



**Timothy A. Loranger**

WISNER BAUM LLP



**Crawford Appleby**

WISNER BAUM LLP



## Avoiding removal in the Ninth Circuit after *Mayes*

THE SCOPE OF REMOVAL AND REMAND FOR PLAINTIFFS IN THE NINTH CIRCUIT, AND STRATEGIES TO HELP AVOID REMOVAL

*Note: The authors represented the plaintiff in *Martinez v. Airbnb, Inc.* (N.D. Cal. 2023) 691 F.Supp.3d 1124, cited herein. The authors wish to thank Mike Cornwell for his assistance with this article.*

The landscape of removing cases from California state to federal court has been in flux for years. Recently, the Ninth Circuit published two new decisions on removal and remand essential for all litigators to understand. These cases are *Mayes v. American Hallmark Insurance Company of Texas* (9th Cir. 2024) 114 F.4th 1077 and *Casola v. Dexcom, Inc.* (9th Cir. 2024) 98

F.4th 947. Although these cases bring mixed news for plaintiffs' attorneys, they establish important guidelines for removal-and-remand practices in California. Here we examine the holdings in *Mayes* and *Casola*, outline the current scope of removal and remand for plaintiffs in the Ninth Circuit, and offer strategies to help avoid removal.

### The *Mayes* decision

The *Mayes* case arose from a dispute between an Oregon resident and a Texas-based insurance company.

The claim arose after a dump truck allegedly allowed sand to spill from its back while driving, damaging the resident's vehicle. (*Mayes v. American Hallmark Insurance Company of Texas* (D. Or., Nov. 15, 2021, No. 1:21-CV-01198-CL) 2021 WL 6127887, at \*1.) The plaintiff, acting pro se, filed his complaint in an Oregon state court. Before service, the insurer removed the case to federal court on the basis of diversity jurisdiction, utilizing "snap removal." (*Mayes, supra*, 114 F.4th at p. 1078.) The plaintiff moved to remand, arguing that the insurer could not

remove the case before it was formally served. The district court denied the motion and the Ninth Circuit affirmed.

In analyzing section 1446(b)(1) of title 28 of the United States Code, the Ninth Circuit determined “that formal service is not a prerequisite to removal . . .” (*Id.* at 1079.) In other words, there was no specific “window” of time where removal was only allowed after the defendant had been served with the complaint. Instead, section 1446(b)(1) merely sets an end-date for removal. The court based this conclusion on several findings: first, the plain language of section 1446(b)(1) permits removal once the defendant has received the complaint, “through formal ‘service or otherwise.’” Second, the court noted that section 1448 supports this interpretation by expressly authorizing service after removal. Finally, the Ninth Circuit found support in the decisions of the First, Second, Fifth, and Eleventh Circuits, all of which agreed that removal before service was allowed. For these reasons, the Ninth Circuit put its stamp of approval on snap removal although, as explained below, questions remain.

### The current scope of removal in the Ninth Circuit

The *Mayes* decision helps by shedding additional light on when removal is appropriate within the Ninth Circuit, marking the first time that a snap removal was deemed acceptable (although the court did not use that phrase).

Earlier this year, the Ninth Circuit provided more insight on removal with its decision in *Casola*, a product-liability case against a California defendant in San Diego Superior Court. (*Id.*, 98 F.4th at 951.) The *Casola* complaint was e-filed, but before it had been officially accepted or a summons issued, the defendant obtained an unfiled copy of the complaint from Courthouse News Service (“CNS”), a national news

organization that publishes daily reports for its subscribers about civil litigation, including the filing of new lawsuits. The defendant then used the unfiled copy of the complaint to remove the case to federal court on the grounds of diversity jurisdiction. Plaintiffs moved to remand and the district court granted the motion, which the Ninth Circuit affirmed.

First, the court held that the defendant’s “notices of removal were premature because they were filed in the district court before the respective complaints had been officially filed in the Superior Court and therefore before the respective actions had commenced.” (*Id.* at 954.) “[F]or purposes of removability, a complaint is ‘filed’ in California state court when it is processed and endorsed or otherwise acknowledged as officially filed by the clerk of the court.” (*Id.* at 955.) To reach this conclusion, the court got “into the weeds” by delving into various statutes, rules of court, local rules about filing, and relevant California case law. (See *id.* at 955-963; see also *Martinez v. Airbnb, Inc.* (N.D. Cal. 2023) 691 F. Supp.3d 1124.)

Second, the court ruled that these premature removal notices did not start the 30-day window for remand under 28 U.S.C. section 1447(c). *Casola, supra*, 98 F.4th at 954. Essentially, the court determined that “a premature notice of removal neither vests the district court with jurisdiction nor starts the 30-day clock for non-jurisdictional remand motions. However, a subsequent supplemental notice of removal will, as here, cure the jurisdictional defect and start the 30-day clock.” (*Id.* at 965.)

### Unresolved removal questions in the Ninth Circuit

These recent cases clarify the scope of removal as follows: A defendant must wait until a complaint is officially accepted for filing before removing a case, even if service has not occurred. Once the civil

action has officially been commenced and the defendant has received a copy of the complaint or summons, the 30-day removal period under 28 U.S.C. section 1446(b)(1) begins.

However, one major question remains about how the “forum defendant rule” impacts removal. “The forum-defendant rule, contained in 28 U.S.C. § 1441(b)(2), prohibits removal based on diversity jurisdiction ‘if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.’” (*Casola*, 98 F.4th at 950.) Some defendants have argued successfully that snap removal does not violate the forum-defendant rule because they had not been “properly joined and served” at the time they attempted removal. (28 U.S.C. § 1441(b)(2).) California federal courts are split on the issue. (Compare *Massachusetts Mut. Life Ins. Co. v. Mozilo* (C.D. Cal., June 28, 2012, No. 2:12-CV-03613-MRP) 2012 WL 11047336, at \*2 with *Regal Stone Ltd. v. Longs Drug Stores California, L.L.C.* (N.D. Cal. 2012) 881 F.Supp.2d 1123, 1127.) Unfortunately, the Ninth Circuit was unable to resolve this question in *Casola*, as 28 U.S.C. section 1447(d) deprived the court of jurisdiction to address the issue. (*Supra*, 98 F.4th at 955.)

Indeed, a better and more well-reasoned approach by the Ninth Circuit would be to hold that snap removal is impermissible in cases involving a forum defendant. First, “[t]he plain meaning of [Section 1441] would permit removability to turn on the timing of service rather than the diversity of the parties. Such a reading would ‘eviscerate the purpose of the forum defendant rule.’” (*Massachusetts Mut. Life Ins. Co., supra*, 2012 WL 11047336, at \*2.) “The Court ‘may not adopt a plain language interpretation of a statutory provision that directly undercuts the clear purpose of the statute.’” (*Id.* citing *Albertson’s, Inc. v.*

*Comm'r* (9th Cir.1994) 42 F.3d 537, 545.) A result is considered absurd if it creates conflict between different provisions of the same act or if a “literal interpretation would thwart the purpose of the over-all statutory scheme. . . .” (*United States ex rel. Barajas v. United States* (9th Cir. 2001) 258 F.3d 1004, 1012.)

Second, “where the forum defendant rule would otherwise apply, interpreting the statute literally would ‘thwart [ ] the purpose of Section 1441(b) and merely promote [ ] gamesmanship on the part of removing defendants.... [Therefore,] § 1441(b) is not implicated where the non-forum defendant (or forum defendant) seeks to remove the action prior to the service of any defendant.” (*Khashan v. Ghasemi*, No. CV10-00543MMM(CWX), 2010 WL 1444884, at \*2 (C.D. Cal. Apr. 5, 2010).)

Third, “[r]emoval based on diversity jurisdiction is intended to protect out-of-state defendants from possible prejudices in state court.... The need for such protection is absent, however, in cases where the defendant is a citizen of the state in which the case is brought.” (*Standing v. Watson Pharms., Inc.*, No. CV09-0527 DOC(ANX), 2009 WL 842211, at \*3 (C.D. Cal. Mar. 26, 2009).) “Within this contextual framework, the forum defendant rule allows the plaintiff to regain some control over forum selection by requesting that the case be remanded to state court.’ [Citation] Thus, the overarching purpose of the forum defendant rule is to prevent certain cases properly brought in state court from ending up in federal court.” (*Ibid.*)

### How to avoid removal post-*Mayes*

Following *Mayes*, this important question remains: How can plaintiffs maintain their choice of a state-court forum in the Ninth Circuit? Several strategies exist that can either prevent

or reduce the likelihood of snap removal in the Ninth Circuit.

First, plaintiffs should endeavor to serve California defendants as quickly as possible after filing. In *Mayes*, the pro se plaintiff filed his complaint on July 16th, but the defendant did not remove the case until almost a month later, on August 13th. In other words, there was plenty of time to affect service. When dealing with sophisticated defendants with counsel who subscribe to services like CNS’ CasePortal, plaintiff’s attorneys must act even faster. Working with process servers using technology, such as scanners, smartphones, and mobile printers can ensure service within minutes of filing.

Second, while e-filing has become mandatory in many California courts, some courts still allow paper filing (e.g., Humboldt County Superior Court and Del Norte County Superior Court) or fax filing (see Cal. Rules of Court, rules 2.300 et seq.). Taking advantage of paper filing provides plaintiffs additional time to serve the complaint and minimizes the advantage for defendants who receive immediate email notifications once the complaint is submitted for filing. In fact, in-person, paper filing has the added advantage of providing instant confirmation of acceptance. There are also specific situations where paper filing is permitted, such as when the plaintiff is self-represented. (Cal. Rules of Court, rule 2.253(b)(2).)

Third, plaintiffs can use their right to amend the complaint in multi-defendant cases strategically. For example, if there is a California defendant, and a sophisticated non-California defendant known to use snap removal, it may be advantageous to name only the California defendant in the initial complaint, serve them, and then amend as a matter of right (which does not require leave of court) to add the non-California defendant. (Code

Civ. Proc., § 472.) In other words, draft the complaint with all defendants and allegations, then create a second draft excluding the non-California defendant. File the latter version, serve the California defendant, and later amend by filing the original draft. Once the California defendant is served, no other defendant can remove the case based on diversity. (28 U.S.C. § 1441(b)(2); *Stevenson & Fitzgerald*, Federal Civil Procedure Before Trial (Calif. and 9th Cir. Edition 2024) ¶ 2:2321.) This strategy solidifies the “forum defendant rule” and prevents removal, while avoiding the unresolved question in the Ninth Circuit of whether a non-served defendant can snap remove a case. However, this approach requires an acute awareness of the statute of limitations.

### Conclusion

The Ninth Circuit’s recent decision in *Mayes* has, unfortunately, endorsed the gamesmanship of snap removal, creating an additional hurdle for plaintiffs who wish to litigate in their chosen California state court forum. Nonetheless, both *Mayes* and *Casola* provide clearer guidance regarding the rules of engagement for removal and remand, enabling plaintiffs to strategize more effectively to avoid snap removal.

*Casola*, in particular, underscores the importance of precise timing in removal actions, serving as a valuable counterbalance to *Mayes* by affirming the necessity for defendants to wait until the official filing of a complaint before seeking to remove. The unresolved question of how the “forum defendant rule” applies to snap removal remains a critical issue as argued here and should lead the Ninth Circuit to bar snap removal by forum defendants. Ultimately, multiple tactical options are available to plaintiffs to avoid snap removal even before this area of litigation becomes fully settled in the Ninth Circuit.

*Timothy A. Loranger is a senior shareholder at the national law firm of Wisner Baum LLP. A consumer attorney, pilot, and avid citizen advocate, Tim oversees the firm's transportation product liability litigation, aviation, and commercial ground transportation accidents (including truck accidents, train crashes, and military vehicle accidents), and military*

*accidents resulting in catastrophic personal injury or wrongful death. A veteran of the United States Marine Corps, Tim served in Operations Desert Shield and Desert Storm. Tim was also an active member of the Civil Air Patrol – a benevolent, nonprofit organization and auxiliary of the new U.S. Air Force, dedicated to aerospace education. Best Lawyers® selected Tim as the 2020*

*“Lawyer of the Year” for Personal Injury Litigation in Los Angeles.*

*Crawford Appleby is an attorney at Wisner Baum LLP. He concentrates his practice on transportation accidents and qui tam claims. He is also the owner of the free, online, tentative rulings database: [www.rulings.law](http://www.rulings.law).*