441(a), Title 28 U.S.C.A." 185 F.2d at 98. "The court held a post judgment garnishment proceeding is a civil action within the meaning of 28 U.S.C.A. § 1441(a), and that diversity of citizenship and the jurisdictional amount having been established, the garnishment proceeding
was properly transferred to the federal court." *Randolph*, 260 F.2d at 463 (discussing *Stoll*). The *Randolph* court provides a more detailed analysis to show subsection (c) has nothing to do with removal jurisdiction over garnishment such as those presented in the sample facts above.\(^\text{14}\)

**III. Survey of the Circuits**

Not all Circuits appear to clearly agree that a post-judgment garnishment is a separate and independent proceeding. Not all circuits or district courts agree that federal law applies to this question, but often instead rely on varying state law characterizations of the garnishment proceeding. So the federal courts do not uniformly support removal jurisdiction for garnishment proceedings following judgment in an underlying matter. The following survey presents a starting point for any practitioner considering removal.

The **First Circuit** has not clearly addressed all the issues, but this appellate court should agree that removal on the sample facts presented is not barred by the direct action proviso in § 1332(c).\(^\text{15}\)

The **Second Circuit** has not clearly addressed all the issues, but this appellate court clearly holds that federal courts have jurisdiction over a tort victim's suit against the tortfeasor's alleged insurer.\(^\text{16}\)

The **Third Circuit** has not clearly addressed all the issues, but this appellate court has agreed that removal on the sample facts presented is not barred by the direct action proviso in §

\(^{14}\) *Randolph*, 260 F.2d at 464-65.

\(^{15}\) *White v. United States Fidelity and Guaranty Co.*, 356 F.2d 746 (1st Cir. 1966)(affirming district court's refusal to remand; rejecting argument that plaintiff/judgment debtor's claims against his alleged insurer constituted a direct action under the bar to removal in 28 U.S.C. § 1332(c)); *see also Velez v. Crown Life Ins. Co.*, 599 F.2d 471, 473 (1st Cir. 1979) (discussing §1332(c)).

\(^{16}\) *Rosa v. Allstate Ins. Co.*, 981 F.2d 669 (2d Cir. 1992)(reversing and remanding district court's dismissal of injured plaintiff's claims against alleged tortfeasor's insurer for no-fault insurance coverage).
Most district courts in this circuit have denied remand, \(^\text{17}\) supporting removal jurisdiction under facts similar to the sample presented, while others have remanded garnishment proceedings back to state court. \(^\text{19}\)

The Fourth Circuit has not clearly addressed the issue. One district court in 1939 analyzed whether garnishment under Virginia law is an ancillary proceeding or independent, and decided in favor of remand. \(^\text{20}\)

The Fifth Circuit appears to fully support removal of these garnishment proceedings under facts similar to the sample presented, as separate and independent. The Mabins court recently reaffirmed and clarified unanimity within the state's federal district courts. \(^\text{21}\)

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\(^{17}\) Myers v. State Farm Ins. Co., 842 F.2d 705, 707 (3d Cir. 1988)(affirming denial of remand; agreeing that the direct action proviso in 28 U.S.C. § 1332(c) does not bar removal under sample facts presented).


\(^{21}\) Butler v. Polk, 592 F.2d 1293, 1296 n.7 (5th Cir. 1979)(citing 8th Circuit in Randolph); accord Freeman v. Walley, 276 F. Supp. 2d 597, 602 (S.D. Miss. 2003); Mabins v. Alfa Ins. Co., 2010 WL 2557743 (S.D. Miss. June 23, 2010)(noting the Northern District of Mississippi's adoption of the Freeman court in cases more recent than a case in that court remanding on state law grounds). Some courts have noted the Fifth Circuit's opinion in Murray v. Murray, 621 F.2d 103 (5th Cir. 1980)(vacating judgment after removal by US government under § 1442(a) and remanding to the state court), as if contrary to Butler, saying the appellate court, there, held that garnishments are not "civil actions." In Murray, the garnisher sought alimony from a US government employee and served papers on the government, which is distinguishable from Butler and the present sample facts of garnishment against an insurer where the insurer's liability under contract is the separate and independent question. The district courts of the Fifth Circuit continue to follow Butler and specifically hold that garnishment proceedings are not direct actions within the meaning of 28 U.S.C. § 1332(c). See, e.g., Freeman v. Walley, 276 F. Supp. 2d 597 (S.D. Miss. 2003)(denying motion to remand and holding that "a garnishment action 'exists
The Sixth Circuit has not reached the issue directly, but support for removal exists in
*dicta*.\(^\text{22}\) At least one district court has remanded a garnishment proceeding upon removal under
facts similar to the sample presented.\(^\text{23}\)

The Seventh Circuit has not squarely reached the issue. In *dicta*, this appellate court once
suggested that it followed the now minority view, and suggesting state law applied instead of
federal law,\(^\text{24}\) but the recent district court opinions appear to support removal under facts similar
to the sample presented, and reject these prior opinions as authoritative.\(^\text{25}\)

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Separate and apart from the primary action that established the judgment debt which provides the
foundation for the right of action against the garnishee. In other words, 'even though,
procedurally, a garnishment action may be filed under the same number as the case in which the
judgment was obtained, it is, in effect, an entirely separate lawsuit' from the original action, and
is removable as a distinct civil action under § 1441(a).')(internal citations, including *Butler*,
omitted); *Smith v. State Farm Fire & Cas. Co.*, 2009 WL 2222854, 2009 U.S. Dist. LEXIS
62206, 2-3 (M.D. Ga. July 21, 2009)(denying motion to remand; rejecting "direct action"
Dist. LEXIS 11083, *10-11* (N.D. Fla. Feb. 4, 2009)(same analysis of *Fortson* and *Bowers*);
motion to remand).

\(^{22}\) *Stockton v. General Accident Ins. Co.*, 897 F.2d 530 (6th Cir. 1990)(per curiam)("We
believe the removal was proper, but that this case became moot subsequent to removal";
rejecting "direct action" arguments and finding the garnishment is a type of adversarial
proceeding and, thus, separate and independent).

\(^{23}\) *Overman v. Overman*, 412 F. Supp. 411 (E.D. Tenn. 1976)(applying state law, not
federal law, under *Erie* analysis to hold that Tennessee garnishment proceedings are ancillary).

\(^{24}\) See *American Automobile Ins. Co. v. Freundt*, 103 F.2d 613 (7th Cir. 1939); and *Ward
v. Congress Const. Co.*, 99 F. 598 (7th Cir. 1900).

characterization of garnishment proceeding as ancillary as not controlling for removal analysis);
garnishee's removal; rejecting arguments that *Freundt* controls); *Davis v. Carey*, 149 F. Supp. 2d
593 (S.D. Ind. 2001)(denying motion for remand, holding garnishment not a direct action).
The **Eighth Circuit** appears to support removal under the sample facts presented, as separate and independent claims.\(^{26}\) This appellate court was among the first to reach this conclusion,\(^{27}\) but the districts do not all agree.\(^{28}\)

The **Ninth Circuit** appears to support removal under the sample facts presented.\(^{29}\)

The **Tenth Circuit** appears to have resolved this issue long ago in favor of removal,\(^{30}\) but the district courts presently appear split on whether removal jurisdiction exists under the sample facts presented.\(^{31}\)

The **Eleventh Circuit**\(^{32}\) appears well-settled on the conclusion that garnishment actions "are generally construed as independent suits, at least in relation to the primary action" because

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\(^{26}\) *Randolph v. Employers Mut. Liability Ins. Co.*, 260 F.2d 461, 463-64 (8th Cir. 1958), *cert. denied*, 359 U.S. 909, 79 S. Ct. 585, 3 L. Ed. 2d 573 (1959) (acknowledging that garnishment is a separate proceeding based on the federal law and that state classification of garnishment proceedings is in no way binding on federal court's determination of whether garnishment is independent action for removal purposes).

\(^{27}\) See *Stoll v. Hawkeye Cas. Co.*, 185 F.2d 96 (8th Cir. 1950).


\(^{29}\) *Searles v. Cincinnati Ins. Co.*, 998 F.2d 728 (9th Cir. 1993)(listing cases); *Swanson v. Liberty Nat. Ins. Co.*, 353 F.2d 12 (9th Cir. 1965)(following 8th Circuit and *Randolph*).

\(^{30}\) *Adriaenssens v. Allstate Ins. Co.*, 258 F.2d 888 (10th Cir. 1958)(saying that in its prior holding in *London & Lancashire Indemnity Co. v. Courtney*, 106 F.2d 277 (10th Cir. 1939), "It was held in terms too clear for misunderstanding that the proceeding was in effect an original and independent action").


\(^{32}\) The Eleventh Circuit, in *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981), adopted as binding precedent all decisions of the former Fifth Circuit rendered before September 30, 1981.
they are "suits involving a new party litigating the existence of a new liability."33 The Southern District of Alabama recently re-affirmed this conclusion in Armentrout, explaining in detail its rejection of the Middle District of Alabama's reasoning to the contrary.34 In doing so, the Armentrout court followed its previous rulings in Stabler, and its reasoning appears most compelling and consistent with the majority of the circuits.

**Conclusion**

The law of the circuits appears split but strongly favoring a garnishee's ability to remove under the sample facts presented. The garnishment is a separate and independent action capable of removal, as a matter of federal law. As the only target in this independent action, the garnishee is the only necessary and practical defendant and is, therefore, a defendant entitled to remove the action. The "direct action" limitation in 28 U.S.C § 1332(c) also does not apply because the requirements for federal subject matter jurisdiction under 28 U.S.C. § 1332, are met where the garnishor and garnishee are "citizens of different states" and the requisite jurisdictional amount is satisfied based on the underlying judgment's exceeding the threshold amount.

Practitioners should consider removing a garnishment proceeding. At first glance, one may not even consider it even fearing that an attempt would give rise to a motion for sanctions for wrongful removal. Parties moving for remand have frequently threatened or even filed motions for sanctions, suggesting removal was improper, but perhaps it is the culpability of these

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parties seeking sanctions that should become the focus, not the propriety of the removal, because ample support exists for removal jurisdiction in these cases.