

## V. REMOVAL AND REMAND\*

### A. Introduction

Once a plaintiff files a claim in state court, defendants often try to remove the case to federal court. The presumption is that federal courts are more defendant-friendly.<sup>1</sup> This presumption was recently substantiated by a law review article by Kevin M. Clermont and Theodore Eisenberg,<sup>2</sup> which provided statistical data that revealed defendants who successfully remove to federal court enjoy higher win rates. Because of this, the respective interests of plaintiffs and defendants make the battle over a state or federal forum especially fierce.

The statutes that govern removal and remand complicate this battle. The statutes themselves can be complex, conflicting, and are occasionally trumped by other congressional legislation. In addition, how the courts interpret the statutes can differ, producing very different results from jurisdiction to jurisdiction. Because of this, even a plaintiff that originally files her case in state court may strategically choose a state court sitting in a federal district that interprets the rules more favorably to her interests, if there is a chance the case could be removed. Furthermore, removal and

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1. See JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE 55 (2d ed. 1993).

2. See generally Kevin M. Clermont & Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction*, 83 CORNELL L. REV. 581 (1998) (discussing the very low percentage of plaintiff win rates in removed cases, as opposed to a significantly higher percentage of plaintiff wins in cases adjudicated in state courts or those originally brought in federal courts).

remand are riddled with constitutional issues, forcing courts to proceed with the greatest caution.

*B. Removal under § 1441(a)*

Under § 1441 of the United States Code,<sup>3</sup> a defendant can generally remove a civil case brought in state court to federal court if that case could have originally been brought in federal court.<sup>4</sup> To properly bring a case in federal court, a case must fall into one of the categories set forth in Article III section 2 of the U.S. Constitution.<sup>5</sup> Of the types of cases over which federal courts have jurisdiction, § 1441<sup>6</sup> only authorizes removal of diversity cases (those between completely diverse parties where the amount in controversy exceeds \$75,000),<sup>7</sup> and cases that present a federal question.<sup>8</sup> Because of the potential for federalism issues, courts generally construe the statutes strictly against removal.<sup>9</sup> Though Congress has amended the removal statute several times<sup>10</sup> with the “inten[t] to resolve ambiguities and conflicts of decisions,”<sup>11</sup> courts continue to struggle to determine whether removal is proper in some cases. Furthermore,

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3. 28 U.S.C. § 1441 (2000).

4. *Id.*

5. The Constitution extends federal judicial power to:

all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; - to all Cases affecting Ambassadors, other public Ministers and Consuls; - to all Cases of admiralty and maritime Jurisdiction; - to Controversies to which the United States shall be a Party; - to Controversies between two or more States; - between a State and Citizens of another State; - between Citizens of different States; - between Citizens of the same State claiming Lands under the Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. CONST. art III, § 2

6. 28 U.S.C. § 1441.

7. *Id.* at § 1332.

8. *Id.* at § 1331.

9. *See Russell Corp. v. Am. Home Assurance Co.*, 264 F.3d 1040, 1049 (11th Cir. 2001); *Guas v. Miles Inc.*, 980 F.2d 564, 566 (9th Cir. 1992).

10. *See generally* 28 U.S.C.A. § 1441 (2000 & Supp. 2003) (outlining history of revision of the statute).

11. *Id.*, historical and revision notes.

Summer 2004]

REMOVAL AND REMAND

1557

federal courts must also comply with any new congressional legislation that may limit or expand the general removal requirements.<sup>12</sup>

### 1. New legislation affecting removal

While Congress's stated intent is to restrict the number of diversity cases that get into federal courts,<sup>13</sup> removal legislation has had the opposite effect by allowing cases to be removed that would not have been removable under § 1441.<sup>14</sup> For example, Congress passed the Securities Litigation Uniform Standards Act of 1998 (SLUSA),<sup>15</sup> which requires class actions dealing with certain "covered securities" to be removed to federal court.<sup>16</sup> In addition, the Multiparty, Multiforum Trial Jurisdiction Act of 2002 (MMTJA) abrogated the complete diversity requirement for mass disaster class action suits.<sup>17</sup> The MMTJA confers federal jurisdiction over cases where only minimal diversity exists, requiring only that any plaintiff be diverse from any defendant<sup>18</sup> (as opposed to the complete diversity requirement of § 1332, that all plaintiffs must be diverse from all defendants).<sup>19</sup>

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12. See 28 U.S.C. § 1441(a) (allowing removal "[e]xcept as otherwise expressly provided by Act of Congress").

13. See, e.g., S. REP. NO. 85-1830 (1958).

14. 28 U.S.C. § 1441 (2000).

15. 15 U.S.C. § 78a (2000).

16. For the history and legislative intent of the SLUSA, see Securities Litigation Uniform Standards Act of 1998, Publ.L.No. 105-353, 112 Stat. 3227; H.R. CONF. REP. NO. 105-803 (1998). Basically, Congress was trying to close a loophole created by the Private Securities Litigation Reform Act of 1995 (PSLRA). The PSLRA was passed to prevent abuse of class action "strike suits" against securities defendants, where the defendants were forced to settle to avoid costly discovery. The PSLRA allowed defendants to obtain early dismissal of these frivolous suits. The effect of the PSLRA was an increase in such strike suits being brought in state courts. In essence, the SLUSA preempts the state actions by requiring removal of cases to federal court, where defendants could obtain early dismissal. See also Spielman v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 332 F.3d 116, 122-23 (2d Cir. 2003) (discussing history of securities legislation).

17. 28 U.S.C. § 1369 (2002).

18. *Id.* In addition to minimal diversity, the Act also requires inter alia, that the action must arise from a single accident, where at least seventy-five natural persons have died at a discrete location. *Id.* The requirements of the Act seem to limit its application to airline or other mass transit disasters. See *id.*

19. 28 U.S.C. § 1332.

While both acts deal with relatively narrow areas of jurisdiction (class actions involving covered securities and mass disasters such as plane crashes), they provide some indication that the proposed Class Action Fairness Act may have enough congressional support to pass. The proposed Class Action Fairness Act “would allow for federal jurisdiction over virtually all nationwide or multi-state class actions.”<sup>20</sup>

Not only does the removal legislation raise federalism concerns at a constitutional level,<sup>21</sup> but it also necessitates new litigation strategies for plaintiffs and defendants. Defendants may cheer for the expansion of federal jurisdiction (assuming that federal courts are more defendant-friendly).<sup>22</sup> On the other hand, the battle over removal can tie a case up for years,<sup>23</sup> and delay can sometimes be a defendant’s strongest ally—if the Act grants original federal jurisdiction, delay would be minimal. From the plaintiff’s perspective, federal courts may be less generous than the more liberal state courts. On the flip side, the Act could result in injured parties getting a more even share of the judgment “pie” by lumping all potential plaintiffs into the same action where there will be no possibility for inconsistent rulings or disparate damages awards. This debate illustrates the substantial role forum selection plays in the success or failure of a case.<sup>24</sup>

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20. Georgene M. Vairo, *An Important Act with Two Antecedents More Controversial than the Original*, NAT’L L.J., Dec. 16, 2002, at B7.

21. For a discussion of the MMTJA as an indicator of further class action legislation and the potential impact on federalism issues, see Georgene M. Vairo, *Problems in Federal Forum Selection and Concurrent Federal State Jurisdiction: Supplemental Jurisdiction; Diversity Jurisdiction; Removal; Preemption; Venue; Transfer of Venue; Personal Jurisdiction; Abstention and The All Writs Act*, in 1 ALI-ABA COURSE OF STUDY MATERIALS: CIVIL PRACTICE AND LITIGATION TECHNIQUES IN FEDERAL AND STATE COURTS 221 (January 2003), WL SH063 ALI-ABA 221.

22. See FRIEDENTHAL, *supra* note 1, at 55.

23. See *Hendricks v. Dynegy Power Mktg. Inc.*, 160 F. Supp. 2d 1155 (S.D. Cal. 2001). This case has been removed and remanded twice and is now awaiting appeal in the Ninth Circuit. The initial case was filed almost three years ago and it has not yet been determined which court should hear the case.

24. See generally Clermont & Eisenberg, *supra* note 2 (discussing the very low percentage of plaintiff win rates in removed cases, as opposed to a significantly higher percentage of plaintiff wins in cases adjudicated in state courts or those originally brought in federal courts).

Summer 2004]

REMOVAL AND REMAND

1559

## 2. Federal question issues

*a. artful pleading*<sup>25</sup>

In order for a plaintiff's case to be removed under federal question jurisdiction,<sup>26</sup> the plaintiff's complaint must affirmatively allege a federal claim.<sup>27</sup> Despite this, a plaintiff may not avoid federal jurisdiction by cloaking a truly federal law claim as a state law claim, a practice referred to as "artful pleading."<sup>28</sup> To determine whether or not a federal claim is at the heart of the plaintiff's state law claim, a court will "'delve beyond the face of the state court complaint and find federal question jurisdiction' by 'recharacteriz[ing] a plaintiff's state-law claim as a federal claim.'"<sup>29</sup> Due in large part to federalism concerns, the mere presence of a federal issue in a state law claim, though, is not enough to confer federal jurisdiction.<sup>30</sup> Instead, the claim must be either necessarily federal in nature<sup>31</sup> or the right to relief itself must depend on the "resolution of a substantial, disputed federal question."<sup>32</sup> Once a court determines that a federal question is an essential part of the plaintiff's claim, the plaintiff cannot avoid removal with artful pleading. Instead, the court looks at the case as one that originally could have been filed in federal court, and the defendant will have the opportunity to remove.

*b. well-pleaded complaint*<sup>33</sup>

Under the related well-pleaded complaint rule, removal of cases is precluded where the plaintiff's cause of action is created by state

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25. For a more detailed discussion on the issue of artful pleading, see *supra* Part III.C.4.

26. 28 U.S.C. § 1331 (2000).

27. *Beneficial Nat'l Bank v. Anderson*, 123 S. Ct. 2058, 2059 (2003).

28. *Burda v. M. Ecker Co.*, 954 F.2d 434, 438 (7th Cir. 1992).

29. *Lippitt v. Raymond James Fin. Servs., Inc.*, 340 F.3d 1033, 1041 (9th Cir. 2003) (quoting *Precision Pay Phones v. Quest Communications Corp.*, 210 F. Supp. 2d 1106, 1112–13 (N.D. Cal. 2002)); *Hunter v. United Van Lines*, 746 F.2d 635, 640 (9th Cir. 1985).

30. *Merrell Dow Pharms., Inc. v. Thompson*, 478 U.S. 804, 808 (1986).

31. *Lippitt*, 340 F.3d at 1041–42 (citing *Brennan v. Southwest Airlines Co.*, 134 F.3d 1405, 1409 (9th Cir. 1998)).

32. *Id.* at 1042 (citing *Merrell Dow*, 478 U.S. at 814).

33. For a more detailed discussion on the issue of the well-pleaded complaint rule, see *supra* Part III.C.3.

law, but an aspect of federal law is an important element of the defendant's defense.<sup>34</sup> The rule severely limits the number of cases in which state law creates the cause of action that may be originated in or removed to federal court.<sup>35</sup> Like the artful pleading doctrine, the well-pleaded complaint rule requires the court to determine whether a federal question is an essential part of the plaintiff's complaint.<sup>36</sup> For jurisdiction to be proper, the plaintiff's claim must allege an issue substantially arising under federal law completely "unaided by anything alleged in anticipation of avoidance of defenses which it is thought the defendant might interpose."<sup>37</sup> Therefore, a defendant cannot remove where the federal question is only part of her defense. Rather, the federal question must appear on the face of the plaintiff's well-pleaded complaint.

*c. preemption*<sup>38</sup>

As a general rule, absent diversity jurisdiction, a case is not removable unless the plaintiff affirmatively alleges a federal claim in her complaint.<sup>39</sup> "Potential defenses, including a federal statute's preemptive effect, do not provide a basis for removal[,]” although an "exception to the general rule occurs when a federal statute completely preempts a cause of action."<sup>40</sup> While issues of federal law can completely preempt a plaintiff's complaint, the application of this doctrine has been relatively narrow, as courts have held that complete preemption occurs only in extraordinary circumstances.<sup>41</sup> The Supreme Court has identified only three federal statutes that

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34. *Lippitt*, 340 F.3d at 1039–40 (citing *Franchise Tax Bd. v. Const. Laborers Vacation Trust*, 463 U.S. 1, 9–10 (1983)).

35. *Id.* at 1039–40 (quoting *Franchise Tax Bd.*, 463 U.S. at 9–10).

36. *Id.*

37. *Id.* at 1040 (quoting *Taylor v. Anderson*, 234 U.S. 74, 75–76 (1914)).

38. For a more detailed discussion on the issue of preemption, see *supra* Part III.D.

39. *Beneficial Nat'l Bank v. Anderson*, 123 S. Ct. 2058, 2059 (2003) (citing *Franchise Tax Bd. v. Const. Laborers Vacation Trust*, 463 U.S. 1 (1983)); see also *supra* Part V.B.2.b.

40. *Beneficial Nat'l Bank*, 123 S. Ct. at 2059.

41. *Ansley v. Ameriquest Mortgage Co.*, 340 F.3d 858, 862 (9th Cir. 2003) (citing *Wayne v. DHL Worldwide Express*, 294 F.3d 1179, 1183–84 (9th Cir. 2002)).

Summer 2004]

REMOVAL AND REMAND

1561

meet the “extraordinary circumstances” requirement.<sup>42</sup> (1) Section 301 of the Labor-Management Relations Act;<sup>43</sup> (2) Section 502 of the Employee Retirement Income Security Act of 1974;<sup>44</sup> and (3) the usury provisions of the National Bank Act.<sup>45</sup> Courts have held that other acts, such as the Alternative Mortgage Transaction Parity Act<sup>46</sup> and the Airline Deregulation Act of 1978,<sup>47</sup> do not completely preempt state law.<sup>48</sup> Given that the Supreme Court so recently addressed the issue of complete preemption in *Beneficial National Bank*<sup>49</sup> and identified only three statutes that qualify, coupled with the federalism issues inherent in the preemption doctrine, it is unlikely that federal courts will expand the scope of “extraordinary circumstances” under which state law is completely preempted by federal law anytime soon.

### 3. Removal based on diversity—fraudulent joinder

#### *a. the usual suspects and standards of proof*

Fraudulent joinder is a hotly litigated issue in removal jurisdiction. Defendants increasingly allege that plaintiffs have fraudulently-joined defendants in efforts to defeat federal jurisdiction by destroying complete diversity.<sup>50</sup> For example, in a products liability case against a diverse pharmaceutical manufacturer, the plaintiff may add non-diverse doctors or pharmacists as defendants, wrecking complete diversity.<sup>51</sup> Other examples of the usual “fraudulently-joined” suspects include retailers,<sup>52</sup> wholesalers,<sup>53</sup>

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42. *Id.* at 862 (compiling list as articulated in *Beneficial Nat'l. Bank*, 123 S. Ct. at 2062–64).

43. 29 U.S.C. § 185 (2000).

44. *Id.* at § 1132.

45. 12 U.S.C. §§ 85, 86 (2000).

46. *Id.* at § 3801.

47. 49 U.S.C. § 41713 (2000).

48. *Ansley*, 340 F.3d at 864; *Wayne*, 294 F.3d at 1184.

49. 123 S. Ct. 2058 (2003).

50. Alan E. Rothman et al., *Advances in Protecting Defendants' Right to Remove from State to Federal Court*, 20 L.J.N'S PRODUCT LIABILITY L. & STRATEGY, May 2002, at 1, WL 20 No. 11 L.J.NPLLST 1.

51. *See Collins v. Am. Home Prods.*, 343 F.3d 765 (5th Cir. 2003).

52. *See Tillman v. R.J. Reynolds Tobacco*, 340 F.3d 1277 (11th Cir. 2003); *Sherwin-Williams Co. v. Holmes County*, 343 F.3d 383 (5th Cir. 2003); *In re Benjamin Moore & Co.*, 318 F.3d 626 (5th Cir. 2002).

branch offices,<sup>54</sup> local employees,<sup>55</sup> attorneys,<sup>56</sup> and distributors.<sup>57</sup> In order for a defendant to prove that the plaintiff has fraudulently-joined a non-diverse party, the defendant bears the burden of showing either that the plaintiff committed actual fraud in pleading the jurisdictional facts, or that there is no claim against the non-diverse defendant.<sup>58</sup> Although there are circumstances under which the defendant may prove actual fraud,<sup>59</sup> the bulk of the case law focuses on the second allegation, that the plaintiff had no claim against the non-diverse defendant.<sup>60</sup>

In determining that the plaintiff does not have a cognizable claim, courts generally require that the defendant show by clear and convincing evidence that there is no possibility that a plaintiff can state a cause of action against the non-diverse defendant in state court.<sup>61</sup> Fifth Circuit courts seem to give defendants more wiggle

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53. *See, e.g.*, *Badon v. RJR Nabisco Inc.*, 236 F.3d 282 (5th Cir. 2000).

54. *See, e.g.*, *Hugger v. Rutherford Inst.*, 63 Fed. Appx. 683 (4th Cir. 2003).

55. *See, e.g.*, *Mercado v. Allstate Ins. Co.*, 344 F.3d 458 (9th Cir. 2003) (agents); *Ross v. Citifinancial, Inc.*, 344 F.3d 458 (5th Cir. 2003) (agents); *In re Diet Drugs Prods. Liab. Litig.*, 2003 U.S. Dist. LEXIS 15479 (E.D. Pa. July 30, 2003) (sales representatives); *United Computer Sys. v. AT&T*, 298 F.3d 756 (9th Cir. 2002) (administrative employee of arbitration company).

56. *See, e.g.*, *Green v. Time-Life Libraries Inc.*, 65 Fed. Appx. 157 (9th Cir. 2003).

57. *See, e.g.*, *Lake Charles Diesel, Inc. v. Gen. Motors Corp.*, 328 F.3d 192 (5th Cir. 2003).

58. *Ross*, 344 F.3d at 458 (citing *Travis v. Irby*, 326 F.3d 644, 647 (5th Cir. 2003)).

59. Fraud may be shown, for example, where the plaintiff includes a non-diverse defendant that does not even exist or where the plaintiff misrepresents a defendant's state of residence. *See B., Inc., v. Miller Brewing Co.*, 663 F.2d 545, 551 n.14 (5th Cir. 1981) (citing *Hughes Constr. Co. v. Rheem Mfg. Co.*, 487 F. Supp. 345 (N.D. Miss. 1980); *Ray v. Bird & Son & Asset Realization Co.*, 519 F.2d 1081 (5th Cir. 1975)).

60. *See, e.g.*, *Ross v. Citifinancial, Inc.*, 344 F.3d at 458 (5th Cir. 2003); *Filla v. Norfolk S. Ry.*, 336 F.3d 806 (8th Cir. 2003); *Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305 (5th Cir. 2002); *Badon v. RJR Nabisco Inc.*, 236 F.2d 282 (5th Cir. 2000); *Pampillonia v. RJR Nabisco, Inc.*, 138 F.3d 459 (2d Cir. 1998).

61. *Pampillonia*, 138 F.3d at 461. The *Pampillonia* court pointed out that courts have various ways of articulating the same rule. *See Sonnenblick-Goldman Co. v. ITT Corp.*, 912 F. Supp. 85, 88 (S.D.N.Y. 1996) ("In evaluating the existence of fraudulent joinder, the Court must determine whether the mere possibility exists that plaintiff can establish any cause of action against a defendant."); *Allied Programs Corp. v. Puritan Ins. Co.*, 592 F. Supp. 1274, 1276 (S.D.N.Y. 1984) ("Joinder will be considered fraudulent

Summer 2004]

REMOVAL AND REMAND

1563

room, with an “arguably reasonable basis standard.”<sup>62</sup> Under this standard, there must be more than a “mere theoretical possibility” that the plaintiff could have a cause of action against those joined.<sup>63</sup> Despite this “reasonableness” language, the consensus seems to be that even if the plaintiff has a colorable cause of action under state law (that is, possible but speculative), courts rarely find fraudulent joinder,<sup>64</sup> partly because of the potential for *Erie*-type<sup>65</sup> problems.<sup>66</sup> Therefore, courts generally resolve all factual and legal issues in the controlling substantive law in favor of the plaintiff at this stage<sup>67</sup> and

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when it is established ‘that there can be no recovery [against the defendant] under the law of the state on the cause alleged.’” (quoting *Parks v. N.Y. Times Co.*, 308 F.2d 474, 478 (5th Cir. 1962)); *infra* Part V.B.3.b.ii (discussing various deficiencies in the plaintiff’s pleading that defendants have relied on to prove that the plaintiff did not have a cognizable claim).

62. *See, e.g., Ross*, 344 F.3d at 462; *Great Plains*, 313 F.3d at 312.

63. *Ross*, 344 F.3d at 462 (citing *Great Plains*, 313 F.3d at 312); *Badon*, 236 F.3d at 286 n.4 (rejecting contention that theoretical possibility of recovery is enough to support no fraudulent joinder; citing “reasonable basis” standard); *Griggs v. State Farm Lloyds*, 181 F.3d 694, 701 (5th Cir. 1999) (“While the burden of demonstrating fraudulent joinder is a heavy one, we have never held that a particular plaintiff might possibly establish liability by the mere hypothetical possibility that such an action could exist.”)).

64. *Filla*, 336 F.3d at 810 & n.10; *Foslip Pharm., Inc. v. Metabolife, Inc.*, 92 F. Supp. 2d 891, 903 (N.D. Iowa 2000).

65. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

66. *See, e.g., Filla*, 336 F.3d at 810–11; *Badon*, 236 F.3d at 286. Under *Erie*, federal courts must apply state substantive law in diversity cases. *Erie*, 304 U.S. at 78–80. In determining whether or not the plaintiff has pled a cognizable claim against the non-diverse defendant, the federal court looks at the applicable state law. *E.g., Filla*, 336 F.3d at 810–11; *Badon*, 236 F.3d at 286. Where the state law is not conclusive on the issue, federal courts are unwilling to “guess” at this stage of the trial, because if they guess wrong (i.e., holding that no claim exists) they would be ignoring the mandate of *Erie* by failing to apply state law. *E.g., Filla*, 336 F.3d at 810–11; *Badon*, 236 F.3d at 286. Therefore, at this point in the trial, the court will resolve the issues in favor of the plaintiff. *E.g., Filla*, 336 F.3d at 810–11; *Badon*, 236 F.3d at 286. After reviewing the case on the merits, the court may yet decide that the claim is barred by state law, and then dismiss the claim, which would not be inconsistent with *Erie*. *E.g., Filla*, 336 F.3d at 810–11; *Badon*, 236 F.3d at 286.

67. *See, e.g., Pampillonia*, 138 F.3d at 461; *Filla*, 336 F.3d at 811; *Fields v. Pool Offshore, Inc.*, 182 F.3d 353, 357 (5th Cir. 1999). Courts use this same approach where international law controls, as well. *See, e.g., Marathon Oil Co. v. Ruhrgas, A.G.*, 115 F.3d 315, 319–20 (5th Cir. 1997) (holding that joinder was not fraudulent where difficult issues of international law need to be resolved in order to determine who could be true defendants).

will give plaintiffs the benefit of the doubt where discovery is not complete.<sup>68</sup>

*b. proving fraudulent joinder through legal doctrines  
and pleading deficiencies*

*i. legal doctrines*

While the defendant seeking removal bears a heavy burden, defendants have found success with various legal doctrines and deficiencies in the plaintiff's pleadings. For example, in pharmaceutical failure to warn cases, the learned intermediary doctrine may bar joinder of pharmacists.<sup>69</sup> Arbitral immunity may block the joinder of a local attorney in a pro se action.<sup>70</sup> Defendants have been particularly successful in proving the fraudulent joinder of local employees by showing the employees were not acting outside the scope of agency, therefore precluding a basis of liability independent of the company.<sup>71</sup>

*ii. pleading deficiencies*

As discussed, a defendant can prove the plaintiff fraudulently-joined a party by showing that the plaintiff has no cognizable claim against the suspect defendant. Defendants have been able to carry this burden via deficiencies in the plaintiff's pleading. While the removing party bears the burden of showing fraudulent joinder, plaintiffs cannot "rest upon mere allegations in their pleadings," rather, the court may "pierce the pleadings"<sup>72</sup> and look beyond their face to determine if the plaintiff has a cognizable claim against each defendant. In the absence of any proof, courts will not assume that the nonmoving party will succeed in proving the necessary facts to support his claims against the non-diverse defendant.<sup>73</sup>

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68. *Travis v. Irby*, 326 F.3d 644, 649 (5th Cir. 2003).

69. *Collins v. Am. Home Prods.*, 343 F.3d 765 (5th Cir. 2003).

70. *Green v. Time-Life Libraries Inc.*, 340 F.3d 824 (9th Cir. 2003).

71. *See, e.g., Mercado v. Allstate Ins. Co.*, 340 F.3d 824 (9th Cir. 2003); *Wiles v. Capitol Indem. Corp.*, 280 F.3d 868 (8th Cir. 2002).

72. *Ross v. Citifinancial, Inc.*, 344 F.3d 458, 462 (5th Cir. 2003).

73. *Badon v. RJR Nabisco Inc.*, 224 F.3d 382, 394 (5th Cir. 2000) (citing *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994)).

Courts have found fraudulent joinder where the plaintiff fails to state a claim against the non-diverse defendant,<sup>74</sup> where plaintiff alleges many claims against many defendants and fails to specify which defendant caused what harm,<sup>75</sup> or where there is simply no connection between the plaintiff's claim and the non-diverse defendant.<sup>76</sup> Claims against non-diverse defendants that are overly conclusory also fail.<sup>77</sup>

*c. fraudulently-joined plaintiffs*

It is worth noting that while fraudulent joinder usually applies to fraudulently-joined defendants, it may also apply to fraudulently-joined plaintiffs. "Misjoinder [of plaintiffs] may be as fraudulent as the joinder of a resident against whom a plaintiff has no possibility of a cause of action."<sup>78</sup> To determine whether a plaintiff has been fraudulently-joined, courts invoke the same principle as where a defendant has been fraudulently-joined—whether the joined plaintiff has a reasonable basis for recovery against the non-diverse defendant.<sup>79</sup>

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74. *United Computer Sys. v. AT&T*, 298 F.3d 756, 761 (9th Cir. 2002); *Whitaker v. Am. Telecasting, Inc.*, 261 F.3d 196 (2d Cir. 2001).

75. *See Badon*, 224 F.3d at 392–93; *Gray v. Beverly Enters.-Miss., Inc.*, 261 F. Supp. 2d 652, 661 (S.D. Miss. 2003); *In re Rezulin Prods. Liab. Litig.*, 133 F. Supp. 2d 272, 282–83 (S.D.N.Y. 2001); *Hughes Constr. Co. v. Rheem Mfg. Co.*, 487 F. Supp. 345, 348 (N.D. Miss. 1980) (citing *Asher v. Pac. Power & Light Co.*, 249 F. Supp. 671, 676 (N.D. Cal. 1965)).

76. *Tedford v. Warner-Lambert Co.*, 327 F.3d 423, 425 (5th Cir. 2003) (evidence showed non-diverse doctor had not even treated the plaintiff); *In re Diet Drugs Prods. Liab. Litig.*, 2003 U.S. Dist. LEXIS 15479, at \*27–\*29 (E.D. Pa. Jul. 30, 2003) (plaintiff's complaint failed to allege sales representatives had any contact with plaintiffs or their doctors).

77. *See, e.g., Badon*, 224 F.3d at 392–93; *Pampillonia*, 138 F.3d at 461–62.

78. *In re Diet Drugs*, 2003 U.S. Dist. LEXIS 15479, at \*16–\*18, \*29–\*32 (joinder of New Jersey plaintiff to class action to wreck diversity with defendant resident of New Jersey was fraudulent); *Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353, 1360 (11th Cir. 1996), *modified on other grounds*, *Cohen v. Office Depot, Inc.*, 204 F.3d 1069 (11th Cir. 2000); *In re Benjamin Moore*, 318 F.3d 626, 628–29 (5th Cir. 2002) (defendants claimed only four of seventeen plaintiffs had a possibility of recovery against the non-diverse defendants); *In re Rezulin Prods. Liab. Litig.*, 2002 WL 548750, at \*2 (where misjoinder of plaintiffs destroys diversity, court severs misjoined plaintiffs to preserve defendant's right to remove).

79. *In re Diet Drugs*, 2003 U.S. Dist. LEXIS 15479, at \*17–\*18.

*C. Restrictions on Removal Under § 1441(b)*

Section 1441(b) specifies that all federal question cases may be removed without regard to the parties' citizenship, but where diversity is the basis for removal, defendants who are citizens of the state in which the action was brought may not remove the case to federal court.<sup>80</sup> Section 1441(b) is read in tandem with § 1441(a), imposing additional restrictions on the types of cases that can be removed even if they could have originally been brought in federal court.<sup>81</sup> The effect of § 1441(b) is to limit the number of diversity cases that make it to federal court, which is consistent with Congress's intent to "restrict rather than to enlarge federal removal jurisdiction."<sup>82</sup>

To determine whether or not the defendants are citizens of the forum state, courts apply the same standards used to determine if diversity exists for jurisdiction under § 1332.<sup>83</sup> A defendant corporation is deemed to be a citizen of the state if it is incorporated in the state, or if the corporation's principal place of business is located in the state.<sup>84</sup> A corporation's principal place of business is ascertained by applying the "nerve center" test (applied where the corporation's activities are spread out among various states),<sup>85</sup> the "place of activity" or "muscle" test (where the corporation has a collection of nerve cells in various states),<sup>86</sup> or the "total activity" test (a synthesis of the first two tests, which looks "to the nature, location, importance, and purpose of a corporation's activities and

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80. 28 U.S.C. § 1441(b) (2000). The rationale behind the restriction relates to the idea that defendants may want to remove a case to federal court to avoid in-state bias against them. If the defendant is a resident of the state in which the suit is brought, the defendant presumably would not be the target of any bias, eliminating the need for the defendant to remove the case. *See Vairo, supra* note 21.

81. *Morris v. TE Marine Corp.*, 344 F.3d 439, 444 (5th Cir. 2003).

82. *Eriksen v. Moore Mill & Lumber Co.*, 157 F. Supp. 888, 889–90 (D. Or. 1958) (referring to the revisor's notes accompanying § 1441).

83. 28 U.S.C. § 1332 (2000). *See supra* Part II for a more detailed discussion of diversity jurisdiction.

84. 28 U.S.C. § 1332(c)(1).

85. *Tubbs v. Southwestern Bell Tel. Co.*, 846 F. Supp. 551, 554 (S.D. Tex. 1994) (citing *Scot Typewriter Co. v. Underwood Corp.*, 284 F. Supp. 862, 865 (S.D.N.Y. 1959)).

86. *Id.* (citing *Kelly v. United States Steel Corp.*, 284 F.2d 850 (3d Cir. 1960)).

the degree to which those activities bring the corporation into contact with the local community”).<sup>87</sup> A growing number of courts are adopting the total activity test to determine the location of a corporation’s principal place of business.<sup>88</sup>

*D. Removal Under § 1441(c): Separate & Independent*

Section 1441(c) of the United States Code allows the removal of otherwise non-removable separate and independent claims when those claims are joined with a claim supported by § 1331 federal question jurisdiction.<sup>89</sup> Removal under § 1441(c) is only available when the claims are joined with a § 1331 federal question claim, and therefore does not apply where the jurisdiction-conferring claim is based on diversity.<sup>90</sup> Removal under this section is very rare and can create a procedural and constitutional minefield, which has prompted some courts to declare removal under § 1441(c) altogether unconstitutional.<sup>91</sup> As discussed below, the courts that do allow

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87. *Howery v. Allstate Ins. Co.*, 243 F.3d 912, 920 (5th Cir. 2001) (citing *Nauru Phosphate Royalties, Inc. v. Drago Daic Interests, Inc.*, 138 F.3d 160, 164 (5th Cir. 1998)). For a more in-depth discussion on the total activity test, see *J.A. Olsen v. City of Winona*, 818 F.2d 401, 404–10 (5th Cir. 1987).

88. ALLAN IDES & CHRISTOPHER N. MAY, *CIVIL PROCEDURE: CASES AND PROBLEMS* 319 (2003). For a more detailed discussion on determining a party’s state of residence, see *supra* Part II.B.

89. 28 U.S.C. § 1441(c). Section 1441(c) is also used as a tool to remand entire cases or individual claims to the state court. See *infra* Part V.E.

90. See, e.g., *Nat’l Am. Ins. Co. v. Advantage Contract Servs., Inc.*, 200 F. Supp. 2d 620, 622 (E.D. La. 2002); *BJB Co. v. Comp. Air Leroi*, 148 F. Supp. 2d 751, 754 (N.D. Tex. 2001); *Baylor v. District of Columbia*, 838 F. Supp. 7, 9 (D.D.C. 1993).

91. *Fullin v. Martin*, 34 F. Supp. 2d 726, 735 (E.D. Wis. 1999). See *id.* at 729–35 for a detailed discussion on the historical development of § 1441(c) and accompanying analysis, which led the court to the conclusion that removal of separate and independent claims that are not textually related to the federal issue is unconstitutional. The court stated that allowing a federal court to take jurisdiction over claims not textually related to the jurisdiction-conferring federal claim would be inconsistent with article III, section 2. *Id.* To comply with article III, section 2, supplemental jurisdiction is only proper where the claims satisfy the “common nucleus of operative fact” test for supplemental jurisdiction articulated by the Supreme Court in *United Mine Workers of America v. Gibbs*, 282 U.S. 715, 725 (1966). *Fullin*, 34 F. Supp. 2d. at 729–35; see also 28 U.S.C. § 1367. This conflict is addressed in more detail *infra* Part V.E.

removal under § 1441(c) apply very different tests that lead to inconsistent results.

### 1. Third-party defendants

While recognizing the potential for constitutional problems, courts have allowed removal under § 1441(c) under narrow circumstances. Fifth Circuit courts have afforded “third-party defendants the opportunity of § 1441(c) removal to federal court,” when “they could have removed when sued alone” (if, for example, the original suit had been between the plaintiff and the third-party defendant, as opposed to the original defendant).<sup>92</sup> This tool is only available to true third-party defendants who are new to the suit, and is unavailable to an original plaintiff to the original claim, who only becomes a counter-defendant after an original defendant files a counterclaim against him.<sup>93</sup> To allow ordinary counter-defendants to remove in this manner “would fly in the face of the well-pleaded complaint rule where the counter-defendants were the same parties as the state court plaintiffs.”<sup>94</sup> This application of § 1441(c) has been very rare and narrowly construed,<sup>95</sup> and the other circuits that have considered the issue disagree as to whether third-party defendants may seek removal under the statute.<sup>96</sup>

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92. *Texas v. Walker*, 142 F.3d 813, 816 (5th Cir. 1998) (citing *Carl Heck Eng’rs v. Lafourche Parish Police Jury*, 622 F.2d 133 (5th Cir. 1980)), (allowing a third-party indemnity defendant to remove a case to federal court pursuant to § 1441(c)); *see also Jones v. Petty-Ray Geophysical Geosource, Inc.*, 954 F.2d 1061, 1066 (5th Cir. 1991) (indemnification claims based on a separate contract are separate and independent).

93. *Walker*, 142 F.3d at 816.

94. *Id.*

95. *See United States v. Pate*, No. CIV.A.7:01-CV-001164, 2002 WL 47900, at \*2 (W.D. Va. Jan. 12, 2002) (unpublished memorandum opinion) (declining to extend removal under § 1441(c) to counter-defendants who although were not original plaintiffs, were substituted as plaintiffs sometime during the proceedings).

96. *Compare Walker*, 142 F.3d at 816 (allowing a third-party indemnity defendant to remove a case to federal court pursuant to § 1441(c)), *and Jones*, 954 F.2d at 1066 (holding indemnification claims based on a separate contract are separate and independent), *and Carl Heck*, 622 F.2d at 136 (“If the third party complaint states a separate and independent claim which if sued upon alone could have been brought properly in federal court, there should be no bar to removal.”), *with Lewis v. Windsor Door Co.*, 926 F.2d 729, 733 (8th Cir. 1991) (finding that § 1441(c) was not intended to effect the removal of a suit with introduction of a third-party claim), *and Thomas v. Shelton*, 740 F.2d

## 2. Different relief

Cases have also been properly removed under section 1441(c) when the plaintiffs seek very different types of relief from a defendant. In *Eyak Native Village v. Exxon Corporation*,<sup>97</sup> the defendants removed the case to federal court after multiple classes joined their distinct claims (all of which arose from the Exxon Valdez oil spill) into one class action.<sup>98</sup> The court held that even though the claims arose from a single wrong, the various claims met the separate and independent test because some of the members of the class were seeking “relief for the general public for damages to the natural resources,” whereas others “were seeking compensatory relief for damages suffered by each member of their classes.”<sup>99</sup> Similarly, in *Justice v. Atchinson*,<sup>100</sup> the court held that the plaintiff’s injunction claim and damages claim were separate and independent, despite the fact that both claims were filed in response to a single defendant flooding their property.<sup>101</sup>

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478, 487–88 (7th Cir. 1984) (third-party defendants may not remove, *and* Monmouth-Ocean Collection Serv., Inc. v. Klor, 46 F. Supp. 2d 385, 394 (D.N.J. 1999) (“[A]ny third-party claim for indemnification is not a claim ‘separate and independent’ from the main action, and therefore is not removable by the third-party defendant under § 1441.”), *and* Fullin v. Martin, 34 F. Supp. 2d 726 (E.D. Wis. 1999) (not recognizing a right to removal under § 1441(c) at all), *and* Fleet Bank-N.H. v. Engeleiter, 753 F. Supp. 417, 419 (D.N.H. 1991) (holding that Congress intended only that original defendants be able to remove pursuant to § 1441(c)), *and* Sequoyah Feed & Supply Co. v. Robinson, 101 F. Supp. 680, 682 (W.D. Ark. 1951) (holding that under a “strict construction” of § 1441(c), third-party defendants may not remove to federal court). For a related discussion dealing with how to interpret “joined” as applied to third-party claims, see *First Nat’l Bank of Pulaski v. Curry*, 301 F.3d 456, 464–66 (6th Cir. 2002). The court adopted a narrow construction of “joined” to apply only to claims joined by the plaintiff in the original state court action, likely precluding all third-party claims from satisfying the separate and independent requirement of § 1441(c).

97. 25 F.3d 773 (9th Cir. 1994), *cert. denied*, 513 U.S. 1102 (1995).

98. The basis for removal hinged on a previously filed consent decree, which provided relief to the general public. The defendants contended that continuing the litigation on issues of relief to the general public, “despite the consent decree, raised a federal question of the construction of the consent decree and whether the consent decree was *res judicata* as to the trust plaintiffs’ claims.” *Id.* at 777.

99. *Id.* at 781.

100. 927 F.2d 502 (10th Cir. 1991).

101. *Id.* at 505.

The test for “separate and independent” in *Eyak* and *Justice* is inconsistent with tests articulated by other courts. In *Eastus v. Blue Bell Creameries*,<sup>102</sup> the court defined separate as “the separateness of the wrong to the plaintiff” and independent as a claim not involving “substantially the same facts.”<sup>103</sup> For example, in *Eastus*, the plaintiff was fired from his job allegedly for requesting time off because his wife was going to give birth.<sup>104</sup> The plaintiff brought three claims against his employer, including tortious interference, intentional infliction of emotional distress (IIED), and a federal claim based on the Family and Medical Leave Act (FMLA).<sup>105</sup> The court held that the IIED claim was not separate from the FMLA claim, as the IIED claim arose from the same single wrong to the plaintiff and dealt with the same facts (his termination).<sup>106</sup> As for the tortious interference claim, the court found that because this claim arose from the defendant’s alleged interference with the plaintiff’s efforts to find a new job, this claim was not based on a single wrong and dealt with different facts.<sup>107</sup>

Under this test, it seems that the claims in both *Eyak* and *Justice* would be separate, because they deal with separate wrongs, but not independent, as they arise from the same set of facts. This inconsistency is yet another example of the complex and problematic nature of § 1441(c).

*E. The Remand Provision of § 1441(c) and the Conflict with § 1367(a)*

Once a court allows removal of a claim under § 1441(c), the district court may adjudicate both the separate and independent claim and the non-removable claim, or the district court “may remand all matters in which State law predominates.”<sup>108</sup> *Eastus* represents a good application of this rule.<sup>109</sup> In *Eastus*, the Fifth Circuit articulated the elements that are required for remand orders under

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102. 97 F.3d 100 (5th Cir. 1996).

103. *Id.* at 104.

104. *Id.* at 100.

105. *Id.* at 103.

106. *Id.* at 105.

107. *Id.* at 106.

108. 28 U.S.C. § 1441(c) (2000).

109. *Eastus v. Blue Bell Creameries*, 97 F.3d 100 (5th Cir. 1996).

Summer 2004]

REMOVAL AND REMAND

1571

§ 1441(c) to be proper: “the claim remanded must be (1) a separate and independent claim or cause of action; (2) joined with a federal question; (3) otherwise non-removable; and (4) a matter in which state law predominates.”<sup>110</sup>

As discussed above, the *Eastus* court found that the IIED claim was not separate and independent, but the tortious interference claim was.<sup>111</sup> Since the IIED claim was not separate and independent, the court held it could not be remanded under § 1441(c).<sup>112</sup> The tortious interference claim did pass the court’s separate and independent test, was joined with a federal question (the FMLA claim), and was otherwise non-removable (as there was no basis for diversity jurisdiction and the claim did not form part of the same case or controversy to qualify for supplemental jurisdiction).<sup>113</sup> Even though the claim survived the first three prongs, the court held that the claim should be remanded as state law pre-dominated the issue.<sup>114</sup> As discussed below, some courts view the discretionary decision to keep the claim to be in direct conflict with the provisions of § 1367.<sup>115</sup>

Section 1367 is the statute that governs supplemental jurisdiction.<sup>116</sup> Under this section, a district court may only take supplemental jurisdiction over “claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.”<sup>117</sup> The standard courts use to determine if a claim is part of the same case or controversy is whether the claims are part of a “common nucleus of operative fact.”<sup>118</sup> The common nucleus test can be summarized as follows:

In particular, “[t]he state and federal claims must derive from a common nucleus of operative fact.” Thus, “if,

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110. *Id.* at 104.

111. *Id.* at 105–06.

112. *Id.* at 105.

113. *Id.*

114. *Id.* at 106–07.

115. *See* 28 U.S.C. § 1367 (2000).

116. *Id.* For a complete discussion of § 1367, see *supra* Part IV.

117. 28 U.S.C. § 1367(a).

118. *See* *Rodriguez v. Doral Mortgage Corp.*, 57 F.3d 1168, 1175 (1st Cir. 1998) (articulating that common nucleus of operative fact test from *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966), was the proper test to determine § 1367(a) inquiries).

considered without regard to their federal or state character, a plaintiff's claims are such that [she] would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is power in federal courts to hear the whole."<sup>119</sup>

Therefore, when a court decides to adjudicate a separate and independent claim under § 1441(c), it is taking jurisdiction over a claim that is not part of the same case or controversy as the jurisdiction-conferring federal question claim. Because of this, some courts have reasoned that § 1441(c) is wholly inconsistent with § 1367,<sup>120</sup> and therefore unconstitutional, as it allows a federal court jurisdiction over a claim outside of the scope of Article III.<sup>121</sup> On the other hand, if § 1367 is regarded as simply codifying *Gibb's* common nucleus test,<sup>122</sup> then arguably the scope of cases included in Article III may be broader than the scope of cases that meet the supplemental jurisdiction requirements of § 1367.<sup>123</sup> Under this line of reasoning, separate and independent claims could be outside the scope of § 1367 and inside the scope of Article III at once, therefore making federal jurisdiction over these claims via § 1441(c) within constitutional limitations.<sup>124</sup>

Notwithstanding this interpretation of § 1367, the apparent conflict between § 1367 and § 1441(c) may explain why courts apply different definitions to "separate and independent." As discussed, some courts require only that the claims seek a different type of relief in order for them to be considered separate and independent.<sup>125</sup> Because there is no requirement that the facts be unrelated, this type of test may allow courts to narrowly squeak by the conflict with § 1367. The results in other courts, which have required different

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119. *Rodriguez*, 57 F.3d at 1175–76 (quoting *Gibbs*, 383 U.S. at 725) (citations omitted).

120. 28 U.S.C. § 1367.

121. See *supra* note 91 and accompanying text (discussing the "unconstitutionality" of § 1441(c)).

122. *Gibbs*, 383 U.S. at 725. See *supra* Part IV.B.4 for a discussion on the origin of § 1367.

123. U.S. CONST. art. III; 28 U.S.C. § 1367.

124. See *supra* Part IV.D.4 (collecting legal commentary on the interpretation of § 1367 and § 1441(c)).

125. See *Eyak Native Vill. v. Exxon Corp.*, 25 F.3d 773, 781 (9th Cir. 1994), *cert. denied*, 513 U.S. 1102 (1995); *Justice v. Atchinson*, 927 F.2d 502, 505 (10th Cir. 1991).

Summer 2004]

REMOVAL AND REMAND

1573

types of relief *and* unrelated facts<sup>126</sup> necessarily come into direct conflict with § 1367, as jurisdiction under § 1441(c) is only proper if the facts are *unrelated*, and jurisdiction under § 1367(a) is proper only if the facts are *related*.

*F. Section 1446: Procedural Requirements for Removal*

1. All defendants must generally join in removal

The well-settled rule that removal requires the consent of all defendants<sup>127</sup> is consistent with the language of § 1446(a), which specifies that a case may be removed “by the defendant or the defendants.”<sup>128</sup> Despite this general rule, there are some situations that do not require all defendants to join in removal, including circumstances where a separate and independent claim is removed under § 1441(c),<sup>129</sup> where the defendant has not been served, or where the defendant is a nominal or fraudulently-joined party.<sup>130</sup>

*a. exception for non-served defendants*

Defendants are not required to join in a removal notice filed before they have been served.<sup>131</sup> This exception is sometimes referred to as the “non-served defendant exception.”<sup>132</sup> After the latter defendant is served, though, she must decide to “either accept

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126. See *Eastus v. Blue Bell Creameries*, 97 F.3d 100, 104 (5th Cir. 1996).

127. See, e.g., *Wis. Dep’t of Corr. v. Schacht*, 542 U.S. 381, 393 (1998) (Kennedy, J., concurring); *Loftis v. United Parcel Serv., Inc.*, 342 F.3d 509, 516 (6th Cir. 2003); *Marano Enters. of Kan. v. Z-Teca Rests.*, 254 F.3d 753, 754 (8th Cir. 2001); *Brierly v. Aluisse Flexible Packaging, Inc.*, 184 F.3d 527, 533 n.3 (6th Cir. 1999), *cert. denied*, 528 U.S. 1076 (2002); *Balazik v. County of Dauphin*, 44 F.3d 209, 213 (3d Cir. 1995); *Doe v. Kerwood*, 969 F.2d 165, 167 (5th Cir. 1992); *Hewitt v. City of Stanton*, 798 F.2d 1230, 1232 (9th Cir. 1986); *N. Ill. Gas Co. v. Airco Indus. Gases*, 676 F.2d 270, 272–73 (7th Cir. 1982); *Cornwall v. Robinson*, 654 F.2d 685, 686 (10th Cir. 1981).

128. 28 U.S.C. § 1446(a) (2000).

129. See *supra* Part V.D.

130. See *Courtney v. Benedetto*, 627 F. Supp. 523, 526 (M.D. La. 1986) (discussing the general rule and exceptions); *McCurtain Co. Prod. Corp. v. Cowett*, 482 F. Supp. 809, 812–13 (E.D. Okla. 1978).

131. See *Pullman Co. v. Jenkins*, 305 U.S. 534, 540–41 (1939).

132. See, e.g., *Paz v. Bonita Tomato Growers*, 920 F. Supp. 174, 175 (M.D. Fla. 1996); *Courtney*, 627 F. Supp. at 526 n.6; *Albonetti v. GAF Corp.-Chem. Group*, 520 F. Supp. 825, 827 (S.D. Tex. 1981).

the removal or exercise [her] right to choose the state forum by making a motion to remand.”<sup>133</sup> The standards courts use to determine when a subsequently served defendant must join the removal notice vary, and are discussed in more detail below.<sup>134</sup>

*b. exception for nominal or fraudulently-joined defendants*

Consistent with the notion that fraudulently joined or nominal parties are ignored when courts determine if complete diversity exists, these parties are similarly ignored when defendants seek removal.<sup>135</sup> While a nominal party’s presence in the case is technically proper, the court does not require a nominal party to join in removal<sup>136</sup> since the party has nothing at stake.<sup>137</sup> On the other hand, a fraudulently-joined defendant’s presence in the case is improper, and therefore it is just as irrelevant if these parties join in removal. Courts determine whether the party is fraudulently-joined using the same standards that are applied during the complete diversity inquiry.<sup>138</sup>

2. Cases initially removable and the thirty-day time limit

Section 1446(b) requires that defendants file a notice of removal within thirty days of receipt of the initial pleading, or within thirty days of being served with the summons if the pleading has been filed in the court and is not required to be served on the defendant.<sup>139</sup> While the language of the statute appears straightforward, courts have been forced to interpret it more precisely to determine exactly what circumstances start the thirty-day clock. There are three instances where this determination is crucial to successful removal. The first two instances deal with cases that are initially removable:

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133. *Getty Oil Corp. v. Ins. Co. of N. Am.*, 841 F.2d 1254, 1263 (5th Cir. 1988).

134. *See infra* Part V.F.2.b.

135. *United Computer Sys. v. AT&T Corp.*, 298 F.3d 756, 762–63 (9th Cir. 2003).

136. *Thorn v. Amalgamated Transit Union*, 305 F.3d 826, 833 (8th Cir. 2002).

137. *See Strotek Corp. v. Air Transp. Ass’n of Am.*, 300 F.3d 1129, 1133 (9th Cir. 2002).

138. *See supra* V.B.3; see also *supra* Part II for a more in-depth discussion of diversity jurisdiction.

139. 28 U.S.C. § 1446(b) (2000).

Summer 2004]

REMOVAL AND REMAND

1575

first, where the court must decide whether the initial pleading or summons is sufficient to start the clock, and second, where the case involves multiple defendants served at different times. The third instance involves situations where the case becomes removable sometime after the initial pleading.

*a. initial pleading and summons*

Recently established parameters govern whether the pleading or summons is sufficient to start the thirty-day clock.<sup>140</sup> In *Murphy Bros. v. Michetti Pipe-Stringing, Inc.*,<sup>141</sup> the Supreme Court addressed the scope of the word “otherwise” in § 1446(b), which states that the defendant must file notice of removal thirty days after receiving the complaint “through service or otherwise.”<sup>142</sup> The Eleventh Circuit Court of Appeals had held that the plain meaning of “otherwise” required that the thirty-day clock be triggered when the defendant received constructive notice of the complaint via a faxed “courtesy copy,” not when the defendant was formally served.<sup>143</sup> The Supreme Court reversed, holding that “mere receipt of the complaint unattended by any formal service” was insufficient to start the thirty-day period.<sup>144</sup>

The Court also articulated a “road map” for courts to follow when determining at what point the thirty-day clock should start running.<sup>145</sup> First, where the summons and complaint are served together, the clock starts running immediately.<sup>146</sup> Second, where the defendant first receives the summons, and then receives the complaint at a later date, the clock is triggered upon receipt of the complaint.<sup>147</sup> Third, where the defendant receives the summons and the plaintiff is not required to serve the defendant with the complaint, the clock will run when the complaint is made available through

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140. See *Murphy Bros. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 353–54 (1999); *Whitaker v. Am. Telecasting, Inc.*, 261 F.3d 196 (2d Cir. 2001).

141. 526 U.S. 344 (1999).

142. 28 U.S.C. 1446(b).

143. *Michetti Pipe Stringing v. Murphy Bros.*, 125 F.3d 1396, 1398 (11th Cir. 1997), *rev'd*, 526 U.S. 344 (1999).

144. *Murphy*, 526 U.S. at 347–48.

145. *Id.* at 354 (citing *Potter v. McCauley*, 186 F. Supp. 146, 149 (D. Md. 1960)).

146. *Id.*

147. *Id.*

filing.<sup>148</sup> Lastly, where the complaint is filed in court before any service, the clock will run upon the defendant's receipt of the summons.<sup>149</sup>

While the *Murphy* roadmap specified the complaint as the usual clock-triggering pleading, the Second Circuit recently expanded the scope of clock-triggering pleadings beyond the complaint.<sup>150</sup> In *Whitaker v. American Telecasting, Inc.*,<sup>151</sup> the court held that the clock-triggering pleading need not specifically be a complaint, but instead any pleading "containing sufficient information to enable the defendant to intelligently ascertain the basis for removal."<sup>152</sup> Since the only pleading in the *Whitaker* case that contained the requisite information was the complaint, it is not clear what other types of pleadings would meet this requirement.<sup>153</sup>

Under *Murphy* and *Whitaker*, as a general rule, unless the plaintiff is only required to serve the defendant with a summons, the defendant must remove within thirty days of receiving the complaint or some other pleading that enables the defendant to determine the removability of the action. This reading of the rule is in the interest of fairness, as it gives defendants ample time to exercise their removal rights by preventing plaintiffs from serving the defendant with summons and then running out the clock before the defendant can ascertain if removal is proper (or wise).

*b. first-served rule v. last-served rule*

When a case involves multiple defendants, the circuits are split as to whether the thirty-day clock should start running when the first defendant is served or when the last defendant is served.<sup>154</sup> The

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148. *Id.*

149. *Id.*

150. *Whitaker v. Am. Telecasting, Inc.*, 261 F.3d 196 (2d Cir. 2001).

151. *Id.*

152. *Id.* at 198.

153. *Id.*

154. Compare *Brown v. Demco, Inc.*, 792 F.2d 478, 482 (5th Cir. 1986) (adopting first-served rule), and *Phoenix Container, L.P. v. Sokoloff*, 235 F.3d 352, 353 (7th Cir. 2000) (upholding district court's ruling based on first-served rule), with *Marano Enters. of Kan. v. Z-Teca Rests.*, 254 F.3d 756, 762 (8th Cir. 2001) (applying last-served rule), and *Brierly v. Alusuisse Flexible Packaging, Inc.*, 184 F.3d 527, 533 (6th Cir. 1999) (same), and *McKinney v. Bd. of Trs. of Md. Cmty. Coll.*, 955 F.2d 924 (4th Cir. 1992) (same).

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The First Circuit Court of Appeals has not yet addressed the issue, and the district courts are split. *Compare* *Garside v. Osco Drug, Inc.*, 702 F. Supp. 19, 22 (D. Mass. 1988) (applying last-served rule), *with* *Gorman v. Abbott Labs.*, 629 F. Supp. 1196, 1201–02 (D.R.I. 1986) (applying first-served rule).

The Second Circuit is in a similar situation. *Compare* *Quinones v. Minority Bus Line Corp.*, No. 98-CIV. 7 167 (WHP), 1999 U.S. Dist. LEXIS 5381, at \*5 (S.D.N.Y. Apr. 19, 1999) (applying first-served rule), *with* *Varela v. Flintlock Constr., Inc.*, 148 F. Supp. 2d 297, 300 (S.D.N.Y. 2001) (applying last-served rule).

The Third Circuit Court of Appeals has not addressed the issue, but the district courts have consistently held that the last-served rule is the proper test in light of the Supreme Court's holding in *Murphy Bros. v. Machetti Pipe Stringing, Inc.*, 526 U.S. 344 (1999). *See* *Zollner v. Swan*, No. 03-1110, 2003 U.S. Dist. LEXIS 9766, at \*7 (E.D. Pa. May 13, 2003); *Shadie v. Aventis Pasteur*, 254 F. Supp. 2d 509, 515 (M.D. Pa. 2003); *Liberty Mut. Ins. Co. v. Bayer Corp.*, No. 02-343 gms, 2002 U.S. Dist. LEXIS 12581, at \*7–\*8 (D. Del. July 8, 2002); *Orlick v. J.D. Carton & Son, Inc.*, 144 F. Supp. 2d 337, 343 (D.N.J. 2001). For a discussion on the rationale that the last-served rule is consistent with *Murphy*, see *infra* Part V.F.2.b.ii.

The Ninth Circuit courts are split, as the Court of Appeals has not yet addressed the issue. *Compare* *McAnally Enters., Inc. v. McAnally*, 107 F. Supp. 2d 1223, 1226–28 (C.D. Cal. 2000) (collecting cases for both the “first-served” and “last-served” rules and adopting the first-served rule), *with* *Ford v. New United Motors Mfg.*, 857 F. Supp. 707, 709 (N.D. Cal. 1994) (each individual defendant has its own thirty-day period commencing on the day that defendant is served). In *United Computer Sys. v. AT&T Corp.*, 298 F.3d 756, 763 n.4 (9th Cir. 2003), the court acknowledged a split in the circuit, but declined to express an opinion on the issue.

Although the Tenth Circuit Court of Appeals has not addressed the issue, the district courts have consistently applied the first-served rule. *See* *Fastpro Int'l, Inc. v. Great Plains Software O.C., Inc.*, No. 01-2082-KHV, 2001 U.S. Dist. LEXIS 5521, at \*2–\*3 (D. Kan. Apr. 10, 2001); *Wakefield v. Olcott*, 983 F. Supp. 1018, 1021 (D. Kan. 1997); *McShares v. Barry*, 979 F. Supp. 1338, 1342–43 (D. Kan. 1997); *Scheall v. Ingram*, 930 F. Supp. 1448, 1449 (D. Colo. 1996); *Henderson v. Holmes*, 920 F. Supp. 1184, 1186 (D. Kan. 1996).

Similarly, district courts in the Eleventh Circuit routinely apply the first-served rule, while recognizing policy concerns under certain circumstances that would subject the later-served defendant to inequitable result. *See* *Fitzgerald v. Bestway Servs.*, 284 F. Supp. 2d 1311, 1315–16 (N.D. Ala. 2003); *Diebel v. S.B. Trucking Co.*, 262 F. Supp. 2d 1319, 1327–28 (M.D. Fla. 2003); *Hooper v. Albany Int'l Corp.*, 149 F. Supp. 2d 1315, 1318 (M.D. Ala. 2001).

The treatises on the issue are also divided. *Compare* 16 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE, § 107–30[3][a] (Daniel R. Cosquillette et al. eds., 3d ed. 2004) (advocating the first-served rule), *with* 14c CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: JURISDICTION § 3739, at 336–39 (3d ed. 1998) (advocating last-served rule).

consequences of applying one test instead of the other are immense. For example, suppose the first defendant is served on the first of January, and the last defendant is served on second of February. Suppose further that the first-served defendant fails to file a notice of removal. Under the first-served rule, the thirty-day clock began running on January first and the last-served defendant is precluded from removing the case. On the other hand, under the last-served rule, the clock would not start running until February second, and the defendant will have thirty days from that date to file a notice to remove if she desires to do so.<sup>155</sup>

i. first-served rule

Under the first-served rule, also referred to as the “single date of removal,”<sup>156</sup> the thirty-day clock begins running when the first defendant is served. Supporters of this test reason that the removal statutes must be strictly construed against removal because of the significant federalism concerns inherent in federal removal jurisdiction,<sup>157</sup> and that courts must only take jurisdiction where the removal action falls “squarely within the bounds Congress has created.”<sup>158</sup> Furthermore, the first-served rule is consistent with the unanimity rule,<sup>159</sup> which requires all defendants to join in the removal petition.<sup>160</sup> The rationale is that if the first-served defendant did not remove the case, then it is irrelevant whether or not the last-served defendant wants to remove because the first-served defendant’s choice not to remove destroys the unanimity requirement.<sup>161</sup>

Finally, jurisdictions that follow the first-served rule do not apply the rule in situations where the first-served defendant has been

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155. See *McKinney*, 955 F.2d at 928 (4th Cir. 1992).

156. *Diebel*, F. Supp. 2d at 1327 (M.D. Fla. 2003).

157. See *Gaus v. Miles*, 980 F.2d 564, 566 (9th Cir. 1992); *Russell Corp. v. Am. Home Assurance Co.*, 264 F.3d 1040, 1049 (11th Cir. 2001).

158. *McAnally Enters., Inc. v. McAnally*, 107 F. Supp. 2d 1223, 1226 (C.D. Cal. 2000) (citing *Hom v. Serv. Merch. Co., Inc.*, 727 F. Supp. 1343, 1345 (N.D. Cal. 1990); quoting *Phillips v. Allstate Ins. Co.*, 702 F. Supp. 1466, 1468 (C.D. Cal. 1989)).

159. See 28 U.S.C. 1446(a) (2000); see also *supra* Part V.F.1 for a more in-depth discussion of the unanimity requirement.

160. See *Brown v. Demco, Inc.*, 792 F.2d 478, 481–82 (5th Cir. 1986).

161. *Id.*

Summer 2004]

REMOVAL AND REMAND

1579

fraudulently-joined.<sup>162</sup> Instead, the clock will begin running with service of the first non-fraudulent defendant.<sup>163</sup>

ii. last-served rule

Under the last-served rule, the thirty-day clock is not triggered until the last defendant has been served. The first rationale for this test is based on the language of the statute: if Congress had intended the clock to start running when the first defendant is served, it would have said so specifically, and courts should be reluctant to read words into the statute.<sup>164</sup> Secondly, other courts have held that the last-served rule is the only proper reading of the statute in light of the Supreme Court's holding in *Murphy*.<sup>165</sup> There, the Court held that a defendant is not bound by the thirty-day time limit until that defendant has been served with summons or the complaint.<sup>166</sup> Courts applying the last-served rule hold that denying a later-served defendant the right to remove would be inconsistent with *Murphy*, as the defendant would be bound to a thirty-day time limit that was triggered before the defendant was formally served.<sup>167</sup>

Finally, courts also hold that fairness dictates application of the last-served rule. For example, since removal petitions became subject to Rule 11<sup>168</sup> sanctions in 1988,<sup>169</sup> it would be unfair to force later-served defendants to “forego removal or join hurriedly in a petition for removal and face possible Rule 11 sanctions.”<sup>170</sup> Furthermore, applying the first-served rule could create unfairness to defendants by giving plaintiff's a “bag of tricks” to overcome

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162. *United Computer Sys., Inc. v. AT&T Corp.*, 298 F.3d 756, 762 (9th Cir. 2003).

163. *Id.*

164. *See Brierly v. Alusuisse Flexible Packaging, Inc.*, 184 F.3d 527, 533 (6th Cir. 1999).

165. *See Marano Enters. of Kan. v. Z-Teca Rests.*, 254 F.3d 753, 756 (8th Cir. 2001). *See also* the line of Third Circuit cases, discussed *supra* note 154, which also rely on this rationale to support application of the last-served rule.

166. *Murphy Bros. v. Michetti Pipe-Stringing, Inc.*, 526 U.S. 344, 350 (1999).

167. *Marano*, 254 F.3d at 756.

168. FED. R. CIV. P. 11.

169. Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 1016(b), 102 Stat. 4642, 4669–70 (1988).

170. *McKinney v. Bd. of Trs. of Md. Cmty. Coll.*, 955 F.2d 924, 928 (4th Cir. 1992).

removal.<sup>171</sup> Such tricks could include serving an unsophisticated defendant who is unlikely to remove first, and then waiting until the thirty-day removal period expires to serve defendants that *are* likely to seek removal.<sup>172</sup> The last-served rule, therefore, preserves a defendant's right to remove, while still subjecting the defendant seeking removal to the unanimity requirement of § 1446(a).<sup>173</sup>

Until the Supreme Court specifically addresses this issue, the courts will likely continue to reach very different results when determining when the thirty-day clock is triggered. Because the consequences of each test have such a disparate impact on defendants, whether the jurisdiction follows the first-served or last-served rule may play a decisive role in where a plaintiff decides to file her claim.

*c. the revival exception*

Even if a defendant fails to remove a case within the thirty-day period, some courts allow removal under the judicially created "revival exception" or "*Wilson* exception"<sup>174</sup> to § 1446(b).<sup>175</sup> This equitable exception has been narrowly applied to situations where the plaintiff files an amended complaint that so changes the nature of her action that the result is "substantially a new suit begun that day."<sup>176</sup> The revival exception only applies to cases that are initially removed.<sup>177</sup>

The revival exception is premised on the idea that the defendant's willingness to litigate the original case in state court may not mean the defendant would also choose to remain in state court to

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171. *Id.*

172. *Smith v. Mail Boxes, Etc., Inc.*, 191 F. Supp. 2d 1155, 1161 (E.D. Cal. 2002).

173. 28 U.S.C. 1446 (a) (2003); see also *supra* Part V.F.1 for a more in-depth discussion of the unanimity requirement.

174. The exception is sometimes referred to as the "*Wilson* Exception" because the scope and definition of the exception was articulated in *Wilson v. Intercollegiate (Big Ten) Conference*, 668 F.2d 962 (7th Cir. 1982). See *infra* notes 184–186 and accompanying text for a discussion on the questioned applicability of the exception after Congress's 1988 amendment to § 1446(b).

175. 28 U.S.C. § 1446(b).

176. *Johnson v. Heublein Inc.*, 227 F.3d 236, 242 (5th Cir. 2000) (citing *Wilson*, 668 F.2d at 965; *Fletcher v. Hamlet*, 116 U.S. 408, 410 (1886)).

177. *Id.*

Summer 2004]

REMOVAL AND REMAND

1581

litigate a completely different claim.<sup>178</sup> In order for the revival exception to apply, the removal must not thwart the purposes of the thirty-day rule.<sup>179</sup> First, the removal must not allow the defendant the tactical advantage of seeing how the case goes in state court before removing.<sup>180</sup> Second, the removal must not result in undue delay and wastefulness by starting over in a second court after significant proceedings have occurred in the first.<sup>181</sup>

Assuming that removal is consistent with the purposes of the thirty-day rule, the amended complaint must be substantially different from the original case for the revival exception to apply. There is no hard and fast test to determine when a change is substantial enough to trigger the exception; therefore courts must determine what is substantial on a case-by-case basis.<sup>182</sup> It seems the changes must be substantively fundamental and radical to trigger the exception, either by making the case much more complex, subjecting the defendant to a much higher level of liability, or completely realigning the parties.<sup>183</sup>

Some courts have questioned the applicability of the revival exception after Congress's 1988 amendment to § 1446.<sup>184</sup> This amendment added the one-year limitation to cases that were not initially removable.<sup>185</sup> These courts reason that the actual text of § 1446(b) and legislative history do not support the application of the revival exception, as Congress intended that the 1988 amendment be a “modest curtailment in access to diversity jurisdiction.”<sup>186</sup> The

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178. *Id.* (citing 14C CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: JURISDICTION § 3732, at 321 (3d ed. 1998)).

179. *Id.* (citing *Wilson*, 668 F.2d at 965).

180. *Id.*

181. *Id.*

182. *Wilson*, 668 F.2d at 965.

183. *See, e.g., id.; Johnson*, 227 F.3d at 242; *Smith v. Hilton Hotel Corp.*, No. 03C388, 2003 U.S. Dist. LEXIS, 12366 at \*7-\*8 (N.D. Ill. 2003); *Clegg v. Bristol-Myers Squibb Co.*, 285 B.R. 23, 31 (M.D. Fla. 2002); *Baych v. Herrick Douglass*, 227 F. Supp. 2d 620, 623 (E.D. Tex. 2002).

184. *See Messick v. Toyota Motor Mfg., Inc.*, 45 F. Supp. 2d 578, 581 (E.D. Ky. 1999); *Smith*, 2003 U.S. Dist. LEXIS 12366 at \*6 n.2; *Burke v. Atlantic Fuels Mktg. Corp.*, 775 F. Supp. 474, 475-76 (D. Mass. 1991).

185. *See* 28 U.S.C. § 1446(b) (2000); Judicial Improvements and Access to Justice Act, Pub.L. 100-702, 102 Stat. 4642 (1988). *See also infra* Part V.F.3.b for a more thorough discussion on the one-year rule.

186. *Burke*, 775 F. Supp. at 476-77 (quoting H.R. REP. NO. 100-889, 100th Cong., 2d Sess., *reprinted in* 1988 U.S.C.C.A.N. 5982, 6032).

application of the revival exception would be inconsistent with Congress's intent to limit federal jurisdiction, as it would allow for an increase in a defendant's access to diversity jurisdiction.

In any event, the revival doctrine remains good law, although its application has been extraordinarily narrow.<sup>187</sup> If nothing else, the exception is yet another illustration of the profound competing interests in the forum selection battle.

### 3. Cases that later become removable

#### *a. the voluntary/involuntary rule*

The second paragraph of § 1446(b) allows a defendant to remove a case that, although not initially removable, becomes removable through an amended pleading, motion, order or other document.<sup>188</sup> The case may become removable either under federal question or diversity jurisdiction,<sup>189</sup> and the defendant will have thirty days from the receipt of the amended pleading, motion, order or other document to file a notice of removal.

The case must only become removable, though, as a result of the plaintiff's *voluntary actions*.<sup>190</sup> Stated differently, the defendant's right to remove is not automatic, but is governed by the so-called *voluntary/involuntary rule*, which only allows removal where the plaintiff has affirmatively chosen a course of action that makes the case removable.<sup>191</sup> The purposes of the voluntary/involuntary rule are to promote judicial economy<sup>192</sup> and to allow the proper deference to the plaintiff's choice of forum.<sup>193</sup>

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187. In fact, *Johnson v. Heublein Inc.*, 227 F.3d 236 (5th Cir. 2000), seems to be the only case in which a federal court of appeals has upheld application of the revival exception since 1956. See *Cliett v. Scott*, 233 F.2d 269, 271 (5th Cir. 1956).

188. 28 U.S.C. § 1446(b).

189. See *id.* at § 1331 for federal question jurisdiction requirements and *id.* § 1332 for diversity jurisdiction requirements.

190. See 16 JAMES WM. MOORE, *supra* note 154, § 107.30 [3][a][ii][B]-[c]; *Great N. Ry. Co. v. Alexander*, 246 U.S. 276, 282 (1918).

191. *Lungren v. Keating*, 986 F.2d 346, 348 (9th Cir. 1993).

192. *Poulos v. Naas Foods, Inc.*, 959 F.2d 69, 72 (7th Cir. 1992) (citing *Quinn v. Aetna Life & Cas. Co.*, 616 F.2d 38, 40 n.2 (2d Cir. 1980)).

193. *Id.* (citing *Insinga v. La Bella*, 845 F.2d 249, 253 (11th Cir. 1988); *Self v. Gen. Motors Corp.*, 588 F.2d 655, 659 (9th Cir. 1978)).

Some defendants seeking removal have unsuccessfully contended that the voluntary/involuntary rule was overruled when Congress adopted § 1446(b) of the removal statute.<sup>194</sup> Courts have rejected this argument, finding that judicial economy and deference to the plaintiff's choice of forum are still valid concerns.<sup>195</sup> Furthermore, courts have found that Congress did not intend to vitiate the rule when it adopted § 1446(b).<sup>196</sup>

While all of the circuits that have addressed the issue consistently hold that the voluntary/involuntary rule survived § 1446(b), the Second Circuit has defined "voluntarily" a bit more broadly than other circuits.<sup>197</sup> Generally, the plaintiff must affirmatively change the case in order for it to be voluntary.<sup>198</sup> The Second Circuit also considers an amendment voluntary where the removability of the case is the result of a decision of the *court*.<sup>199</sup> If the plaintiff decides not to appeal the court's decision, the court considers the plaintiff's inaction a voluntary action that would make the case removable.<sup>200</sup> For example, if the court dismisses a non-diverse defendant creating complete diversity, and the plaintiff does not appeal, the voluntary/involuntary test will be satisfied and the defendant will now be able to remove.<sup>201</sup> Courts in other circuits have commented that defining "voluntary" in this way does not afford the plaintiff the proper deference in choice of forum,<sup>202</sup> and therefore require the plaintiff to be the party to actually sever the non-diverse defendant in order for the case to become removable.<sup>203</sup>

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194. *See Poulos*, 959 F.2d at 71–72; *Higgins v. E.I. DuPont de Nemours & Co.*, 863 F.2d 1162, 1166 (4th Cir. 1988) (dictum); *Quinn*, 616 F.2d at 40 n.2 (dictum); *In re Iowa Mfg. Co.*, 747 F.2d 462, 464 (8th Cir. 1984); *DeBry v. Transamerica Corp.*, 601 F.2d 480, 486–88 (10th Cir. 1979); *Weems v. Louis Dreyfus Corp.*, 380 F.2d 545, 548 (5th Cir. 1967).

195. *See Poulos*, 959 F.2d at 72.

196. *Id.*

197. *See Id.* at 72 n.3.

198. *See* 16 JAMES WM. MOORE, *supra* note 154, § 107.30 [3][a][ii][B]-[c]; *Great N. Ry. Co. v. Alexander*, 246 U.S. 276, 282 (1918).

199. *Quinn*, 616 F.2d at 40 n.2.

200. *Id.*

201. *Id.*

202. *See Poulos*, 959 F.2d at 72 n.3; *Self*, 588 F.2d at 660–65 (Ely, J., dissenting).

203. *Poulos*, 959 F.2d at 71–72.

An exception to the rule exists where the non-diverse defendant has been fraudulently joined.<sup>204</sup> The voluntary/involuntary rule does not apply where the plaintiff fraudulently joins a non-diverse defendant.<sup>205</sup> There, if complete diversity is created when the court dismisses the non-diverse, fraudulently-joined defendant, the remaining defendants may remove the case even though the dismissal was not the result of the plaintiff's voluntary action.<sup>206</sup>

Finally, note that there are two other situations where a case may subsequently become removable. First, a case may also become removable based on diversity jurisdiction where the plaintiff's initial pleading did not exceed the amount in controversy requirement,<sup>207</sup> but the amount is satisfied at some later date.<sup>208</sup> Second, a case may become removable under federal question jurisdiction when a subsequent document reveals that the plaintiff is asserting a claim based on federal law.<sup>209</sup> Just as where jurisdiction is based on diversity, the defendant will not be required to file notice of removal until thirty days after being able to ascertain that the plaintiff's claim includes a question of federal law.<sup>210</sup>

*b. the one-year rule*

As discussed, the second paragraph of § 1446(b) allows the removal of a case that becomes removable sometime after the initial pleading.<sup>211</sup> The section further specifies that when the basis for

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204. *Mayes v. Rapoport*, 198 F.3d 457, 461 & n.9 (4th Cir. 1999) (citing *Insinga v. LaBella*, 845 F.2d 249, 254 (11th Cir. 1988)).

205. *Id.*

206. *Id.*

207. See *infra* Part V.F.5 for a more detailed discussion of "jurisdictional amount games."

208. See *Chapman v. Powermatic, Inc.*, 969 F.2d 160, 161 (5th Cir. 1992) (plaintiff did not include specific amount of damages in initial pleading, but plaintiff's subsequent answer alleged damages upwards of \$800,000; thirty-day clock not triggered until defendant served with this document, as removability was not ascertainable until then). *But see Bosky v. Kroger Tex., LP*, 288 F.3d 208, 210 (5th Cir. 2002) (holding that "specific damage estimates that are less than the minimum jurisdictional amount, when combined with other unspecified damage claims, can provide sufficient notice that an action is removable so as to trigger the time limit for filing a notice of removal.") (citing *Marcel v. Pool Co.*, 5 F.3d 81, 82-85 (5th Cir. 1993)).

209. See *Leffall v. Dallas Indep. Sch. Dist.*, 28 F.3d 521, 525 (5th Cir. 1994).

210. *Id.*

211. 28 U.S.C. § 1446(b) (2000).

Summer 2004]

REMOVAL AND REMAND

1585

removal is diversity jurisdiction, defendants *must* remove such cases within one year after the commencement of the action.<sup>212</sup> Congress added the one-year rule to § 1446(b) in 1988 in an attempt to reduce the number of diversity cases over which federal courts have jurisdiction.<sup>213</sup>

- i. first approach to the one-year rule: it applies only to cases not initially removable

One approach to the one-year rule is to apply it only to cases that were removable from the initial pleading. Every appellate court that has considered the issue has adopted this approach.<sup>214</sup> These courts have reasoned that the textual structure of the statute dictates such an interpretation because the clause is contained in the second paragraph of the section, which applies only to cases not initially removable.<sup>215</sup>

Adopting this interpretation could potentially have a favorable impact on defendants who are later added to the action, or defendants who are served late in the action. For example, suppose the plaintiff commenced the suit and serves “Defendant A” on January 1, 2004 in a jurisdiction that follows the last-served rule. Suppose further that the case is initially removable based on diversity jurisdiction. The plaintiff then serves “Defendant B” on February 2, 2005. Under this interpretation of the rule, Defendant B would not be precluded from removing the case to federal court, since the one-year rule would not apply because the case was initially removable.

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212. *Id.*

213. *See id.*; Judicial Improvements and Access to Justice Act, Pub. L. 100-702, 102 Stat. 4642 (1988).

214. *See* *Brown v. Tokio Marine and Fire Ins. Co.*, 284 F.3d 871, 873 (8th Cir. 2002); *Johnson v. Heublein Inc.*, 227 F.3d 236, 241 (5th Cir. 2000); *Brierly v. Alusuisse Flexible Packaging, Inc.*, 184 F.3d 527, 534–35 (6th Cir. 1999); *N.Y. Life Ins. Co. v. Deshotel*, 142 F.3d 873, 886 (5th Cir. 1998); *Ritchey v. Upjohn Drug Co.*, 139 F.3d 1313, 1316 (9th Cir. 1998).

215. *See Ritchey*, 139 F.3d at 1316 (finding that the “most sound reading of a sentence will refer its limiting clause back to the antecedent clause to which it is attached, and not to other paragraphs or sentences in the statute”).

- ii. second approach to the one-year rule: it applies to all cases regardless of whether the case was initially removable

Although no court of appeals has adopted this approach, a number of district courts have held that the one-year limitation should apply to all diversity cases, whether initially removable or not.<sup>216</sup> In *Ariel Land Owners, Inc. v. Dring*,<sup>217</sup> a district court in the Third Circuit questioned the logic of interpreting the rule as applying only to cases not originally removable based only on the “plain meaning” of the statute.<sup>218</sup> The *Ariel* court found recent U.S. Supreme Court decisions<sup>219</sup> and the “weight of contrary interpretations in lower courts and learned treatises”<sup>220</sup> demanded a contrary interpretation.<sup>221</sup> Furthermore, the court reasoned that applying this broad meaning of the rule was consistent with legislative history.<sup>222</sup>

Although no court of appeals has adopted this meaning of the one-year rule, the frequency of its application in the district courts may indicate that the rationale behind interpreting the rule this way is gaining some momentum.<sup>223</sup> That, coupled with the fact that the courts of appeals in only four circuits<sup>224</sup> have weighed in on the issue, may signal a potential circuit split. Only time will tell which version of the rule the other circuits will adopt—as discussed above, the version adopted by the remaining circuits could lead to very different results for defendants seeking removal and plaintiffs seeking to keep their cases in state court.

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216. See *Ariel Land Owners, Inc. v. Dring*, 245 F. Supp. 2d 589, 597–98 & n.18 (M.D. Pa. 2003) (citing a number of federal district court cases which have applied the rule to all diversity cases), *rev'd on other grounds*, 351 F.3d 611 (3d Cir. 2003).

217. *Id.*

218. *Id.* at 593.

219. *Id.* at 593–96.

220. *Id.* at 597–98.

221. *Id.* at 593.

222. *Id.* at 597–98.

223. The *Ariel* court cites district court cases from six different circuits that have applied the one-year rule to all diversity cases. See *id.* at 597–98 & n.18. Furthermore, a district court in the Tenth Circuit recently followed *Ariel*, applying the same version of the rule, bringing the number to seven. See *Caudill v. Ford Motor Co.*, 271 F. Supp. 2d 1324, 1327 (N.D. Okla. 2003).

224. See *supra* note 214 (listing the circuits in which the Courts of Appeals have applied the rule only to cases that are not initially removable).

Summer 2004]

REMOVAL AND REMAND

1587

## iii. equitable exception to the one-year rule

In *Tedford v. Warner-Lambert*,<sup>225</sup> the Fifth Circuit held that the one-year limitation was not absolute, but flexible and subject to “equitable tolling” where the plaintiff was apparently trying to manipulate the forum.<sup>226</sup> The court reasoned that a strict application of the one-year rule would encourage plaintiffs to join non-diverse defendants until the one-year clock expired, simply to avoid federal jurisdiction, undermining the very purpose of diversity jurisdiction.<sup>227</sup>

While no other court of appeals has specifically addressed this issue, at least two have hinted in dicta that the one-year limitation would be an absolute bar to the removal of cases where jurisdiction is based on diversity.<sup>228</sup> District courts that have addressed the issue have reached different conclusions, some holding that an equitable exception to the rule is proper, others holding it is not.<sup>229</sup>

Once again, the inconsistencies in the application of the removal statutes illustrate the competing interests at play. Courts obviously struggle to balance the plaintiff’s interest in choosing a forum against the defendant’s right to remove. This tension is not surprising when one considers the variance in win-rates when the plaintiff successfully keeps her case in state court, as opposed to when the defendant successfully removes the case to federal court.<sup>230</sup>

## 4. Waiving the right to remove

As illustrated thus far, defendants often fight fiercely to exercise their right to remove, but there are situations under which a defendant may waive her right to remove. First, a defendant will waive her right to remove if she fails to file notice of removal within

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225. *Tedford v. Warner-Lambert*, 327 F.3d 423 (5th Cir. 2003).

226. *Id.* at 426–27.

227. *Id.* at 427.

228. *See Lovern v. Gen. Motors. Corp.*, 121 F.3d 160, 163 (4th Cir. 1997) (stating in dicta that the one-year rule was “an absolute bar to removal of cases in which jurisdiction is premised on 28 U.S.C. § 1332”); *Burns v. Windsor Ins. Co.*, 31 F.3d 1092, 1097 n.12 (11th Cir. 1994) (stating in dicta that “Congress has recognized and accepted that, in some circumstances, plaintiff can and will intentionally avoid federal jurisdiction”).

229. *See Tedford*, 327 F.3d at 426 n.4 (citing various district courts that have reached opposite decisions).

230. *See Clermont & Eisenberg*, *supra* note 2.

the time limitations required by § 1446(b).<sup>231</sup> Second, the defendant may waive the right by contract if the defendant and plaintiff enter into an agreement, granting the plaintiff the right to choose the forum. Third, a defendant may also waive the right to remove if she participates in the state court proceedings. Whether the alleged waiver is by contract or by participating in the state court proceedings, courts generally insist that the removal waiver be clear and unambiguous.<sup>232</sup>

*a. waiver by contract*

Waiver by contract usually takes the form of a forum selection clause included in a contract between the parties. Because forum selection clauses may address personal jurisdiction, venue in a specific region, or the party's right to removal, courts generally require that the provision must make it clear that the defendant intended to waive her right to removal.<sup>233</sup> While courts require clarity, they generally do not require the language to explicitly read "waiver of right of removal."<sup>234</sup>

To determine whether or not the party intended to waive his removal rights, courts generally look to methods of interpretation that are applied to contract disputes.<sup>235</sup> These methods may include construing the language against the drafter, deciding whether or not the language reflects typical "boilerplate" language, determining the ordinary meaning of the terms at issue, and ascertaining the intention

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231. See 28 U.S.C. § 1446(b) (2000); see also *Murphy Bros. v. Michetti Pipe-Stringing, Inc.*, 526 U.S. 344, 356 (1999) (a defendant's procedural rights "slip away" if defendant fails to file notice of removal within thirty days of service).

232. See, e.g., *EIE Guam Corp. v. Long Term Credit Bank of Japan, Ltd.*, 322 F.3d 635, 649 (9th Cir. 2003); *Waters v. Browning-Ferris Indus.*, 252 F.3d 796, 797 (5th Cir. 2001).

233. See, e.g., *Waters*, 252 F.3d at 797; *In re Delta Am. Re Ins. Co.*, 900 F.2d 890, 892 (6th Cir. 1990) (citing *Regis Assocs. v. Rank Hotels, Ltd.*, 894 F.2d 193, 195 (6th Cir. 1990)).

234. *Waters*, 252 F.3d at 797 (citing *City of Rose City v. Nutmeg Ins. Co.*, 931 F.2d 13, 15 (5th Cir. 1991), cert. denied, 502 U.S. 908 (1991); *Gen. Phoenix Corp. v. Malyon*, 88 F. Supp. 502, 503 (S.D.N.Y. 1949); *Perini Corp. v. Orion Ins. Co.*, 331 F. Supp. 453, 454–55 (E.D. Cal. 1971)).

235. See *Delta*, 900 F.2d at 892–95.

Summer 2004]

REMOVAL AND REMAND

1589

of the parties and the degree to which the term had been negotiated.<sup>236</sup>

Despite the guidance provided by these methods of interpretation, the level of specificity required for the defendant to waive his right to removal by contract varies from court to court. Some hold that language to the effect of “the plaintiff has the right to choose the forum” is enough,<sup>237</sup> while others require the language to be more precise to constitute a waiver.<sup>238</sup> Because of this, parties to a contract should be very specific in order to protect their forum selection or removal rights.

*b. waiver by participating in state court proceedings*

A defendant may also waive his right to remove if he substantially participates in state court proceedings. The general rule is that the defendant’s waiver can only be demonstrated by a “clear and unequivocal” intent to remain in state court<sup>239</sup> that should only be found in “extreme situations.”<sup>240</sup> Courts have held that defendants will not waive the right to remove by participating in state court proceedings “short of seeking an adjudication on the merits.”<sup>241</sup> The holdings suggest the defendant’s intent is to be determined through his affirmative acts and nothing else; even where a defendant led the plaintiff to believe he would not remove the case, the court held the defendant did not show the requisite intent required to waive his right.<sup>242</sup> Even if the defendant takes substantive defensive action in the state court *after* filing notice of removal, courts have held that the right is not waived, as a defendant “could not waive a right it had already exercised.”<sup>243</sup>

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236. *See id.*

237. *See Waters*, 252 F.3d at 798.

238. *See Regis Assocs. v. Rank Hotels Mgmt., Ltd.*, 894 F.2d 193, 195 (6th Cir. 1990) (holding that a defendant’s right to removal is absolute barring precise and unequivocal language to the contrary).

239. *See, e.g., EIE Guam Corp. v. Long Term Credit Bank of Japan, Ltd.*, 322 F.3d 635, 649 (9th Cir. 2003) (citing *Resolution Trust Corp. v. Bayside Developers*, 43 F.3d 1230, 1240 (9th Cir. 1994)); *Grubb v. Donegal Mut. Ins. Co.*, 935 F.2d 57, 59 (4th Cir. 1991); *Rothner v. City of Chi.*, 879 F.2d 1402, 1415–16 (7th Cir. 1989) (superceded by statute on other grounds).

240. *See Rothner*, 879 F.2d at 1415–16.

241. *Tedford v. Warner-Lambert*, 327 F.2d 423, 428 (5th Cir. 2003).

242. *See EIE Guam*, 322 F.3d at 649.

243. *Aqualon Co. v. MAC Equip. Inc.*, 149 F.3d 262, 264 (4th Cir. 1998).

The Supreme Court has stated that “waiver is the intentional relinquishment or abandonment of a known right.”<sup>244</sup> Requiring clear and unequivocal evidence that the defendant intended to waive this right is consistent with this. Because the statutes in the United States Code govern the removal process, and those statutes confer to the defendant the right to remove, it follows that the defendant would maintain this right unless there was clear and convincing evidence to the contrary. Until the defendant’s right to remove begins butting heads with other interests of the legal system, namely, judicial economy, this right will not be vitiated. Therefore, unless the defendant substantively participates in the state court action to the extent that it would be a waste of judicial resources to start the case over in a brand new court, it is unlikely that a court would find that the defendant waived his right to remove.<sup>245</sup>

#### 5. Jurisdictional amount games<sup>246</sup>

For a federal court to have jurisdiction over a case based on diversity of citizenship, § 1332 of the United States Code requires that the amount in controversy exceed \$75,000, exclusive of interest and costs.<sup>247</sup> Therefore, in order for a defendant to remove a case based on § 1332, this minimum likewise must be exceeded. While this requirement seems straightforward, situations arise where the amount in controversy inquiry becomes problematic. For example, how does a defendant remove if the plaintiff has not alleged a specific amount of damages? What if the plaintiff alleges damages of \$74,999 to avoid federal jurisdiction? Can potential punitive damages or attorney fees be added to this? What if the plaintiff alleges damages for less than \$75,000, and the defendant offers to settle for \$100,000? Does the settlement offer become the new amount in controversy? As these scenarios illustrate, the amount in

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244. *United States v. Olano*, 507 U.S. 725, 733 (1993).

245. *See Rothner*, 879 F.2d at 1416 (indicating that instances where the defendant waives its rights to removal will be rare and limited to extreme situations).

246. This term is used by Professor Georgene Vairo to refer to the back and forth actions of plaintiffs and defendants to either avoid or satisfy the minimum amount in controversy requirement established by 28 U.S.C. § 1332 (2000). *See Vairo, supra* note 21, at 289.

247. 28 U.S.C. § 1332 (2000).

Summer 2004]

REMOVAL AND REMAND

1591

controversy is yet another removal issue highlighting the forum-selection battle.

*a. plaintiff does not specify amount of damages or alleges damages below the jurisdictional minimum*

When a plaintiff's initial pleading does not specify the amount of damages, the defendant has two options with regard to removal. First, the defendant may serve the plaintiff with a set of interrogatories, requesting that the plaintiff specify the amount of damages. When the plaintiff's answer indicates the damages exceed \$75,000, the case is removable under the § 1446(b).<sup>248</sup>

Second, where the amount in controversy is not satisfied (because it is either not specified or insufficient), the defendant may choose to remove the case anyway. This option is necessitated in some jurisdictions where state law does not allow the plaintiff to specify the exact numerical value of the damage claim.<sup>249</sup> In this situation, the defendant seeking removal must show that the amount in controversy exceeds \$75,000.<sup>250</sup> To meet this burden, the defendant may either demonstrate that it is "facially apparent" that the claims are likely above \$75,000, or the defendant may set forth the facts in controversy that support a finding of the requisite amount.<sup>251</sup> The defendant will not meet this burden by simply making a conclusory statement that the plaintiff seeks damages in excess of \$75,000.<sup>252</sup>

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248. See *supra* Part V.F.3 (discussing what happens when an originally non-removable case becomes removable).

249. *Lockett v. Delta Airlines, Inc.*, 171 F.3d 295, 298 (5th Cir. 1999).

250. While it is widely accepted that the party seeking federal jurisdiction bears the burden of showing that jurisdiction is proper, there is disagreement among the circuits as to what that the burden of proof should be. See *Watterson v. GMRI, Inc.*, 14 F. Supp. 2d 844, 847-49 (S.D. W. Va. 1997), for an in-depth discussion of the standards applied by various circuits.

251. *Lockett*, 171 F.3d at 298 (citing *Allen v. R & H Oil & Gas Co.*, 63 F.3d 1326, 1335 (5th Cir. 1995)).

252. See, e.g., *Gaus v. Miles, Inc.*, 980 F.2d 564, 567 (9th Cir. 1992); *Williams v. Best Buy Co.*, 269 F.3d 1316, 1319 (11th Cir. 2001); *White v. FCI USA, Inc.*, 319 F.3d 672, 675 (5th Cir. 2003) (citing *Asociacion Nacional de Pescadores a Pequena Escala o Artesanales de Colombia (ANPAC) v. Dow Quimica De Columbia S.A.*, 988 F.2d 559 (5th Cir. 1993)).

*b. proving the amount in controversy exceeds \$75,000*

As outlined above, a defendant may prove the controversy exceeds the minimum either by showing it is facially apparent, or through the facts of the case.<sup>253</sup> One way defendants have done this is by using post-complaint settlement letters from the plaintiff, which demand a settlement in excess of \$75,000.<sup>254</sup> Courts have held that settlement offers are relevant to determining the amount in controversy if they reasonably reflect an estimate of the plaintiff's claim.<sup>255</sup>

Punitive damages can generally be added to a plaintiff's alleged amount of compensatory damages to meet the jurisdictional minimum.<sup>256</sup> If the plaintiff alleges compensatory damages that fall short of the jurisdiction minimum, a court must determine if the amount of punitive damages required to exceed the minimum could reasonably be sustained.<sup>257</sup> Although punitive damages may be considered to exceed the jurisdictional minimum, in the case of a class action suit, those damages may not be aggregated.<sup>258</sup>

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253. *Luckett*, 171 F.3d at 298 (citing *Allen*, 63 F.3d at 1335).

254. *See Cohn v. Petsmart, Inc.*, 281 F.3d 837, 840 (9th Cir. 2002) (holding plaintiff's settlement offer for \$100,000 was a reasonable basis for defendant to show amount in controversy exceeded minimum); *Addo v. Globe Life & Accident Ins. Co.*, 230 F.3d 759, 761–62 (5th Cir. 2000) (holding that a post-complaint demand letter constitutes "other paper" under 28 U.S.C. § 1446(b) for purpose of ascertaining the amount in controversy). *But see In re Minn. Mut. Life Ins. Co. Sales Practices Litig.*, 346 F.3d 830, 835 (8th Cir. 2003) ("Although [plaintiff's] letter offers further support for the valuation of the claims, we do not decide here whether a post-complaint settlement offer alone is sufficient to establish the requisite amount in controversy.").

255. *Cohn*, 281 F.3d at 840 (citing *Chase v. Shop 'N Save Warehouse Foods, Inc.*, 110 F.3d 424, 428–30 (7th Cir. 1997) (the plaintiff's settlement offer is properly consulted in determining "plaintiff's assessment of the value of her case"); *Burns v. Windsor Ins. Co.*, 31 F.3d 1092, 1097 (11th Cir. 1994) (holding that while a "settlement offer, by itself, may not be determinative, it counts for something"); *Wilson v. Belin*, 20 F.3d 644, 651 n.8 (5th Cir. 1994) ("Because the record contains a letter, which plaintiff's counsel sent to defendants stating that the amount in controversy exceeded \$50,000, it is 'apparent' that removal was proper.")).

256. *Bell v. Preferred Life Assurance Soc'y*, 320 U.S. 238, 240 (1943).

257. *See Smith v. Am. Gen. Life and Accident Ins. Co., Inc.*, 337 F.3d 888, 895–96 (7th Cir. 2003).

258. *See, e.g., Ayres v. Gen. Motors Corp.*, 234 F.3d 514, 517 (11th Cir. 2000); *Lindsey v. Ala. Tel. Co.*, 576 F.2d 593, 594 (5th Cir. 1978).

Summer 2004]

REMOVAL AND REMAND

1593

Finally, attorney fees are generally not included in the amount in controversy calculation.<sup>259</sup> An exception to the rule exists where the parties are contractually bound, and a term of the contract provides that one party will cover the attorney fees of another in the event of litigation.<sup>260</sup> As with punitive damages, the attorney fees of parties in a class action may not be aggregated.<sup>261</sup>

*c. removal can be precluded even when amount in controversy exceeds minimum*

If a defendant successfully shows that the amount in controversy exceeds \$75,000, she may remove unless the plaintiff has shown to a legal certainty that her recovery cannot exceed the minimum. In *De Aguilar v. Boeing Co.*,<sup>262</sup> the Fifth Circuit speculated as to how a plaintiff might meet the legal certainty obligation:

Plaintiff's state complaint might cite, for example, to a state law that prohibits recovery of damages that exceed those requested in the *ad damnum* clause and that prohibits the initial *ad damnum* to be increased by amendment. Absent such a statute, "[l]itigants who want to prevent removal must file a binding stipulation or affidavit with their complaints; once a defendant has removed the case, *St. Paul* makes later filings irrelevant."<sup>263</sup>

Courts have stressed that this is not a burden-shifting exercise, but instead a requirement that the plaintiff make all information known at the time of the pleading.<sup>264</sup>

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259. 12 JAMES WM. MOORE, *supra* note 154, § 57.21.

260. *See* Springstead v. Crawfordville State Bank, 231 U.S. 541, 542 (1913).

261. *See* Coghlan v. Wellcraft Marine Corp., 240 F.3d 449, 455 n.5 (5th Cir. 2001).

262. 47 F.3d 1404 (5th Cir. 1995).

263. *Id.* at 1412 (quoting *In re Shell Oil Co.*, 970 F.2d 355, 356 (7th Cir. 1992) (per curiam); referring to *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 289 (1938) (questioned on other grounds)).

264. *Id.*

*G. Section 1447—Remand Procedure*

## 1. Grounds for remand

Section 1447 of the United States Code governs the procedural requirements for remanding a case to state court.<sup>265</sup> A case may be remanded at any time for lack of subject-matter jurisdiction. In addition, remand is also appropriate where there has been a defect in the removal process.<sup>266</sup> While the court may unilaterally remand a case for lack of subject-matter jurisdiction, the plaintiff must be the party to remand where the basis for remand is a defect in the removal procedure. Defects in removal procedure can include instances where: all defendants fail to join in removal;<sup>267</sup> defendants fail to remove within thirty-days of being served;<sup>268</sup> or defendants fail to remove a newly removable case based on diversity within one year of the commencement of the suit.<sup>269</sup>

Non-compliance with the removal statutes is the major source of removal defects, but there are also removal defects that are not based on the statutes. For example, a court may remand where the defendant waives the right to remove.<sup>270</sup> A court may also remand if removal was in violation of a forum selection clause.<sup>271</sup> Removal may also be defective where the defendant removes despite a statutory proscription against such removal.<sup>272</sup>

Furthermore, parties may allege other procedural defects not contemplated in the removal statutes. For example, in *Wiles v. Capitol Indemnity Corp.*,<sup>273</sup> the plaintiff argued that the removal was defective because defendants based removal on § 1446<sup>274</sup> (which

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265. 28 U.S.C. § 1447 (2000).

266. See *Caterpillar v. Lewis*, 519 U.S. 61, 76–77 (1996).

267. See 28 U.S.C. § 1446(a). See *supra* Part V.F.1 for a more detailed discussion of the unanimity rule.

268. See 28 U.S.C. § 1446(b). See *supra* Part V.F.2 for a more detailed discussion of the thirty-day rule.

269. See 28 U.S.C. § 1446(b). See *supra* Part V.F.3.b for a more detailed discussion of the one-year rule.

270. See *supra* Part V.F.4 for a more detailed discussion of the waiving the right to remove.

271. *Foster v. Chesapeake Ins. Co.*, 933 F.2d 1207, 1214 (3d Cir. 1991).

272. *Williams v. AC Spark Plugs Div. of Gen. Motors Corp.*, 985 F.2d 783, 787 (5th Cir. 1993).

273. 280 F.3d 868 (8th Cir. 2002).

274. 28 U.S.C. § 1446.

Summer 2004]

REMOVAL AND REMAND

1595

prescribes the procedure for removal)<sup>275</sup> instead of § 1441 (which sets the grounds for removal).<sup>276</sup> The court rejected this argument, holding that “[a]lthough [the defendant] should have cited § 1441 as part of its grounds for removal, its failure to do so did not deprive the court of removal jurisdiction because the § 1441 jurisdictional requirements were nonetheless met.”<sup>277</sup> Although the *Wiles* court rejected the plaintiff’s position, the case is yet another illustration of a litigant fighting for her choice of forum, as well as an illustration of the vast amount of confusion that surrounds the removal statutes.

## 2. Timing for remand

As mentioned above, there are no time limits for remand based on subject matter jurisdiction.<sup>278</sup> However, a motion to remand based on a procedural defect must be made within thirty days.<sup>279</sup> Note that the party seeking remand is not always the plaintiff. In *Loftis v. United Parcel Service*,<sup>280</sup> the Sixth Circuit Court of Appeals recently held that under certain situations a codefendant may be able to seek remand as well as a plaintiff.<sup>281</sup> There, a codefendant timely filed a motion to remand a case that was removed by other defendants without his consent. The court held that a “frank opposition to removal by a codefendant who affirmatively seeks a remand within the thirty-day period satisfies the prerequisite of a motion, and empowers the district court to enforce the unanimity requirement.”<sup>282</sup>

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275. *Wiles*, 280 F.3d at 871.

276. 28 U.S.C. § 1441.

277. *Id.*

278. *See* 28 U.S.C. § 1447(c) (“If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.”) (emphasis added); *see also* *Caterpillar, Inc. v. Lewis*, 519 U.S. 61, 76–77 (1996) (the court may remand the case at any time for problems with subject-matter jurisdiction).

279. *See* 28 U.S.C. § 1447(c); *see also* *Caterpillar*, 519 U.S. at 76–77 (the plaintiff must file a motion for remand within thirty days of removal motion for defects in removal).

280. 342 F.3d 509 (6th Cir. 2003).

281. *Id.* at 517.

282. *Id.*

### 3. Waiving the right to remand

As is the case with removal, a party may waive the right to seek remand. First, if a party fails to file a motion to remand the case within thirty days after the defendant files the notice of removal, the party will lose its right to seek remand.<sup>283</sup> Second, a party may waive the right to seek remand by contract, if for example, the parties entered into contract including a forum selection clause.<sup>284</sup> Third, the party may waive the right to seek remand by substantially participating in the federal court action.<sup>285</sup>

### 4. Remanding under § 1447: attorney fees and costs

If a court lacks subject matter jurisdiction or there has been a legitimate defect in removal procedure and the plaintiff has timely filed a motion to remand, the court will remand that case to the state court.<sup>286</sup> Section 1447(c) provides that an “order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal.” The rationale behind this provision of the statute is to compensate a plaintiff for additional expenses incurred when the defendant improperly removes a case to federal court.<sup>287</sup> The plaintiff will not receive costs it would have incurred if the case had remained in state court, but is compensated only for the increased costs of moving to federal court.<sup>288</sup> This provision promotes judicial economy by providing a disincentive for parties with deep pockets to bounce from federal to state court until their adversaries run out of money, effectively ending the litigation.

In order for a court to award fees, it must find that the removal was not fairly supported by the merits of the case.<sup>289</sup> The courts of appeals have allowed the district courts broad discretion awarding

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283. *Doe v. GTE Corp.*, 347 F.3d 655, 657 (7th Cir. 2003); *Smith v. Amedisys, Inc.*, 298 F.3d 434, 439 n.1 (5th Cir. 2002); *Patin v. Allied Signal*, 77 F.3d 782, 786 (5th Cir. 1996).

284. For a more detailed discussion on waiver by contract, see *supra* Part V.F.4.a.

285. For a more detailed discussion on waiver by participating in court proceedings, see *supra* Part V.F.4.b.

286. See 28 U.S.C. § 1447 (2000).

287. See *Baddie v. Berkeley Farms*, 64 F.3d 487, 490 (9th Cir. 1995).

288. See *id.*

289. See *Schmitt v. Ins. Co. of N. Am.*, 845 F.2d 1546, 1552 (9th Cir. 1988).

Summer 2004]

REMOVAL AND REMAND

1597

fees when they concluded there is no reasonable basis for removal. For example, the court may include the fees in the remand order or in some supplemental order.<sup>290</sup> The court may award fees to plaintiffs or defendants depending on which party was responsible for the improper removal.<sup>291</sup> The court may award fees despite the fact that the defendant withdrew his case and voluntarily stipulated to a remand.<sup>292</sup> Once the court determines removal was improper, the only limitation imposed on the district courts is that the award reflect the *actual expenses incurred* by the party because of the removal, as opposed to reasonable attorney fees.<sup>293</sup>

#### 5. Section 1447(d)—reviewability of remand orders

Section 1447(d) states that “an order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise.”<sup>294</sup> A party cannot circumvent the rule by seeking review via a writ of mandamus.<sup>295</sup> This bar on reviewing remand orders is presumably rooted in the idea that if the district court remanded due to lack of jurisdiction, the appellate court would likewise have no constitutional authority to consider the case. However, there are

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290. *Wisconsin v. Hotline Indus.*, 236 F.3d 363, 365 (7th Cir. 2000)

291. The court outlined cases awarding fees against defendants:

*See Vaughan*, 227 F. 364 (removal based on diversity improper because plaintiff misled residency in complaint); *Duarte v. Donnelley*, 266 F. Supp. 380, 384 (D. Haw. 1967) (removal improper because amount in controversy was below jurisdictional limit); *Barracough v. ADP Automotive Claims Servs., Inc.*, 818 F. Supp. 1310 (N.D. Cal. 1993) (removal improper because plaintiff's only federal claim was, by her own admission, frivolous). *But see Clark v. Safeway Stores, Inc.*, 117 F. Supp. 583 (W.D. Mo. 1953) (remand forced by plaintiff's subsequent amendment of complaint to join a local defendant).

*Baddlie*, 64 F.3d at 490 n.2.

292. *See Hotline Indus.*, 236 F.3d at 365.

293. *See id.* at 366–68.

294. *See* 28 U.S.C. § 1447(d) (2000); *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124 (1995); *see also Severonickel v. Gaston Reymenants*, 115 F.3d 265, 268–69 (4th Cir. 1997) (holding that there is no review even if district court's order is erroneous); *Krangel v. General Dynamics Corp.*, 968 F.2d 914, 916 (9th Cir. 1992) (same). Note that 28 U.S.C. § 1447(d) provides an exception for civil rights actions removed via § 1443, which are not at issue in this Article.

295. *See In re Benjamin Moore & Co.*, 318 F.3d 626, 631 (5th Cir. 2002). For a more detailed discussion on writs of mandamus, see *infra* Part VI.C.

circumstances where remand orders are reviewed. As outlined below, these exceptions generally deal with circumstances where jurisdiction is not at issue and therefore the danger of the appellate court overstepping its constitutional boundaries is not so profound. While any exception to the rule seems inconsistent with the language of the statute, these exceptions *are* consistent with the presumed purpose of the statute.

First, note that the bar against reviewing orders to remand does not apply to refusals to remand, due to subject matter jurisdiction concerns.<sup>296</sup> While not really an exception to the rule (because refusals to remand are not included in the bar), this practice is more the mirror image of § 1446(d). If remand orders are not to be reviewed because the appellate court would lack jurisdiction, it follows that refusals to remand should be reviewed to ensure that the district court does have the authority to hear the case.

Many of the exceptions deal with instances where the district court (at least at some point) had subject matter jurisdiction over the case. Section 1447(d) will not bar appellate review of a district court's discretionary decision not to exercise jurisdiction,<sup>297</sup> and the appellate court is not bound by the district court's characterization of its authority to remand.<sup>298</sup> On a related point, appellate review is permitted where the original removal was proper, but the district court remanded at some point post-removal because it lost subject-matter jurisdiction.<sup>299</sup>

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296. *See, e.g.,* Caterpillar v. Lewis, 519 U.S. 61, 76 (1996); USX Corp. v. Adriatic Ins. Co., 345 F.3d 190 (3d Cir. 2003).

297. *See, e.g.,* Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 712 (1996); First Nat'l Bank v. Curry, 301 F.3d 456, 460 (6th Cir. 2002); Tuscon v. U.S. W. Communications, Inc., 284 F.3d 1128, 1131 (9th Cir. 2002); Ferrari, Alvarez, Olsen & Ottoboni v. Home Ins. Co., 940 F.2d 550, 553 (9th Cir. 1991).

298. *See* Abada v. Charles Schwab & Co., Inc., 300 F.3d 1112, 1117 (9th Cir. 2002).

299. *See* Long v. Bando Mfg. of Am., Inc., 201 F.3d 754, 758–59 (6th Cir. 2000) (holding that appellate jurisdiction to consider remand order existed where district court remanded remaining state law claims after dismissal of plaintiff's federal-law claims in federal question case); *see also* Van Meter v. State Farm Fire & Cas. Co., 1 F.3d 445, 450 (6th Cir. 1993) (“If a district court determines subject matter jurisdiction to have existed at the time of removal, yet remands for alleged lack of subject matter jurisdiction based on some post-removal event(s), the remand order is . . . reviewable . . .”).

Summer 2004]

REMOVAL AND REMAND

1599

Additionally, an order to remand may be reviewable if it was based on the resolution of any substantive issue independent of the jurisdictional issue,<sup>300</sup> but this does not apply where deciding a substantive legal question is necessary to determine whether subject matter jurisdiction existed.<sup>301</sup>

Other exceptions deal with the more technical aspects of remand. Section 1447(d) does not bar review where the remand was based on a party's contractual waiver of removal rights.<sup>302</sup> In addition, appellate review is not barred on the issue of attorney fees awarded under § 1447(c).<sup>303</sup>

Despite these exceptions, the general rule remains that remand orders based on timely raised procedural error or jurisdictional error may not be reviewed.<sup>304</sup> The removal statutes serve to protect both parties' interest in choosing a proper forum, while promoting judicial economy. The bar on reviewing remand orders serves this purpose in most cases by giving a defendant the chance to seek removal, and if removal is proper, the case will likely remain in the federal courts. If not, the plaintiff succeeds in securing her choice of forum and need not worry about being shuffled back and forth between federal and state courts once the remand has been ordered.

#### 6. Life after remand

Once a federal court remands a case to state court, questions arise as to the propriety of any rulings the district court made while the case was still in federal court. For example, suppose while in federal court the court dismissed a claim, and subsequently remands the case to state court. May the plaintiff raise that claim again in state court? Or, is the decision of the district court binding?

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300. *See* *Clorox Co. v. United States Dist. Court*, 779 F.2d 517, 520 (9th Cir. 1985); *Pelleport Investors, Inc. v. Budco Quality Theaters, Inc.*, 741 F.2d 273 (9th Cir. 1984).

301. *See* *Lyons v. Alaska Teamsters Employer Serv. Corp.*, 188 F.3d 1170, 1172 (9th Cir. 1999); *Abada*, 300 F.3d at 1118.

302. *See* *Waters v. Browning Ferris Indus.*, 252 F.3d 796, 797 (5th Cir. 2001); *In re Delta Am. Re Ins. Co.*, 900 F.2d 890, 892 (6th Cir. 1990).

303. *See e.g.*, *Roxbury Condo. Ass'n v. Anthony S. Cupo Agency*, 316 F.3d 224, 226 (3d Cir. 2003); *Moore v. Permanente Med. Group, Inc.*, 981 F.2d 443, 447 (9th Cir. 1992).

304. *See supra* note 294.

In instances where the case is remanded for lack of subject matter jurisdiction, courts usually hold that any orders entered by the district court after the case was removed to the district court must be vacated and the entire case remanded to state court.<sup>305</sup> To hold otherwise would be an unlawful expansion of federal jurisdiction, giving “district courts power the congress has denied them”<sup>306</sup> because if the district courts never had jurisdiction, they never had the authority to issue orders in the first place.

What about when a case is remanded for a defect in removal procedure? In these types of cases, the district court does not lack subject matter jurisdiction, but instead remands because the case was improperly removed—basically remand by technicality.<sup>307</sup> There is little case law on this issue, but since the court does have jurisdiction over the case, then arguably orders granted post-removal should be more likely to stand because there is a decreased danger of overstepping constitutional bounds. On the other hand, since the case has not been properly removed, the district court lacks jurisdiction just the same and any post-removal adjudication is

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305. See *Brown v. Francis*, 75 F.3d 860, 866–67 (3d Cir. 1996); see also *Mills v. Harmon Law Offices*, 344 F.3d 42, 45–47 (1st Cir. 2003) (vacating district court’s dismissal and remanding with instructions to remand to state court); *Christopher v. Stanley-Bostitch, Inc.*, 240 F.3d 95, 100 (1st Cir. 2001) (“When a federal court concludes that it lacks subject matter jurisdiction over a case, it is precluded from rendering any judgments on the merits of the case.”); *Hernandez v. Conriv Realty Assocs.*, 182 F.3d 121, 124 (2d Cir. 1999) (vacating dismissal and remanding to district court with instructions to remand to state court); *Avitts v. Amoco Prod. Co.*, 53 F.3d 690, 692, 694 (5th Cir. 1995) (vacating district court’s orders for preliminary injunction, costs, and attorneys fees because the court lacked subject-matter jurisdiction and remanding to district court with the instruction to remand to state court); *Smith v. Wis. Dep’t of Agric., Trade and Consumer Prot.*, 23 F.3d 1134, 1139 n.10 (7th Cir. 1994) (“[T]he point of section 1447(c) is that a federal court does not have the authority to dismiss a claim over which it never had jurisdiction in the first instance. The merits of the . . . claim are therefore irrelevant to this determination.”); *Laughlin v. Prudential Ins. Co.*, 882 F.2d 187, 192 (5th Cir. 1989) (vacating “all actions taken by the district court, including the granting of [partial] summary judgment dismissing the claims against [one defendant],” and remanding to district court with instructions to remand for lack of subject-matter jurisdiction).

306. *Am. Fire & Cas. Co. v. Finn*, 341 U.S. 6, 18 (1951).

307. See 28 U.S.C. § 1447(c) (2000).

Summer 2004]

REMOVAL AND REMAND

1601

improper. This was the approach taken in *Roe v. O'Donahue*.<sup>308</sup> The plaintiff originally filed his claim in state court, which the defendants then removed to a federal district court.<sup>309</sup> The district court dismissed one of the defendants, and then subsequently remanded the case to state court due to a defect in removal procedure.<sup>310</sup> The plaintiff appealed, and the Seventh Circuit Court of Appeals vacated the district court's dismissal of one of the defendants, stating that the "district court should not have entered judgment for [one of the] defendants on the merits," because the defendants failed to remove the case within thirty days.<sup>311</sup> Therefore, the court remanded the case to the district court with instructions to remand the entire case to the state court from which it was removed.<sup>312</sup>

In sum, if a case has been improperly removed and the plaintiff has made a timely motion to remand, policy would seem to dictate that the district court be precluded from adjudicating the matter. First, the defendant was given a chance to remove, but waived this right by failing to comply with the removal statutes. It is only fair that the plaintiff in this case should be able to adjudicate the entire case in her chosen forum. Second, it would be a waste of judicial resources to have the district court contemplating claims that belong in the state court.

#### H. Conclusion

As with many areas of the law, removal and remand embody the tension of competing interests: the plaintiff's interest in choosing a forum; the defendant's interest in removing the case to federal court; and the federal courts' interest in promoting judicial economy and providing relief to injured parties without overstepping their constitutional and congressionally-created boundaries. The respective interests of plaintiffs and defendants are especially profound in light of the immense difference forum can make to the

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308. *Roe v. O'Donahue*, 38 F.3d 298 (7th Cir. 1994) (abrogated on other grounds).

309. *Id.* at 300.

310. *Id.*

311. *Id.* at 304.

312. *Id.*

1602            *LOYOLA OF LOS ANGELES LAW REVIEW* [Vol. 37:1555

success or failure of a case.<sup>313</sup> The combination of these competing interests, new legislation, and complex removal and remand statutes subject to various interpretations creates a legal environment that promises only to become more interesting.

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313. See Clermont & Eisenburg, *supra* note 2.