

5th Circ. Venue-Transfer Cases Highlight Mandamus Limits

By **Charles Fowler** (June 5, 2024, 4:04 PM EDT)

The U.S. Court of Appeals for the Fifth Circuit has apparently taken an interest in venue-transfer cases, publishing several in the last six months.[1]

Three ongoing cases highlight an odd procedural wrinkle that sometimes lets district courts defy an appellate writ: orders granting transfer to out-of-circuit districts.[2]

Federal appellate courts have mandamus review power over venue-transfer decisions. But an appellate court lacks power to order an out-of-circuit transferee court to return a case once transferred; it can only order the transferor court to request return.[3] And the transferee court need not comply.[4]



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In 2022, in *Defense Distributed v. Platkin*, the Fifth Circuit had granted a writ of mandamus overturning transfer from the U.S. District Court for the Western District of Texas to the U.S. District Court for the District of New Jersey. But the District of New Jersey refused to return the case, putting the Fifth Circuit in a then-unprecedented jurisdictional bind.

Previously, courts had honored retransfer requests in the interest of comity.[5] Without that exercise of comity, the Fifth Circuit could find no ground to reassert jurisdiction over the transferred claims, meaning that the District of New Jersey's refusal "functionally [] nullif[ied] a Fifth Circuit decision." [6]

Platkin may have emboldened district courts to independently decide whether to retransfer a case, so parties opposing intercircuit transfer should account for this hurdle to effective appellate review. Three recent Fifth Circuit cases highlight the limits on mandamus power.

Recent Cases

Fort Worth Chamber: The Fifth Circuit's holding that transfer was "without jurisdiction" was effective — but may not always be.

In *In re: Fort Worth Chamber of Commerce*, the chamber of commerce **sued** the Consumer Financial Protection Bureau in the U.S. District Court for the Northern District of Texas on March 7, challenging a new rule regulating credit card late fees.[7] The plaintiffs sought a preliminary injunction on the same day. Rather than rule on an injunction, the Texas district court invited — and, on March 28, **granted** — a motion to transfer venue to the U.S. District Court for the District of Columbia.

Three days before the Texas district court entered its transfer order, however, the chamber noticed an appeal, claiming that the district court effectively denied the injunction by failing to rule.

On April 5 — just seven days after the chamber filed its mandamus petition and eight days after the transfer order — the Fifth Circuit granted mandamus. The Fifth Circuit **held** that the district court effectively denied the preliminary injunction by waiting too long to rule.[8] Since that "denial" was appealable, and the notice of appeal effective, the district court lacked jurisdiction to transfer the case.[9]

The Fifth Circuit ordered "the district court to reopen the case ... and to give notice to [the District of Columbia court] that its transfer was without jurisdiction and should be disregarded."[10]

The District of Columbia court reluctantly acquiesced. The court, in an April 10 order by U.S. District Judge Amy Berman Jackson, explained that it was "not inclined to 'disregard' a case on its docket." [11] Still, the court noted its "considerable discretion to supervise its own cases" and observed that the case was proceeding in the Northern District of Texas.[12] The court thus terminated the case without prejudice.

The Fifth Circuit eventually dismissed the preliminary injunction appeal.[13] As soon as the Fifth Circuit's mandate was filed in the district court, the district court again ordered the case transferred to the District of Columbia "at the earliest possible juncture." [14] The same day, May 28, the chamber filed another mandamus petition and stay request.[15] The next day, the Fifth Circuit administratively stayed the transfer order.[16]

Until the case is redocketed in D.C., under the Fifth Circuit's reasoning in SpaceX, discussed below, the Fifth Circuit presumably retains jurisdiction.

SpaceX: A California district court honors the Fifth Circuit's interlocutory retransfer request.

In *In re: Space Exploration Technologies Corp.*, SpaceX sued the National Labor Relations Board in the U.S. District Court for the Southern District of Texas to enjoin some NLRB administrative proceedings.[17] On Feb. 15, the district court granted the NLRB's motion to transfer venue to the U.S. District Court for the Central District of California.

An interlocutory Fifth Circuit order lays out the timeline from there: The district court "immediately sent the case [to the Central District of California] electronically"; on Feb. 16, SpaceX sought a writ of mandamus; on Feb. 19, the Fifth Circuit administratively stayed the transfer order; and on Feb. 23, the Central District of California court docketed the case.[18]

That same interlocutory order, entered on Feb. 26, held that the Fifth Circuit "still ha[d] jurisdiction over the case" and thus directed the Southern District of Texas to request retransfer.[19] The court reasoned that transfer is complete — and the transferor court stripped of jurisdiction — not when the case is electronically sent but when it is docketed.[20]

Given the Fifth Circuit's interlocutory order, the Central District of California, in a Feb. 27 order by U.S. District Judge Consuelo Marshall, held that it lacked jurisdiction.[21] The California federal court denied the NLRB's request to brief retransfer[22] and, a few days later, ordered the case returned to Texas district court.[23]

While the mandamus petition was pending, the Fifth Circuit scolded the NLRB's in-house lawyers for apparently trying to undermine the Fifth Circuit's jurisdiction by contacting the Central District of California clerk's office to expedite docketing.[24]

In March, the Fifth Circuit entered a one-line mandamus denial.[25] Meanwhile — taking a cue from Fort Worth Chamber — SpaceX noticed an interlocutory appeal, claiming that the Texas district court effectively denied its preliminary-injunction request by waiting too long to rule.[26] The preliminary injunction appeal is still pending, and Texas likely lacks jurisdiction to transfer until the Fifth Circuit issues its mandate in that appeal.[27]

Clarke: The transferee independently weighed the Fifth Circuit's retransfer request.

In *In re: Clarke*, users of PredictIt, an online platform for trading on the outcome of political events, sued the U.S. Commodity Futures Trading Commission in the Western District of Texas to block the agency from shutting down the platform.[28] On Jan. 16, the district court granted the CFTC's motion to transfer venue to D.C. court, "and the case was transferred that same day." [29]

The Fifth Circuit granted the plaintiffs' mandamus petition. The court held that the Texas district court abused its discretion by granting transfer based mainly on court congestion and perceived local interests when even those factors were neutral at best. The Fifth Circuit thus directed the district court "to request return of the case from D.D.C." [30] On March 7, the Western District of Texas complied with the Fifth Circuit's mandate.[31]

But the Fifth Circuit's holdings were not the last word. Two weeks after the Western District of Texas requested retransfer, the D.C. court by order of U.S. District Judge Jia Cobb stayed the case "until 10 days after th[e] Court's decision regarding transfer." [32] Recognizing that the Fifth Circuit and the Western District of Texas lack the practical ability to force retransfer, the CFTC urged the D.C. court to refuse the retransfer request, which would have functionally nullified the Fifth Circuit's writ.[33]

On May 22 — more than two months after the Western District of Texas court's retransfer request — the D.C. court finally ordered the case retransferred.[34] The court relied on "the overwhelming weight of authority" showing that "federal district court's routinely — and without further analysis — return [transferred cases] upon request." [35]

Four steps could prevent a transferee district from defying an appellate writ.

These cases illustrate some of the many procedural paths a case may take when a party seeks intercircuit transfer. They also highlight that the availability of effective appellate review may, oddly enough, be in the transferee district court's discretion.

In *Clarke*, the D.C. court eventually honored the retransfer request but took more than two months, during which it appears to have weighed the matter independently; in *Fort Worth Chamber*, the D.C. court honored the retransfer request while expressing that it had discretion not to; and in *SpaceX*, the Central District of California honored the retransfer request under circumstances that might lead another district judge to refuse.

Parties opposing transfer should consider four steps to help ensure the availability of effective appellate review. First, when opposing transfer, a party should alternatively ask the district court to temporarily stay any transfer to allow for review. *Clarke* supports this relief, noting that a short stay would be

"especially deserving of commendation." [36]

Second, the party opposing transfer should assess a possible interlocutory appeal, as from a preliminary injunction denial, before the case is transferred. Unlike a mandamus petition, a notice of appeal strips the district court of jurisdiction to transfer the case — assuming appellate jurisdiction exists.

This approach worked in Fort Worth Chamber and appears to be working again in SpaceX. Even so, the D.C. court's retransfer order in Fort Worth Chamber suggests that the transferee court may consider refusing retransfer even if the transferor court purportedly lacked jurisdiction. [37]

Third, if the district court did not stay its transfer order, then the party opposing transfer should seek a stay from the appellate court before the transferee district docket the case. That approach requires an immediate mandamus petition and emergency stay request in the appellate court. It worked in SpaceX and appears to have worked again following the second transfer order in Fort Worth Chamber.

But it is unclear whether it will always work without the transferee court's cooperation: A defiant transferor court could disagree with the Fifth Circuit that docketing — at a more-or-less arbitrary point in time — carries jurisdictional weight.

Fourth, if none of the above works, then a party opposing transfer should consider more creative measures. For instance, while the appellate court may lack power to order retransfer, it still has broad power over the parties before it, and so could perhaps bar them from proceeding in the transferee court or order them to jointly ask the transferee court to return the case. Or the aggrieved party may seek a writ from the appellate court embracing the transferee district, which may be more inclined than the district court to require return of the case as a matter of comity.

Alternatives like these are apparently untested to date.

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[1] In *After TikTok, Tiptoeing Toward Patent Transfer Alignment*, I explored the Fifth Circuit's effort to clarify review of orders denying transfer in Texas patent cases. Consistent with my analysis there, the Federal Circuit has since denied two more mandamus petitions seeking to overturn W.D. Tex. transfer denials. See *In re Google LLC*, No. 2024-117, 2024 WL 1460003, at *1 (Fed. Cir. Apr. 4, 2024); *In re Apple Inc.*, No. 2024-111, 2024 WL 1153977, at *1–2 (Fed. Cir. Mar. 18, 2024).

[2] See *In re Fort Worth Chamber of Commerce*, --- F.4th ---, 2024 WL 1976963 (5th Cir. May 3, 2024); *In re Space Exploration Technologies, Corp.*, 96 F.4th 733 (5th Cir. 2024); *In re Clarke*, 94 F.4th 502, 507–08 (5th Cir. 2024).

[3] *Def. Distributed v. Bruck*, 30 F.4th 414, 424 (5th Cir. 2022) (citing *In re Red Barn Motors, Inc.*, 794 F.3d 481, 484 (5th Cir. 2015)).

[4] *Def. Distributed v. Platkin*, 55 F.4th 486, 495–96 (5th Cir. 2022).

[5] Id. at 496.

[6] Id.

[7] 2024 WL 1976963, at *1.

[8] Id. at *4–5.

[9] Id. at *6.

[10] Id. Judge Higginson dissented and would have denied mandamus. Id. at *11–14. Apparently implying that the Fifth Circuit's decision would not bind D.D.C., Judge Higginson expressed "confiden[ce] the [D.C. District] will give the suggestion that it should disregard a case docketed by it its closest attention." Id. at *14 (emphasis added).

[11] Minute Order, Chamber of Commerce of the U.S., et al., v. CFPB, et al., No. 1:24-cv-00915-ABJ (D.D.C. Apr. 10, 2024).

[12] Id.

[13] Unpublished Order, Chamber of Commerce of the U.S., et al., v. CFPB, et al., No. 24-10248 (5th Cir. May 24, 2024), ECF No. 134-1.

[14] Opinion & Order, Chamber of Commerce of the U.S., et al., v. CFPB, et al., No. 4:24-cv-00213-P (N.D. Tex. May 28, 2024), ECF No. 96.

[15] Petition, In re Chamber of Commerce of the U.S., No. 24-10463 (5th Cir. May 28, 2024), ECF No. 2.

[16] Unpublished Order, In re Chamber of Commerce of the U.S., No. 24-10463 (5th Cir. May 29, 2024), ECF No. 12-1.

[17] In re Space Expl. Techs., Corp., 96 F.4th 733 at 734 (5th Cir. 2024). (Elrod, J., dissenting).

[18] Unpublished Order, In re Space Exploration Technologies, Corp., No 24-40103 (5th Cir. Feb. 26, 2024), ECF No. 46-1.

[19] Id. at 3.

[20] Id.

[21] In Chambers Order, Space Exploration Techs. Corp. v. NLRB, et al., No. CV-24-1352-CBM-ARGx (C.D. Cal. Feb. 27, 2024), ECF No. 103.

[22] Id.

[23] In Chambers Order & Notice to All Parties, Space Exploration Techs. Corp. v. NLRB, et al., No. CV-24-1352-CBM-ARGx (C.D. Cal. Mar. 4, 2024), ECF No. 106.

[24] Unpublished Order, *In re Space Exploration Technologies, Corp.*, No 24-40103 (5th Cir. Apr. 1, 2024), ECF No. 101-1; Unpublished Order, *In re Space Exploration Technologies, Corp.*, No 24-40103 (5th Cir. Apr. 17, 2024), ECF No. 110.

[25] *SpaceX*, 96 F.4th at 733. In April, the Fifth Circuit denied en banc rehearing by a vote of eight to eight. *In re SpaceX*, 99 F.4th 233 (5th Cir. 2024).

[26] See Plaintiff SpaceX's Notice of Appeal, *Space Exploration Techs. Corp. v. NLRB, et al.*, No. 1:24-CV-00001 (S.D. Tex. Apr. 30, 2024), ECF No. 119.

[27] See Order, *Space Exploration Techs. Corp. v. NLRB, et al.*, No. 1:24-CV-00001 (S.D. Tex. May 20, 2024), ECF No. 125.

[28] 94 F.4th at 507–08.

[29] *Id.* at 508.

[30] *Id.* at 516.

[31] Order Requesting Return of Case From United States District Court for the District of Columbia, *Clarke, et al. v. CFTC*, No. 1:22-CV-909-DAE (W.D. Tex. Mar. 7, 2024), ECF No. 70.

[32] Minute Order, *Clarke, et al. v. CFTC*, No. 1:24-cv-00167-JMC (D.D.C. Mar. 21, 2024).

[33] See, e.g., Defendant CFTC's Supplemental Briefing Opposing Retransfer of this Case to the Western District of Texas, *Clarke, et al. v. CFTC*, No. 1:24-cv-00167-JMC (D.D.C. Mar. 27, 2024), ECF No. 73.

[34] Order, *Clarke, et al. v. CFTC*, No. 1:24-cv-00167-JMC (D.D.C. May 22, 2024), ECF No. 78.

[35] *Id.* at 1, 5–6 (collecting cases).

[36] 94 F.4th at 507 n.1; see also Fort Worth Chamber, 2024 WL 1976964, at *11 (Oldham, J., concurring) ("[A] district court should stay a transfer order for a short period so that opposing parties may appeal it.").

[37] An appellate holding that the district court lacked jurisdiction to effectuate the transfer may distinguish the case from *Platkin*, where the Fifth Circuit found no viable ground for the Texas court to reassert jurisdiction over the transferred case. See 55 F.4th at 491–95. If the transferee court refused "return" in that scenario, the appellate court conceivably could order the transferor court to resume proceedings anyway, leading to another unprecedented jurisdictional conflict.