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Waiving Removal, Waiving Remand–The Hidden and Unequal Dangers of Participating in Litigation

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WAIVING REMOVAL, WAIVING REMAND—THE HIDDEN AND UNEQUAL DANGERS OF PARTICIPATING IN LITIGATION

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Abstract

The law governing removal of cases to federal court and remand of cases from federal court has increasingly been codified. But what is not codified is left to courts, and courts have created bodies of law concerning waiver of the right to remove and waiver of the right to remand that are strongly skewed against plaintiffs and in favor of federal court adjudication, even in cases that raise only substantive state law issues. This a problem because there is no reason to believe that this development of the law is consistent with Congressional intent, or with an appropriate allocation of cases between state and federal courts. Moreover, it disadvantages plaintiffs for no good reason, and without providing adequate notice.

The absence of statutory provisions governing conduct-based waivers raises the question whether courts unilaterally should be recognizing such waivers at all, as a matter of separation of powers, and if so, under what circumstances waiver should be found. This Article addresses those questions. It surveys the case law, and takes on the underlying policy questions.

The doctrines that the courts have molded in these domains are not even close to even-handed. Under them, defendants are held to have waived their right to remove far less frequently than plaintiffs are held to have waived their right to remand. The need for litigants to clearly know in advance what conduct will constitute a waiver, the realities of litigation, and the policy reasons for equalizing treatment of the parties and bringing symmetry to the law, all argue for substantial changes in the common law, especially with respect to waiver of the right to remand. Because the courts are unlikely to change what they have been doing without a push from Congress, this Article proposes statutory language and advisory notes to indicate Congressional intent. Such additions to the law would illuminate the very existence of judge-made waiver doctrines concerning removal and the right to remand, and should spur the development of case law that will be more coherent, defensible, and fair than that which now exists. The proposed statute and advisory notes

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crystallize how the law of conduct-based waiver should be improved for the many lawyers and litigants who find themselves seeking to avoid a waiver and for the judges who must confront whether a waiver should be held to have occurred.

INTRODUCTION

When a case filed in a state court meets the requirements for removal to federal court, defendants can remove the case to federal court.[1] Defendants can, however, waive their right to remove.[2] Defendants can do so contractually[3] or by their litigation conduct in state court.[4] This Article focuses in part on what courts have decided about defendants' conduct in state court that will constitute a waiver of defendants' right to remove, justifying remand to state court. This Article also describes and analyzes the case law on the corresponding issue: What federal-court conduct by plaintiffs will waive a right to a court-ordered remand of a case to state court that plaintiffs would otherwise enjoy?[5] In both instances, one must look at court decisions because that is all there is. Unlike the great majority of removal and remand issues,[6] these matters of waiver are not addressed in the removal or remand statutes. Digging into the judicial opinions demonstrates that courts have created bodies of law concerning waiver of the right to remove and waiver of the right to

1. *See* 28 U.S.C. § 1441(a) (2012) ("Any civil action brought in a State court . . . may be removed . . . ."). There are numerous other removal statutes for particular situations. Under some of these specialized removal statutes, other parties, such as third-party defendants and even plaintiffs, also can remove cases to federal courts. *See, e.g.*, 12 U.S.C. § 1441(a)(1)(3)(A) (2012) (allowing the Resolution Trust Corp. to remove certain actions when it has been appointed receiver or conservator of a financial institution involved in the litigation); 12 U.S.C. § 1819(b)(2)(B) (empowering the Federal Deposit Insurance Corporation to remove state court actions in which it is a party). *See generally* 14C CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE §§ 3721, 3728 (4th ed. 2018) (discussing the right to remove a case from state to federal court).

2. *See* 16 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 107.132 (3d ed. 2017).

3. The circumstances under which defendants will be held to have contracted away their right to remove is not the subject of this Article; others have written about that. *See generally* David S. Coale et al., *Contractual Waiver of the Right to Remove to Federal Court: How Policy Judgments Guide Contract Interpretation*, 29 REV. LITIG. 327 (2010) (discussing the contractual waiver of a defendant's right to remove to federal court).

4. *See* MOORE ET AL., *supra* note 2.

5. When the Article speaks of the conduct of "defendants" that will or will not waive the right to remove, the term "defendants" should be understood to encompass other litigants that, but for the waiver, would have a right to remove. Ordinarily, only defendants may remove, but there are some statutory exceptions to that rule. *See* WRIGHT ET AL., *supra* note 1, § 3730. Similarly, when the Article speaks of the conduct of "plaintiffs" that will or will not waive the right to remand to state court, the term "plaintiffs" should be understood to encompasses other litigants that, but for the waiver, would be entitled to have the case remanded to state court.

6. The law governing removal and remand has increasingly been codified. The Federal Courts Jurisdiction and Venue Clarification Act of 2011 provided statutory answers to a number of removal and remand-related issues that previously had been left to judge-made law and had split the courts. Pub. L. No. 112-63, 125 Stat. 758 (2011) (codified as amended in scattered sections of 28 U.S.C.).

remand that are strongly skewed against plaintiffs and in favor of federal court adjudication, even in cases that raise only substantive state law issues. This state of the law is a problem because there is no reason to believe that it is consistent with congressional intent or with an appropriate allocation of cases between state and federal courts. Moreover, it disadvantages plaintiffs for no good reason, and without providing adequate notice. Because these legal developments occur exclusively in case law—in a realm that is largely statutory—they have escaped the attention of most attorneys, and even commentators. And the current lack of consistency within and between the respective realms of waiver of the right to remove and waiver of the right to remand is a testament to the inadequate thinking that courts and commentators have devoted to these issues.

The absence of statutory provisions governing conduct-based waivers raises the threshold question whether courts should unilaterally be recognizing such waivers at all. Would bad consequences follow if they ceased to do so? This Article addresses that early on. Moreover, if some such waivers are going to exist, under what circumstances should they be found? Should the law make it easy for defendants to waive their right to remove (favoring plaintiffs' choice of the state court forum) or difficult (favoring defendants and the movement of cases to federal court)? Should the law make it easy for plaintiffs to waive their right to remand (favoring defendants and the retention of jurisdiction by federal courts) or difficult (favoring plaintiffs and the reinstatement of their choice of state court as the forum to resolve their dispute)? On what bases should one choose between these positions?

This Article also makes clear that, whatever the substantive content of waiver doctrine in these contexts, it would be best if plaintiffs and defendants could know in advance what will constitute a waiver. This is a matter of basic fairness, and it underscores one of the key reasons this area of the law warrants careful review: Because courts have not always been consistent in their determinations of the conduct that will effect a waiver of the right to remove or the right to obtain remand, respectively, our system is failing in the fundamental need to ensure clear rules for litigants. In addition, the notice problem is worse for plaintiffs because courts define and apply waiver doctrine differently when considering waiver by defendants who want to remove than when they consider waiver by plaintiffs who want to have their case remanded to state court—and the inconsistency regularly manifests itself in harsher waiver rules when plaintiffs' rights are at issue. Unless good reasons exist for asymmetry, there should be consistency and symmetry between conduct-based waivers of removal rights and conduct-based waiver of the right to remand. This Article explains why that is so. Thus, the themes of fairness (in terms of notice) and equality of treatment (as between plaintiffs and

defendants), absent articulated and persuasive reasons for differentiation, are central themes of this Article.

In considering how great a problem all of this is, it is noteworthy that a significant number of cases involve these waiver issues.[7] Moreover, although the number of cases involving alleged waiver-by-conduct does not rival the number of cases addressing defective removals and defective remand motions (distinguished later in this Article), the significance of the issues and the need for reconsideration of these parallel areas of law does not depend entirely on the number of cases involved. Issues of basic fairness and of equal or comparable treatment of plaintiffs and defendants are important wherever they arise.

After evaluating in detail what conduct should and what conduct should not waive the rights to remove and to obtain remand of a case, this Article asks: If the law on this constellation of issues is problematic, what would be the best way to reform it? In particular, should we seek codification of the "answers," as so much of the law governing removal and remand has been codified, or approach the problems in a different way? If Congress should codify the "answers," what should the codification say?

Part I lays out the general principles on the subjects of waiver of the right to remove and to obtain remand, as described in the key federal practice treatises. Part II looks to history for its answer to the question whether waivers of the right to remove or to obtain remand are ever warranted. Part III focuses on conduct-derived waivers of the right to remove to federal court. After distinguishing defective removals, it examines U.S. Supreme Court, federal court of appeals, and federal district court decisions and dicta differentiating state court conduct that will work a waiver of the right to remove from state court conduct that will not work such a waiver. In light of this case law, public policy considerations, and alternative ways in which the law might have developed, Part III then offers tentative opinions on the circumstances under which state court conduct should work a waiver of the right to remove from state court.

Part IV shifts the focus to conduct-derived waivers of the right to obtain remand to state court after a removal. After distinguishing defective motions to remand, it examines U.S. Supreme Court, federal court of appeals, and federal district court decisions and dicta differentiating federal court conduct that will work a waiver of the right to remand to state court from conduct that will not work such a waiver. This Article seeks to understand the significant differences between the law governing waiver of the right to remove and waiver of the right to obtain remand. In both Parts III and IV, this Article identifies aspects of

7. *See, e.g.*, cases cited *infra* in Sections III.C and IV.B.

the law, as it has developed, that seem off-base and unhelpful, and seeks to identify what should matter in doing these analyses, paying particular attention to the rights and obligations of defendants and plaintiffs, as such, in litigation. In light of the case law on conduct-based waivers of the right to obtain remand, the contrasting waiver law concerning conduct-based waivers of the right to remove, public policy considerations, and other matters referenced in this paragraph and later in this Article, Part IV offers opinions on the circumstances under which federal court conduct should work a waiver of the right to remand to state court.

Finally, Part V considers by what techniques—and through what codification—the law of conduct-based waiver might best be improved and illuminated for the many lawyers and litigants who find themselves seeking to avoid such waivers, and for the judges who find themselves confronting these issues.

I. THE GENERAL PRINCIPLES—HORNBOOK LAW

Congress's general provision for removal indicates Congress's belief that, unless Congress has excepted or added requirements as to particular categories of cases, civil suits that a plaintiff could have sued upon in federal court are suits that defendants should be able to remove to federal court, for adjudication. In this way, cases that arise under federal law can be determined by federal courts, which presumptively will be more hospitable to them, decide them more accurately, and create more uniform federal law than state courts would or could do.[8] Similarly, removed cases between diverse parties, as defined in 28 U.S.C. § 1332(a) (2012), can be determined by federal courts so long as the defendants are not citizens of the state in which the action was brought and certain other congressionally set limits are satisfied.[9] Cases that meet the requirements of the Class Action Fairness Act of 2005[10] similarly can be determined by federal courts upon removal, as well as upon commencement in federal court by plaintiffs.[11] In each instance, Congress had reason to believe that the federal courts would provide an equally good or better forum for the type of suit involved than the state courts in which the suits were filed.[12] Myriad other removal statutes exist, most of which allow removal of cases that originally could have been filed in federal court, but

8. These are the policies most commonly cited in support of general federal question jurisdiction. *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 5.2 (6th ed. 2012).

9. 28 U.S.C. § 1441(b).

10. Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified as amended at 28 U.S.C. § 1332(d) (2012)).

11. *See* 28 U.S.C. § 1332(d).

12. Class Action Fairness Act of 2005 § 2(a)(4).

a few of which allow removal of cases that could *not* originally have been filed in federal court.[13]

Despite the absence of statutory provisions governing waiver based on litigants' in-court conduct, the courts have created bodies of case law concerning waiver of the right to remove and waiver of the right to remand based on such conduct. According to *Federal Practice and Procedure*, one of the leading treatises on federal procedure:

> A state-court defendant . . . may lose or waive the right to remove a case to a federal court . . . .
>
> [W]aiver may be found if the defendant takes some substantial offensive or defensive action in the state-court action, indicating a willingness to litigate in the state tribunal, before filing a notice of removal with the federal court. Federal courts sometimes have found such waivers by defendants who asserted a counterclaim or engaged in pretrial discovery in state court. They have refused to find such a waiver, however, when the defendant's participation in the state action was not substantial or was dictated by the rules of that court or a state-court judge. Unfortunately, a perusal of the decided cases shows that the line between what will constitute waiver of the right to remove and what will not is far from clear.
>
> Occasionally, the doctrine of judicial estoppel also has prevented a defendant from removing an action. Other courts, however, have held that judicial estoppel cannot be employed to defeat a statutory right to a federal forum.[14]
>
> Just as a defendant may waive its right to remove, a plaintiff may waive the right to object to a defendant's removal. For example, many courts have held that a plaintiff who fails to make a timely objection to defects in the removal procedure or to the propriety of the defendant's

13. *See generally* WRIGHT ET AL., *supra* note 1, § 3728 (discussing specialized statutes providing for removal). The category of cases that can be removed but could not have been filed in federal court includes actions against federal officers for acts done in the performance of their duties. *See* 28 U.S.C. § 1442(a)(3). The claims may be state law claims, but they can be removed to federal court if the defendant asserts a federal defense. *See id.* The latter is necessary to satisfy the requirement of Article III that the case arise under the Constitution or laws of the United States. *See* Ruppel v. CBS Corp., 701 F.3d 1176, 1180 (7th Cir. 2012).

14. *See* WRIGHT ET AL., *supra* note 1, § 3721 & nn. 105–08 (footnotes omitted). According to several older cases, a defendant's participation in state court proceedings conducted after removal to federal court, although in disregard of the removal statutes, does not constitute a waiver of the right to remove. By contrast, courts have concluded that, by filing an untimely or otherwise defective removal notice, a defendant does waive the right to remove.

> removal waives any objection, except [that] of lack of federal subject-matter jurisdiction. Any defect in removal that does not go to the subject-matter jurisdiction of the federal court is waivable, and the federal court may retain [any case within the federal court's] jurisdiction if a procedural error escapes the plaintiff's timely objection.[15]

Similarly, *Moore's Federal Practice*, states:

> A defendant may waive the right to remove a state court action to federal court by taking actions in state court, after it is apparent the case is removable, that manifest the defendant's intent (1) to have the case adjudicated in state court and (2) to abandon the right to a federal forum. However, it must be unequivocally apparent that the case is removable. In addition, most courts hold that the intent to submit to state court jurisdiction and to waive the right to remove to federal court must be clear and unequivocal, and the defendant's actions must be inconsistent with the right to remove.[16]

There follows in *Moore's* a list of acts that, when taken by a defendant, have been held to constitute a waiver of the defendant's right to remove to federal court.[17] *Moore's* then provides a long list of acts that, when

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15. *Id.* (footnotes omitted). The treatise continues:

> A defendant does not waive any defense it may have to an action, however, by removing the case from state to federal court. A defendant may, for example, move to dismiss for lack of personal jurisdiction after removing a suit. Of course, as is true in other contexts, defects going to the federal court's subject-matter jurisdiction are not waivable and may be raised by the parties or by the federal court at any time after the removal. Removal of a case generally does not waive rights such as the contractual right to arbitrate a dispute.

Id. (footnotes omitted).

16. *See* MOORE ET AL., *supra* note 2, at § 107.132[1] (footnotes omitted).

17. *Moore's* list includes:

- Filing a permissive counterclaim or crossclaim.
- Moving to dismiss.
- Seeking an injunction.
- Seeking summary judgment.
- Moving in state court to compel arbitration.

taken by a defendant, have been held *not* to constitute a waiver of the defendant's right to remove.[18]

> • Participating in state court proceedings and removing only after there has been a mistrial or an adverse ruling, so removal would effectively operate as an appeal of an adverse state court decision.
>
> • Obtaining a continuance in state court without notifying plaintiff or state court of intention to remove case in interim.

Id. § 107.132[2] (footnotes omitted).

18. *Moore's* list of acts that have been held, in the context of particular cases, not to constitute a waiver of the right to remove includes:

> • Filing a cross-complaint.
>
> • Filing a previous action in state court.
>
> • Filing defensive pleadings or motions.
>
> • Moving to compel arbitration.
>
> • Moving to dismiss or for reconsideration, when the motions did not clearly indicate a willingness to litigate in state court and focused on why the case should be heard in federal court.
>
> • Participation in state court by FDIC.
>
> • Making prejoinder statements indicating an intent not to remove.
>
> • Miscellaneous actions that did not submit cause to adjudication on [the] merits.
>
> • Actions taken before [the] case becomes removable.
>
> • Granting plaintiff permission to file in state court.
>
> • Filing preliminary objections and joinder complaint.
>
> • Post-removal actions.
>
> • Opposing a temporary restraining order or preliminary injunction.
>
> • Failing to remove a previous action based on the same claim.
>
> • Appointing [an] agent for service of process in [the] state where [the] action is pending.
>
> • Filing a compulsory counterclaim.
>
> • Defending unremovable cases arising out of the same transaction on which [the] removed class action is based.
>
> • Moving to dismiss for lack of prosecution.
>
> • Engaging in ADR activities.

With respect to waivers by plaintiffs, *Moore's* reports:

> [A] plaintiff who takes affirmative action in the federal court prior to making a motion to remand may waive the right to seek remand . . . . The Eighth Circuit held that the plaintiff had waived her right to seek remand by moving to file [a] supplemental complaint. Indeed, the court noted that the motion to remand was not made until after the plaintiff lost the motion in the federal court. Preventing motions to remand under such circumstances is precisely what Congress had in mind when it amended Section 1447(c) in 1988.[19]

II. IS THERE ANY WARRANT FOR WAIVERS OF THE RIGHTS TO REMOVE OR TO OBTAIN REMAND THAT ARE NOT SPECIFIED IN THE REMOVAL/REMAND STATUTES?—A HISTORY

Removal and remand often are said to be governed by statute,[20] with the scope and terms of the right to remove depending entirely on the will of Congress,[21] yet nothing in the statutes speaks of waiver of the rights to remove or obtain remand of a removed action to state court. Thus, one might wonder whether perhaps all the cases that permit waiver of these rights are misguided. Separation of powers issues lurk just below the surface. In matters closely related to issues of federal court jurisdiction and generally governed by statute, should the courts be intervening through common law waiver doctrines?

The primary federal appellate court case to question the propriety of holdings that defendants waived the right to remove is *Rothner v. City of*

Id. § 107.132[3] (footnotes omitted).

19. *Id.* § 107.151[1][d][iii] (footnotes omitted).

20. *E.g.*, Syngenta Crop Prot., Inc. v. Henson, 537 U.S. 28, 32 (2002) ("The right of removal is entirely a creature of statute . . . ."); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 349 (1816) (noting that removal is subject to Congress's absolute legislative control); Leffall v. Dall. Indep. Sch. Dist., 28 F.3d 521, 524 (5th Cir. 1994) ("[R]emoval is an issue of statutory construction . . . ."); Shannon v. Shannon, 965 F.2d 542, 545 (7th Cir. 1992) ("Fundamentally, removal is a procedure created by federal statute . . . ."); Hurt v. Dow Chem. Co., 963 F.2d 1142, 1145 (8th Cir. 1992) (noting that statutory requirements must be met for the court to have removal jurisdiction).

21. *See, e.g.*, Breuer v. Jim's Concrete of Brevard, Inc., 538 U.S. 691, 693–94 (2003) ("Removal of FLSA actions is thus prohibited under § 1441(a) only if Congress expressly provides as much."); Glob. Satellite Commc'n Co. v. Starmill U.K. Ltd., 378 F.3d 1269, 1271 (11th Cir. 2004) ("A defendant's right to remove an action against it from state to federal court 'is purely statutory and therefore its scope and the terms of its availability are entirely dependent on the will of Congress.'" (quoting 14B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3721, at 285–86 (3d ed. 1998))).

Chicago.[22] In *Rothner*, the U.S. Court of Appeals for the Seventh Circuit initially confronted the threshold question of whether the appeals court had jurisdiction to review a remand that had been ordered on the basis of a waiver of the right to remove.[23] At the time of *Rothner*, remands that were predicated on removals having been "improvident" or having brought to federal court cases beyond federal subject-matter jurisdiction were unreviewable by appeal or otherwise.[24] But the Seventh Circuit held that the remand in *Rothner* was not grounded in either of those flaws.[25] The removal complied with all statutory requirements, and so the remand was reviewable under *Thermtron Products, Inc. v. Hermandorfer*.[26] Although the court did not regard waiver as discretionary "in a strict sense," it observed that waiver "is a doctrine of uncertain application, capable of great manipulation[,] . . . malleable and quasi-discretionary," and thus outside the realm of 28 U.S.C. § 1447(c) and (d), like the remand in *Thermtron*.[27]

Having confirmed its jurisdiction to review the remand, the Seventh Circuit held that the remand authority conferred by § 1447(c) is measured by reference to the specific statutory requirements for removal.[28] In other words, the court concluded that district courts have authority to remand cases to state court if, but only if, the cases were removed in violation of the statutory requirements for removal, which encompass both jurisdictional and procedural elements. Was waiver somehow encompassed within those requirements, or did the federal courts have

22. 879 F.2d 1402 (7th Cir. 1989); *see also* Morgan Dall. Corp. v. Orleans Par. Sch. Bd., 302 F. Supp. 1208, 1209 (E.D. La. 1969) (opining that such a waiver cannot be implied); Minkoff v. Scranton Frocks, 172 F. Supp. 870, 875 (S.D.N.Y. 1959) (questioning whether waiver continued to exist after the 1948 revision of the removal statutes).

23. *Rothner*, 879 F.2d at 1403.

24. *Rothner* was governed by the removal statutes in effect prior to November 19, 1988. At that time, § 1447(c) stated that district courts shall remand cases that were removed "improvidently and without jurisdiction." 28 U.S.C. § 1447(c) (1982). *Rothner* interpreted the quoted words in § 1447(c) to refer to defects in the statutory grounds for removal. *Rothner*, 879 F.2d at 1409.

25. *Rothner*, 879 F.2d at 1405, 1408.

26. 423 U.S. 336, 345 (1976) (holding that a remand based upon the federal docket and the long wait for trial of cases within diversity jurisdiction was not based upon the removal having been improvident or upon lack of federal jurisdiction, hence appellate review of that remand was not precluded by 28 U.S.C. § 1447(d), and was reviewable by writ of mandamus), *abrogated in part by* Quackenbush v. Allstate Ins., 517 U.S. 706 (1996) (abrogating *Thermtron* only insofar as *Thermtron* held that an order remanding a removed action is not a final judgment, reviewable by appeal, when that view is inconsistent with the collateral order doctrine, which recognized the finality for appeal purposes of a small group of orders that do not end the litigation).

27. *Rothner*, 879 F.2d at 1408; *see Thermtron*, 423 U.S. at 345.

28. *Rothner*, 879 F.2d at 1409–11.

inherent authority, whose contours were a function of common law, to remand on grounds of waiver?

In a scholarly opinion, the court traced the history of the time requirements of the removal statutes and showed how concerns about waiver and language of waiver came out of efforts to interpret ambiguous language in the early removal statutes.[29] For example, the *Removal Cases*[30] required the Supreme Court to interpret Judiciary Act of 1875's[31] command that a removal petition be filed before the state court trial,[32] the specific question there presented being whether the plaintiff's offer of evidence during preliminary motions had started the trial.[33] The Court stated that Congress "did not intend, by the expression 'before the trial,' to allow a party to experiment on his case in the State court, and, if he met with unexpected difficulties, stop the proceedings, and take his suit to another tribunal."[34] The *Removal Cases* had not gotten to that point, so the removal petition was held to have been timely filed.[35] But the quoted language was picked up by later courts in support of the notion that a party could waive the right to remove.[36]

Later revisions of the removal statutes refined the requirements as to when removal petitions, and then removal notices,[37] had to be filed.

29. *Id.* at 1412.

30. 100 U.S. 457 (1879).

31. Ch. 137, 18 Stat. 470.

32. *See id.* at 471.

33. *Removal Cases*, 100 U.S. at 465.

34. *Id.* at 473.

35. *Id.* at 472–73.

36. *E.g.*, Rothner v. City of Chicago, 879 F.2d 1402, 1412 (7th Cir. 1989). Similarly, other interpretations of the 1875 Act's time requirements led to the holding that the filing of a demurrer in state court rendered a subsequent petition for removal untimely. Alley v. Nott, 111 U.S. 472, 475 (1884). And the Act of Mar. 3, 1887, ch. 373, § 2, 24 Stat. 552, 553, in part required removal petitions to be filed at or before the time the defendant was required, by state law or rules, to answer or plead to the complaint. *See Rothner*, 879 F.2d at 1413. One can see how the requirements of the early removal statutes and their interpretations led to development of a body of law that addressed waiver of the right to remove.

37. The terminology was changed in 1988 by Pub. L. No. 100-702, enacted Nov. 19, 1988, but the revision was not applicable in *Rothner*. 879 F.2d at 1405. Under the 1988 revisions, § 1447(c) stated in part:

> A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.

28 U.S.C. § 1447(c) (1988). The Historical and Revision Notes of this section noted that subsection (e) originally stated as follows: "If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case." *Id.*

Rothner opined that although the revisions "seemed to obviate the need of courts to resort to judicial rules concerning waiver, those rules had . . . become so entrenched . . . that post-1948 decisions continued to use them."[38] The consequence for *Moore's Federal Practice* was the position that amended "Rule 81(c) implie[d] that, if a removal petition [was] timely, the right of removal [was] not lost by the defendant answering or taking related steps in the state court prior to the filing of the removal petition," but that waiver of the right to remove still was possible,[39] notwithstanding that, in the opinion of the *Rothner* court, nothing in the statute supported the latter view.[40] *Rothner* concluded that the removal statutes "cannot be interpreted to authorize remands on the ground of waiver,"[41] but it too "fudged," suggesting that district courts have power to remand in extreme situations, with that power deriving from common law, in furtherance of the values of judicial economy, fairness, convenience, and comity.[42] The Seventh Circuit's bottom line was that "instances of waiver . . . occur only where the parties have fully litigated the merits," although it did not defend that position.[43] Instead, the court seemed to take solace in the observation that instances of waiver of the right to remove were "rare,"[44] or at least the court so perceived them thirty years ago. It also posited (consistent with the general understanding of waiver but again without defense or explanation) that waiver implied by conduct "requires an objective inquiry into the [defendant's] intent . . . ."[45] *Rothner*'s ultimate holding was that opposing a motion for a temporary restraining order in state court did not waive the right to remove.[46]

Other circuit courts of appeals did not, in general, explicitly follow *Rothner*'s views on the obsolescence or limitedness of waiver of the right

38. *Rothner*, 879 F.2d at 1414.

39. 1A JO DESHA LUCAS, MOORE'S FEDERAL PRACTICE ¶ 0.157[9] (2d ed. Supp. 1996–97).

40. *See Rothner*, 879 F.2d at 1415.

41. *Id.* at 1416 (footnote omitted).

42. *Id.* These are the very values that typically are invoked when the question is whether a federal district court should exercise supplemental jurisdiction. *See* United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966). In *Rothner*, the Seventh Circuit did not explain why they are the "right" considerations when the question is whether a defendant waived its right to remove a case from state to federal court. For alternative thoughts on the policies that ought to inform whether a defendant has waived the right to remove, see *infra* text accompanying notes 180–86.

43. *Rothner*, 879 F.2d at 1416.

44. *Id.*

45. *Id.* at 1417. Waiver is generally understood as the voluntary relinquishment or abandonment of a known legal right, so the element of intent inheres in it. *See* BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 923 (2d ed. 1995).

46. *Rothner*, 879 F.2d at 1418–19.

to remove,[47] although they seldom have held defendants to have waived the right to remove.[48] By contrast, the U.S Court of Appeals for the Fourth Circuit said that it was persuaded by *Rothner*'s reasoning, but what it most embraced was *Rothner*'s recognition of power to remand based on waiver in extreme situations.[49] Even in the Seventh Circuit, district courts wrote off *Rothner*'s view of the non-statutory nature of waiver of the right to remove as having been superseded by the 1996 revision of the removal statutes. *Fate v. Buckeye State Mutual Insurance*[50] viewed *Rothner* as having been made irrelevant by the substitution, in § 1447(c), of language referring to remand on the basis of "any defect other than lack of subject matter jurisdiction," which replaced language of "improvident" removal.[51] In the *Fate* court's view, this change freed courts to consider any kind of challenge to a removal and brought challenges based on waiver within the remand statutes.[52]

Rothner's cogent analysis led to the conclusion that the removal statutes' 1948 revisions obviated the courts' need to resort to judge-made rules concerning waiver. *Rothner* urged courts to confine waiver of the right to remove to "extreme situations."[53] And the absence of statutory mention of waiver of the right to remove continued. Despite all this, litigants continued to argue waiver of the right to remove and the federal courts, especially the district courts, continued to find such waivers. They have been finding such waivers for a very long time, presumably based upon a background principle that litigants can waive procedural, including statutory, rights.[54] The Supreme Court itself has recognized the

47. District courts, however, have at times indicated some doubt about the waivability of the right to remove. *See, e.g.*, Stemmle v. Interlake S.S. Co., 198 F. Supp. 3d 149, 166 (E.D.N.Y. 2016) ("[T]he Second Circuit does not appear to have endorsed a waiver exception to an otherwise timely removal."); Brown v. Sasser, 128 F. Supp. 2d 1345, 1347 (M.D. Ala. 2000) ("Assuming [, without deciding,] that a defendant c[ould] waive his right to remove despite having fully satisfied the statutory requirements for removal."); *see also infra* text accompanying note 49 (noting that a circuit court was persuaded by *Rothner*).

48. *See supra* note 18; *infra* text accompanying notes 96, 113–41.

49. *See* Grubb v. Donegal Mut. Ins., 935 F.2d 57, 59 (4th Cir. 1991); *infra* text accompanying note 111.

50. 174 F. Supp. 2d 876 (N.D. Ind. 2001).

51. *Id.* at 881.

52. *Id.*

53. Rothner v. City of Chicago, 879 F.2d 1402, 1416 (7th Cir. 1989).

54. *See, e.g.*, Berghuis v. Thompkins, 560 U.S. 370, 371 (2010) (stating that Miranda rights can be waived); Neder v. United States, 527 U.S. 1, 35 (1999) (noting that the absolute right to trial by jury can be waived); Johnson v. Burken, 930 F.2d 1202, 1204 (7th Cir. 1991) (stating that the Soldiers' and Sailors' Civil Relief Act gives procedural rights to a class of litigants which, like most procedural rights, can be waived); San Antonio v. U.S. Immigration & Naturalization Serv., 922 F.2d 845 (9th Cir. 1991) (unpublished table decision) (noting that the statutory procedural right to a personal hearing before a particular official can be waived).

possibility that a defendant may waive the right to remove—although it did so a long time ago, when the removal and remand statutes were written quite differently than they are today[55]—so it is not surprising that the intermediate federal courts of appeals and district courts have rarely questioned the waivability of that right and have focused instead on the circumstances in which such waivers should and should not be found.

To round out this history, this Article notes that the Supreme Court also has long recognized that a party may waive the right *to remand* of an improperly removed case to state court. In the 1870s the Court held that a party waives the objection of untimely removal by failing to raise that objection in a timely fashion.[56] In 1908, the Court denied a petition for writ of mandamus to compel remand of a case to the state court, where the plaintiff, instead of challenging the federal court's jurisdiction by filing a motion to remand, filed an amended complaint, signed a

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55. *See, e.g.*, R.R. v. Koontz, 104 U.S. 5, 14 (1881) (holding that (1) "if a State court wrongfully refuses to give up its jurisdiction on a petition for removal," a party does not waive his right to remove by contesting the case on its merits in state court; (2) after final judgment, the party can appeal the denial of its petition for removal and have the state court judgment vacated; and instructing that (3) that be done here). The Court in *Koontz* cited even earlier Supreme Court decisions to the same effect. *Id.* See Rosenthal v. Coates, 148 U.S. 142 (1893), where the Court affirmed a remand to state court (at a time when review of many remands was not statutorily precluded) where the suit was not properly removable under the Judiciary Act of 1875, or on the ground of local prejudice. *Id.* at 147–48. The Court stated:

> [T]o sustain this removal would certainly violate the spirit of the removal acts, which do not contemplate that a party may experiment on his case in the state court, and, upon an adverse decision, then transfer it to the Federal court. Here, Rosenthal has gone through the state trial and appellate courts, and his rights have been finally declared by the Supreme Court of the State, and though as yet no formal decree has been entered in the trial court, it is none the less true that he has experimented with the state courts and been beaten, and now seeks a different forum.

Id. (citing Jifkins v. Sweetzer, 102 U.S. 177 (1880)). In *Jifkins v. Sweetzer*, the Court held:

> The act of 1875 requires that the petition for removal shall be filed "before the trial." . . . If the "trial had actually begun and was in progress in the orderly course of proceeding," when the petition [for removal] was presented, it would be too late. . . . These statutes do not, any more than that of 1875, "allow a party to experiment on his case in the State court, and, if he meets with unexpected difficulties, stop the proceedings and take his suit to another tribunal." He must make his election before he goes to the trial or hearing on the merits.

Jifkins, 102 U.S. at 179 (quoting Removal Cases, 100 U.S. 457 (1879)); *see also* Ayers v. Watson, 113 U.S. 594, 598–99 (1885) (noting that a party may waive its objection to the untimeliness of a removal).

56. *See* French v. Hay, 89 U.S. 238, 245 (1875).

stipulation giving the defendant additional time to answer, and entered into successive stipulations for a continuance of the trial.[57] By so doing, the plaintiff was said to have accepted the jurisdiction of the federal court.[58] And in the 1970s, the Supreme Court rendered a decision in *Grubbs v. General Electric Credit Corp.*[59] that one might view as holding that a plaintiff waives the right to remand of a case that was improperly removed (in *Grubbs*, for lack of jurisdiction) if he does not object and allows the case to go to final judgment in federal court in a posture in which the district court would have had jurisdiction if the case had been so configured when brought to federal court.[60]

Intermediate federal appellate courts too have consistently found waivers of the right to remand when they thought the circumstances warranted it, and they have so found far more often than they have found waivers of the right to remove. One reason may flow from aspects of the law of appellate jurisdiction. Although remands are final decisions within 28 U.S.C. § 1291,[61] that conclusion of law was reached only about

57. *In re* Moore, 209 U.S. 490, 496 (1908), *abrograted in part on other grounds by Ex parte* Harding, 219 U.S. 363, 379–80 (1911).

58. *See id.*

59. 405 U.S. 699 (1972).

60. *Id.* at 700. Cases following and sometimes extending *Grubbs* include: Gentek Bldg. Prods., Inc. v. Sherwin-Williams Co., 491 F.3d 320, 329 (6th Cir. 2007) (finding waiver of the right to remand where plaintiff failed to move to remand for lack of jurisdiction that was erroneously asserted as a function of complete preemption under the federal Magnuson-Moss Warranty Act (MMWA) and amended its complaint to allege an MMWA claim before the court entered summary judgment for defendant). Both the removal and plaintiff's amendment were based upon defendant's statement that the product at issue was a "consumer product," which turned out to be incorrect but, unfortunately for plaintiff, plaintiff took the bait. *Id.*; Tolton v. Am. Biodyne, Inc., 48 F.3d 937, 941 (6th Cir. 1995); Kidd v. Sw. Airlines, Co., 891 F.2d 540, 546 (5th Cir. 1990) (having concluded that plaintiff's removed complaint did not allege a claim arising under federal labor laws, the court held, under *Grubbs*, that although Kidd initially protested the removal for lack of federal jurisdiction, her decision to amend her complaint to add federal question claims, after the district court denied her motion to remand, waived this objection and the case fell under the rule that the jurisdictional issue on appeal became whether the district court would have had jurisdiction over the case as configured at judgment); Farm Constr. Servs., Inc. v. Fudge, 831 F.2d 18, 22 (1st Cir. 1987) (holding that a forum-defendant defect and the right to object to removal were waived by plaintiff's "continued prosecution of the case in federal court for approximately a year, and [plaintiff's] failure to object to removal until after judgment had been rendered"); Bernstein v. Lind-Waldock & Co., 738 F.2d 179, 185 (7th Cir. 1984) ("Otherwise . . . if [a plaintiff] won his case on the merits in federal court[,] he could claim to have raised the federal question in his amended complaint voluntarily, and if he lost[,] he could claim to have raised it involuntarily and to be entitled to start over in state court."); Illinois *ex rel.* Barra v. Archer Daniels Midland Co., 704 F.2d 935, 939 (7th Cir. 1983). For a competing understanding of *Grubbs*, see *infra* text accompanying notes 231–31.

61. Quackenbush v. Allstate Ins., 517 U.S. 706, 714–15 (1996) (reasoning that a remand to state court is a final decision for purposes of appeal because, when a district court remands a case to a state court, "the district court disassociates itself from the case entirely, retaining nothing of

twenty-two years ago; before that, remands were not appealable under § 1291.[62] Moreover, 28 U.S.C. § 1447(d) prohibits the federal courts from entertaining appeals of remands to state court if the remands were ordered pursuant to § 1447(c).[63] Some federal appeals courts hold remands based on waivers of the right to remove to be ordered under § 1447(c).[64] Thus, in some circuits, appeals courts do not have occasion to affirm (or reverse) waivers of the right to remove, leading to remands. The appellate courts can provide some guidance by ruling upon holdings that defendants did *not* waive the right to remove, but (for the most part) can do so only after final judgment. Moreover, where district courts held against waiver of removal and against remand, appellate courts might be reluctant to reverse, absent other prejudicial error, leaving district courts relatively unguided and un-pushed to broaden waiver of the removal right. By contrast, the § 1447(d) obstacle to federal appeals does not stand in the way of federal appeals of decisions holding that plaintiffs waived the right to remand to state court.[65] Such decisions leave cases to be adjudicated in federal court. Those remand denials can be appealed to federal appellate courts after final judgment, if not in an interlocutory appeal,[66] whereas cases that are remanded to state court go to judgment

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the matter on the federal court's docket" even though the remand did not "en[d] the litigation on the merits and leav[e] nothing for the court to do but execute the judgment" (alterations in original) (quoting Caitlin v. United States, 342 U.S. 229, 233 (1945)).

62. *See id.*

63. "[T]he Supreme Court has made it clear that so long as the order to remand was based on grounds set out in Section 1447(c)—(1) a lack of subject-matter jurisdiction in the district court and (2) any defect in the removal procedure—the correctness of that decision is unreviewable and the lower courts have adhered to that rule." WRIGHT ET AL., *supra* note 1, § 3740 (footnote omitted).

64. In *Laghaei v. Federal Home Loan Mortgage, Corp.*, for example, the court treated the contention that defendants had waived their right to remove as alleging a removal defect, which therefore had to be raised by a motion to remand filed within 30 days of the notice of removal, or itself would be waived. 624 F. App'x 597, 597 (9th Cir. 2015); *see supra* text accompanying notes 50–52. *But see* WRIGHT ET AL., *supra* note 1, § 3741; *infra* text accompanying note 79 & note 79; *cf.* City of Albuquerque v. Soto Enters., Inc., 864 F.3d 1089, 1097 (10th Cir. 2017) (holding that the court could review a remand that was based on a determination that the defendant had waived its right to remove).

65. *See* WRIGHT ET AL., *supra* note 1, § 3470 (explaining that the § 1447(d) bar applies only to those cases that were actually remanded to state court).

66. *See* PCI Transp., Inc. v. Fort Worth & W.R.R., 418 F.3d 535, 539 (5th Cir. 2005) (denying remand, which became reviewable when "coupled with an interlocutory appeal of an injunction order under 28 U.S.C. § 1292(a)(1)"); Estate of Bishop v. Bechtel Power Co., 905 F.2d 1272, 1275 (9th Cir. 1990) (dismissing interlocutory appeal from denial of motion to remand, where plaintiffs failed to obtain certification under either Federal Rule of Civil Procedure 54(b) or 28 U.S.C. § 1292(b)); Polyplastics, Inc. v. Transconex, Inc., 713 F.2d 875, 880 (1st Cir. 1983) (holding that the court lacked jurisdiction over an interlocutory appeal from a denial of remand based on a finding of diversity jurisdiction, even when accompanied by an order to the district

in state court (plaintiff *not* having waived the right to remand and the case warranting remand in the view of the district court). After final judgment in state court, the federal remand decision is beyond the scope of the federal courts' jurisdiction,[67] and one generally does not see state appellate court review of federal remand decisions. The Supreme Court has observed that the "state court cannot review the [federal court's] decision to remand in an appellate way," although state courts are "free to reject the remanding court's reasoning."[68]

The upshot of this appellate matrix is that federal appeals courts seldom had occasion to encourage district court holdings that defendants, by their conduct in state court, waived their right to remove cases, and district courts remained disinclined to find such waivers. By comparison, the federal appellate courts were free to review holdings that plaintiffs waived their right to remand, but the incentive to further judicial economy favored affirmance, absent other prejudicial errors. Federal appeals courts never had occasion to affirm (or otherwise rule upon) district court decisions rejecting conduct-based waivers by plaintiffs of their right to remand. All of this may have contributed to the findings of many more waivers of the right to remand than waivers of the right to remove.

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court to refrain from further proceedings, where there was no final judgment as of yet and no exception to the final decision rule applied).

67. The remand is beyond federal appellate courts' jurisdiction because the intermediate federal courts have no jurisdiction over appeals from state court judgments. *See* 28 U.S.C. § 1291 (2012); *see also id.* § 1447(d) ("An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1442 or 1443 of this title shall be reviewable by appeal or otherwise.").

68. Kircher v. Putnam Funds Tr., 547 U.S. 633, 647 (2006). Any claim of error on that point then can be considered on review by the Supreme Court. *See* Franchise Tax Bd. v. Constr. Laborers Vacation Tr., 463 U.S. 1, 12 n.12 (1983) ("If the state courts reject a claim of federal pre-emption, that decision may ultimately be reviewed on appeal by this Court." (citing Fid. Fed. Savs. & Loan Ass'n v. De la Cuesta, 458 U.S. 141 (1982))). The Supreme Court can review federal law issues that undergird state law judgments:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where . . . any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the . . . statutes of . . . the United States.

28 U.S.C. § 1257(a). After a case has reached judgment in a state court that has subject-matter jurisdiction over the case and personal jurisdiction over the parties, the Supreme Court might well regard as harmless any error in the remand from federal court.

III. CONDUCT-DERIVED WAIVERS OF THE RIGHT TO REMOVE TO FEDERAL COURT

Before delving into conduct-based waivers of the right to remove cases to federal court, this Article distinguishes defective removals and considers the implications—for district courts that must determine whether defendants have waived their right to remove—of the doctrines that govern the availability of appellate review of remand grants and denials.

A. *Comparing Defective Removals*

Before going further, it should be emphasized that the waivers this Article is trained upon are to be distinguished from the loss of removal and remand rights by means set out in the removal and remand statutes. Acts and omissions by the parties that in-and-of themselves render a removal or a remand motion defective under the statutes are not the focus here. As to defendants, these acts and omissions are not behaviors in state court, which is what this Article focuses upon. They instead are acts and omissions, vis-à-vis the removal notice, that go to such matters as the time of filing of the notice in federal court, who must join it, in which federal court the defendants must file it, whether the case is exclusively within federal diversity jurisdiction and one in which a properly joined and served defendant is a citizen of the state in which the action was brought, whether the removal papers are incomplete or otherwise defective, and the like. Similarly, when the question is waiver of the right to remand, this Article's focus is on conduct of the plaintiff in federal court that is distinct from the acts and omissions that are explicitly recognized in the remand statutes as behaviors that waive the right to remand—such as failures to move to remand within a specified period of time, based on non-jurisdictional defects in the removal.[69] These defects are not the center of attention of this Article.

Having distinguished defective removals and defective remand motions from the conduct-based waivers that are this Article's target, important lessons nonetheless can be learned from the statutory requirements for removals and remand motions and from how the statutes handle defective removals and remand motions. Notice that the statutes (28 U.S.C. § 1446, for example) set out specific requirements for removal and a timing requirement for remand motions.[70] The grounds for remand most commonly correspond to the statutory requirements for removal, so

69. *See supra* text accompanying notes 56–61.

70. *See, e.g.*, 28 U.S.C. § 1447(c) ("A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a).").

that remand motions typically argue defendants' failures to satisfy those requirements. The motions will point to lack of federal jurisdiction,[71] untimely filing of the removal notice,[72] a failure to join in or consent to the removal by all defendants who were obligated to join or consent,[73] and on down the line of requirements. Alternatively, the basis for a remand motion may be found elsewhere in doctrines governing federal courts—in abstention doctrines, or supplemental jurisdiction doctrines, for instance. These motions precisely parallel motions to dismiss that might be asserted by defendants in cases filed by plaintiffs in federal court. Likewise, the grounds for arguments that a motion to remand should be denied typically correspond to the statutory requirements for such motions, so that defendants typically assert either that the motion is ill-founded (because the federal court does have jurisdiction, the removal was timely and otherwise procedurally proper, etc.) or that the remand motion itself was untimely.

The matters that are most notable for the purposes of this Article are these: First, the statutory requirements for removal and for remand motions, insofar as they are "in black and white" in federal statutes, have not given rise to the same level of notice problems as have wholly court-determined conduct-based waivers of the rights to remove or remand. This Article does not want to overstate that point because there have been many occasions on which the proper application of the removal/remand statutes was uncertain and courts had to interpret the statutes.[74] Gradually, however, many of the issues and disagreements have been resolved, and Congress sometimes has resolved those issues itself by amendments to the removal and remand statutes.[75]

Second, the evenhandedness of the treatment afforded to plaintiffs and defendants by the removal and remand statutes is manifest. Congress imposed requirements on each side and gave the opposing side the right to seek judicial enforcement of those requirements.[76] Of course, the requirements for removal are necessarily different from the requirements for remand, but whatever the requirements are, plaintiffs and defendants each know them in advance[77] and thus know what they each must do to avoid "waiving" their right to remove or their right to obtain court-

71. *See, e.g.*, Thermtron Prods., Inc. v. Hermansdorfer, 423 U.S. 336, 336–37 (1976), *abrogated in part on other grounds by* Quackenbush v. Allstate Ins., 517 U.S. 706 (1996).

72. *See, e.g.*, Ayers v. Watson, 113 U.S. 594, 598–99 (1885).

73. *See, e.g.*, City of Cleveland v. Ameriquest Mortg. Sec., Inc., 615 F.3d 496, 500–01 (6th Cir. 2010).

74. *See supra* Part II.

75. *See, e.g.*, 28 U.S.C. § 1441.

76. District courts are supposed to raise *sua sponte* only matters of subject-matter jurisdiction, as they must in cases filed in federal court. *See* 28 U.S.C. § 1447(c); WRIGHT ET AL., *supra* note 1, § 3739.1.

77. Subject to the caveat raised in the prior paragraph in the text.

ordered remand. Moreover, the parties' rights to challenge the removal or remand motion are symmetrical—again, each opponent has the right to seek judicial enforcement of the requirements applicable to his adversary. Nothing in the statutes provides an asymmetrical waiver burden. Presumptively, this approach should inform thinking about conduct-based waivers of the rights to remove and to obtain court-ordered remand.

B. *Comparing and Considering the Ramifications of Appellate Review*

As discussed above, Congress has denied jurisdiction to federal courts of appeals to review most remands to state courts of cases removed from those courts, including those remands that are based on lack of federal subject-matter jurisdiction or defects in removal procedure.[78]

When district courts have remanded on the grounds that, based on a defendant's or defendants' conduct, defendants waived the right to remove to federal court, federal appellate courts sometimes have regarded the remand as falling *outside* of § 1447(d)'s prohibition on review, and sometimes have regarded the remand as falling *within* that prohibition by viewing the remand as predicated on a defect in removal procedure.[79]

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78. *See* 28 U.S.C. § 1447(d); Kircher v. Putnam Funds Tr., 547 U.S. 633, 641 (2006) (noting that the statutory bar against appellate court review of orders remanding cases removed from state court "applies equally to cases removed under the general removal statute, § 1441, and to those removed under other provisions," including the Securities Litigation Uniform Standards Act (SLUSA)).

79. *Compare* Mendoza v. Fed. Nat. Mortg. Ass'n, 469 F. App'x 544, 545 (9th Cir. 2012) (holding that "the district court's remand 'for waiver of a right to remove is not within the ambit of' the § 1447(d) bar" and accepting jurisdiction over appeal from such a remand (quoting Clorox Co. v. U.S. Dist. Court, 779 F.2d 517, 520 (9th Cir. 1985))), *and* Rothner v. City of Chicago, 879 F.2d 1402, 1406–12 (7th Cir. 1989) (holding district court remand for waiver of the right to remove not to be within the ambit of § 1447(d)'s bar and accepting jurisdiction over appeal from such a remand, reasoning that such a remand is not grounded in the removal being improvident, the removal procedure being defective, or the federal court lacking jurisdiction), *and Clorox Co.*, 779 F.2d at 520 (holding district court remand for waiver of a right to remove not within the ambit of § 1447(d)—which was § 1447(c) at the time—and accepting jurisdiction over appeal from such a remand), *with* Laghaei v. Fed. Home Loan Mortg. Corp., 624 F. App'x 597, 597 (9th Cir. 2015) (treating the contention that defendants had waived their right to remove as alleging a removal defect, which therefore had to be raised by a motion to remand filed within 30 days of the notice of removal, or itself would be waived), *and* Schmitt v. Ins. Co. of N. Am., 845 F.2d 1546, 1549, 1552–53 (9th Cir. 1988) (dismissing, for lack of appellate jurisdiction, appeal from remand based on defendant having waived its right to remove, reasoning that such a remand falls within 28 U.S.C. § 1447(c), such that its review is precluded by § 1447(d)). When faced with remands based on contractual forum selection clauses, most courts have upheld appellate jurisdiction. *E.g.*, Waters v. Browning-Ferris Indus., Inc., 252 F.3d 796, 797 (5th Cir. 2001) ("When a district court remands a suit relying on a contractual forum selection clause, that decision is not based on lack of subject-matter jurisdiction and is therefore outside of the statutory prohibition on . . . review." (citing McDermott Int'l, Inc. v. Lloyds Underwriters, 944 F.2d 1199, 1201 (5th Cir. 1991)));

One might consider whether doctrines concerning conduct-based waivers of the right to remove should be influenced by whether a remand based on a conduct-based waiver of the right to remove is subject to appeal in the circuit where the case is pending. Where such a remand is not subject to appeal (because it is regarded as a remand based on defects in removal procedure),[80] the district courts will be largely unfettered in their decisions as to what conduct constitutes a waiver of the right to remove. One might conclude that where conduct-based remands are not appealable, district courts should be conservative and seldom find waivers of the right to remove by virtue of conduct in the state court. However, the effect of this thinking will disfavor plaintiffs. In the circuits where such a remand *is* subject to appeal (because it is regarded as falling outside the prohibition on appeal in 28 U.S.C. § 1447(d) on the ground that the remand is based on something other than a defect in removal procedure), the appellate courts *will* be able to exercise more control over decisions as to what conduct constitutes a waiver of the right to remove. That control suggests that, as an initial matter, district courts may feel freer to find waivers of the right to remove by virtue of conduct in the state court. Then, appellate courts that disapprove what the district courts are deciding can rein them in. The effect of this thinking would allow more remands and thereby favor plaintiffs, unless and until the appellate courts tighten the standards for waiver of the right to remove. When it comes to waiver of the right to remand, a somewhat different intellectual exercise applies. Waiver-of-remand holdings (which result in a suit remaining in federal court) are appealable, but only after final judgment, unless an exception to the final judgment rule applies.[81] The availability

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Snapper, Inc. v. Redan, 171 F.3d 1249, 1260 (11th Cir. 1999) (upholding appellate jurisdiction over a remand order that was based on a forum selection clause, and concluding that the clause waived defendant's right to remove and was enforceable by remand to state court); Foster v. Chesapeake Ins. Co., 933 F.2d 1207 (3d Cir. 1991) (same as *Snapper*); Regis Assocs. v. Rank Hotels (Mgmt.) Ltd., 894 F.2d 193 (6th Cir. 1989) (upholding appellate jurisdiction over a remand order that was based on a forum selection clause, but here concluding that the clause did not waive the right to remove, and reversing the remand to state court); *Clorox Co.*, 779 F.2d at 517 (upholding appellate jurisdiction over a remand order that was based on an employee handbook provision that suits could be filed in state or federal court, but here concluding that the provision did not waive the right to remove, and reversing the remand to state court). The rationale for these latter decisions is that the district court's remand order is based on a "resolution of the merits" of a matter of substantive law, apart from any jurisdictional decision, and that § 1447(d) does not foreclose appellate review of such decisions of substantive law. *See Rothner*, 879 F.2d at 1422.

80. *See* 28 U.S.C. § 1447(c) (speaking to when motions to remand a case on the basis of any defect other than lack of subject-matter jurisdiction must be made); *id.* § 1447(d) ("An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1442 or 1443 of this title shall be reviewable by appeal or otherwise.").

81. *See supra* text accompanying notes 64–66.

of appellate review for waiver-of-remand holdings suggests that the district courts need not be especially reticent to find such waivers simply for lack of appellate constraints. Additional implications of the appellate matrix were discussed earlier.[82]

Discussion of a case from the U.S. Court of Appeals for the Eleventh Circuit illustrates some unexpected complexities. In *Yusefzadeh v. Nelson, Mullins, Riley & Scarborough, LLP*,[83] the Eleventh Circuit decided the waiver issue in the context of an appeal from a *sua sponte* remand of the case to state court based upon waiver of the right to remove through the defendant's filing of motions to dismiss in state court.[84] The court of appeals treated the supposed waiver of the right to remove as a defect in the removal within the meaning of § 1447(c).[85] Despite § 1447(d)'s ban on appeals from remands predicated on § 1447(c) defects in removal, the Eleventh Circuit entertained the appeal.[86] It did so without any discussion of its appellate jurisdiction, but the fact that the Circuit held the district court to have lacked authority to remand the case *sua sponte* on a ground other than lack of subject-matter jurisdiction[87] helps to explain why the Circuit believed it had appellate jurisdiction. In *Cogdell v. Wyeth*,[88] the court had before it precisely the same situation—an appeal from a *sua sponte* remand based upon a defendant having waived his right to remove (in that case, by filing a motion to dismiss for failure to state a claim or for a more definite statement)—and the Eleventh Circuit did address its appellate jurisdiction.[89] While recognizing that the court ordinarily lacked jurisdiction to review remand orders that are based on lack of subject-matter jurisdiction or a non-jurisdictional defect in removal, the *Cogdell* court reasoned that such a defect is not synonymous with any remandable ground and that waiver of the right to remove is not a defect in removal within the meaning of § 1447(c).[90] (*Yusefzade* disagreed with *Cogdell* on this point.) Moreover, even if waiver were a defect in removal under § 1447(c), the *Cogdell* court reasoned, because the district court remanded *sua sponte* rather than in response to a motion to remand, the district court arguably was not acting pursuant to § 1447(c),[91] hence review was not precluded by

82. *See supra* notes 65–66 and text accompanying note 68.
83. 365 F.3d 1244 (11th Cir. 2004) (per curiam).
84. *Id.* at 1245–46.
85. *Id.* at 1246–47.
86. *See id.* at 1245.
87. *Id.* at 1247.
88. 366 F.3d 1245 (11th Cir. 2004).
89. *Id.* at 1247–49.
90. *See id.*
91. *Id.* at 1247 & n.4. *Cogdell* also explained that the notion of lacking "removal jurisdiction" need not imply a lack of subject-matter jurisdiction, and when a case is remanded

§ 1447(d).[92] *Yusefzadeh* apparently followed this latter aspect of the reasoning in *Cogdell*.

The point at this juncture is just how complicated the decision about appellate jurisdiction can be, when remands based on conduct-based waiver of the right to remove undergird the remand. By contrast, remands based on straightforward defects in removal procedure will *not* be reviewable, on appeal or otherwise. The courts have not always clearly distinguished between "waivers" of the right to remove based upon defects in removal procedure and waivers of the right to remove by dint of behaviors in the state court.[93] But that distinction is important to this Article. It focuses next on conduct of a defendant or defendants in the state court proceedings that may constitute a waiver of the right to remove.

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for lack of the former, the court of appeals has to look into the underlying reason. *Id.* at 1248–49. Here, where remand and the ostensible lack of "removal jurisdiction" was based on a finding that the defendant had waived its right to remove, remand was not predicated on a lack of subject-matter jurisdiction, which would have rendered the remand unreviewable under § 1447(d). *Id.* The issue was presented after remand was denied, on appeal from final judgment. *Id.* at 1249.

92. *See id.* at 1247 n.4; *see also* Smith v. Mylan Inc., 761 F.3d 1042, 1044–46 (9th Cir. 2014) (explaining that because the one-year limit on removal of diversity cases is a procedural requirement and procedural defects are waivable, the district court lacked authority to remand based on defendant's violation of that limit, absent a timely motion to remand, and the remand order therefore was reviewable); Ellenburg v. Spartan Motors Chassis, Inc., 519 F.3d 192, 197–98 (4th Cir. 2008) (holding the court's *sua sponte* remand to be reviewable because it was based on a procedural defect in the notice of removal that was not raised in a timely motion by a party); Mitskovski v. Buffalo & Fort Erie Pub. Bridge Auth., 435 F.3d 127, 131–32 (2d Cir. 2006) (explaining that even if a party moves for remand within 30 days after removal, if the district court grants the motion more than 30 days after removal on the ground of a procedural defect that was not raised by the remand motion, the remand will be reviewable on appeal, as such a remand is not within § 1447(c) and hence is reviewable notwithstanding § 1447(d)); AM. LAW INST., *Sua Sponte Remand for Procedurally Defective Removal*, *in* FEDERAL JUDICIAL CODE REVISION PROJECT 589, 592 (2004) ("[A] circuit court wishing to address the propriety of *sua sponte* remands on procedural grounds is not prevented from doing so by § 1447(d). The very fact that the district court misapplied § 1447(c) renders the misapplication reviewable." (footnotes omitted)).

93. *See, e.g.*, Rosenthal v. Coates, 148 U.S. 142, 147–48 (1893) (noting that the right to remove can be waived where the defendant "ha[d] gone through the state trial and appellate courts, and his rights ha[d] been finally declared by the Supreme Court of the State," but no formal decree had yet been entered in the trial court); Aynesworth v. Beech Aircraft Corp., 604 F. Supp. 630, 637 (W.D. Tex. 1985) (relying on *Rosenthal* and noting that the right to remove can be waived in a context where the defendant was alleged to have waived its right to remove by waiting until jury deliberations had ended in a mistrial before petitioning for removal, but the court's actual holding was that the case was improperly removed for lack of diversity jurisdiction; if that had not been the case, defendant's delay in removing might have rendered the removal untimely under the removal statutes).

C. *Conduct in State Court*

1. U.S. Supreme Court and Federal Court of Appeals Decisions

There are a great many (non-precedential) decisions of federal district courts holding that particular conduct did or did not constitute a waiver of the right to remove.[94] There are substantially fewer U.S. Supreme Court and federal court of appeals opinions on the subject, for reasons related to appellate jurisdiction, described above.[95] This Article will focus first on the appellate courts' decisions and on the principles upon which they rely, and thereafter turn to the district courts' rulings.

Case law evidences that federal appellate courts *recognize*, in principle, that defendants may waive their right to remove a case from state to federal court, but it turns out that these courts almost never *hold* that defendants did waive their right to remove.[96] Exceptions to the latter generalization exist in *Texas & Pacific Railway v. Eastin & Knox*,[97] holding that the defendant lost its right to remove a case by voluntarily filing and recovering on a third-party claim in state court, thereby invoking the jurisdiction of the state court to obtain affirmative relief,[98] and indirectly in *Moore v. Permanente Medical Group, Inc.*,[99] which upheld an award of attorney's fees against defendants who removed an action after the state court denied the defendants' motions to dismiss a petition to vacate an arbitration award and to preclude discovery, where the district court remanded the case to state court on the ground that the defendant had waived its right to remove.[100] The *Moore* court reasoned that the defendants' motions reflected their (defendants') intent to litigate the action in state court until the state court denied the defendants' motions, indicating the state court's adverse position on the merits of part of the action.[101]

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94. One can find them in the footnotes to WRIGHT ET AL., *supra* note 1, § 3721 nn.99–100, and MOORE ET AL., *supra* note 2, § 107.132-2.

95. *See supra* Sections II and III.B.

96. The Supreme Court, for example, held that the defendant had not waived its right to remove in *Remington v. Central Pacific Railroad* and *Insurance Co. v. Dunn*. *See* Remington v. Cent. Pac. R.R., 198 U.S. 95, 96 (1905) (describing that, on the day after defendant's right to remove first appeared, it successfully argued, in state court, its previously filed motion to stay proceedings pending an appeal of the denial of its challenge to service of process); Ins. Co. v. Dunn, 86 U.S. (19 Wall.) 214, 214 (1873) (detailing that defendant contested suit in state court in proceedings that went forward over his objection).

97. 214 U.S. 153 (1909).

98. *Id.* at 160.

99. 981 F.2d 443 (9th Cir. 1992).

100. *Id.* at 448.

101. *Id.*

Given the paucity of actual holdings by the Supreme and appellate courts of waiver of the right to remove, consider what the federal appellate courts *say*.

The Supreme Court has said that "the removal acts [i.e., statutes] do not contemplate that a party may experiment on his case in the state court, and, upon an adverse decision, then transfer it to the Federal court[;]"[102] to allow a removal in such circumstances would violate the spirit of the removal statutes.

The intermediate federal appellate courts say:

> A party, generally the defendant, may waive the right to remove to federal court where, after it is apparent that the case is removable, the defendant takes actions in state court that manifest his or her intent to have the matter adjudicated there, and to abandon his or her right to a federal forum. . . . A waiver of the right of removal must be clear and unequivocal.[103]

Sometimes the appellate courts invoke the definition of waiver as "the intentional relinquishment or abandonment of a known right,"[104] and sometimes they say that a waiver of the right to remove should be found only in "extreme situations."[105]

At times, the federal appellate courts rely on a treatise. In *Beighley v. FDIC*,[106] for example, the U.S. Court of Appeals for the Fifth Circuit quoted *Moore's Federal Practice* for the proposition that "the right of removal is not lost by action in the state court short of proceeding to an adjudication on the merits."[107] By implication, the right to remove *would* be waived by defendant's proceeding to adjudication on the merits. In *Yusefzadeh*, Wright et al. got the nod, with the Eleventh Circuit quoting

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102. Rosenthal v. Coates, 148 U.S. 142, 143 (1893); *see supra* text accompanying note 55 & *supra* note 93.

103. EIE Guam Corp. v. Long Term Credit Bank of Japan, Ltd., 322 F.3d 635, 649 (9th Cir. 2003) (citation omitted) (quoting Resolution Tr. Corp. v. Bayside Developers, 43 F.3d 1230, 1240 (9th Cir. 1994)); *accord* Grubb v. Donegal Mut. Ins., 935 F.2d 57, 59 (4th Cir. 1991); Rothner v. City of Chicago, 879 F.2d 1402, 1415 (7th Cir. 1989); Weltman v. Silna, 879 F.2d 425, 427 (8th Cir. 1989) (after final judgment, affirming denial of remand). *Resolution Trust*, in turn, cited district court opinions and circuit court opinions, including: Beighley v. FDIC, 868 F.2d 776, 782 (5th Cir. 1989). *Resolution Tr.*, 43 F.3d at 1240.

104. *E.g.*, Tedford v. Warner-Lambert Co., 327 F.3d 423, 428 n.15 (5th Cir. 2003) (quoting *In re* Al Copeland Enters., Inc., 153 F.3d 268, 271 (5th Cir. 1998)).

105. *E.g.*, *Grubb*, 935 F.2d at 59 (quoting *Rothner*, 879 F.2d at 1416).

106. 868 F.2d 776 (5th Cir. 1989).

107. *Id.* at 782 (quoting 1A JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 0.157[9] (2d ed. 1987)); *see also Tedford*, 327 F.3d at 428 n.14 (relying on *Beighley* and the same language from *Moore's*).

the principle that

> [a] state court defendant may lose or waive the right to remove a case to a federal court by taking some substantial offensive or defensive action in the state court action indicating a willingness to litigate in that tribunal before filing a notice of removal with the federal court . . . [W]aiver will not occur, however, when the defendant's participation in the state action has not been substantial or was dictated by the rules of that court . . . .[108]

Appellate cases also have pointed out that "waiver by conduct does not exist when removal . . . precedes any state court action [by the defendant]," although "[a] defendant may waive the right to remove by taking . . . substantial defensive action in the state court [such as filing permissive counterclaims or cross-claims] *before* petitioning for removal."[109] The Fourth Circuit also has taken the position that "[t]he district court's decision that the defendant did not demonstrate an intent to waive its right to remove to federal court is a factual determination, to be reversed only if clearly erroneous."[110] It continued, "we held that 'although a defendant may . . . waive its . . . right to removal . . . by demonstrating a "clear and unequivocal" intent to remain in state court, such a waiver should only be found in "extreme situations."'"[111] It is worth noting that courts almost always use the word "waiver," and in most instances it will not matter whether a court refers to what has occurred as "waiver" or "forfeiture," but frequently when a party takes steps to litigate in a court, that court is asked to decide whether the party should be held to have forfeited its right to remove (or to a remand) since there really isn't an *intentional* waiver of that right.[112]

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108. Yusefzadeh v. Nelson, Mullins, Riley & Scarborough, LLP, 365 F.3d 1244, 1246 (11th Cir. 2004) (per curiam) (quoting 14B WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 3721 (3d ed. 2003)) (second alteration in original); *see also* WRIGHT ET AL., *supra* note 1, § 3721 nn.99–100 (revised section 3721). The text in this revised section 3721 differs slightly, but not substantively, from that quoted in *Yusefzadeh*.

109. Aqualon Co. v. Mac Equip., Inc., 149 F.3d 262, 264 (4th Cir. 1998), *abrogated in part on other grounds by* Grupo Dataflux v. Atlas Global Grp., L.P., 541 U.S. 567, 572 (2004); *see also* Schmitt v. Ins. Co. of N. Am., 845 F.2d 1546, 1552–53 (9th Cir. 1988) (dismissing appeal from waiver-based remand for lack of appellate jurisdiction; hence expressing no opinion on remand predicated on defendant having voluntarily subjected itself to the jurisdiction of the state court by filing a permissive cross-complaint).

110. *Aqualon*, 149 F.3d. at 264 (citing *Grubb*, 935 F.2d at 59).

111. *Id.*

112. *See infra* text accompanying notes 160–62.

Shifting to the negative side of the coin, federal appeals courts have said:

> [T]he right of removal is not lost by actions in the state court short of proceeding to an adjudication on the merits.[113]

> Where . . . a party takes necessary defensive action to avoid a judgment being entered automatically against him, such action does not manifest an intent to litigate in state court, and accordingly, does not waive the right to remove.[114]

> [A] defendant who actively invokes the jurisdiction of the state court and interposes a defense in that forum is not barred from the right to removal in the absence of adequate notice of the right to remove.[115]

Under these principles, the federal courts of appeals have held that:

- Defendants did not waive their right to remove to federal court when defendants allegedly led the plaintiff to believe that they would not remove the action.[116] The court found that the statements made by the defendant before it was joined were not a clear and unequivocal abandonment of the right to a federal forum.[117]

- Defendants did not waive their right to remove to federal court when defendants filed a petition for rehearing in the state court of appeals on the same date they filed the notice of removal, where the petition

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113. Beighley v. FDIC, 868 F.2d 776, 782 (5th Cir. 1989) (quoting MOORE ET AL., *supra* note 107, ¶ 0.157[9], at 153); *see also* Ward v. Resolution Tr. Corp., 972 F.2d 196, 198 (8th Cir. 1992) (holding that defendant's post-removal request for a release of the record from a state appellate court, in an attempt to transfer the record to the federal court to which the case had been removed, did not waive the right to remove because the defendant did not request a ruling on the merits).

114. Resolution Tr. Corp. v. Bayside Developers, 43 F.3d 1230, 1240 (9th Cir. 1994) (first citing *Ward*, 972 F.2d at 198; then citing *Beighley*, 868 F.2d at 782).

115. Akin v. Ashland Chem. Co., 156 F.3d 1030, 1036 (10th Cir. 1998) (stating the above where a defendant had filed a motion for summary judgment in state court "before it was unequivocally apparent that the case was removable"); *see also* Berbig v. Sears Roebuck & Co., 568 F. Supp. 2d 1033, 1039 (D. Minn. 2008) (holding that defendant did not waive its right to remove by filing a jury demand in state court, all the more so because, at the time, the suit had not yet become removable; additionally, defendant's motion to dismiss on *forum non conveniens* grounds indicated its intention not to litigate the case in state court).

116. *See* EIE Guam Corp. v. Long Term Credit Bank of Japan, Ltd., 322 F.3d 635, 647 (9th Cir. 2003).

117. *Id.* at 649. The issue came before the court of appeals after denial of remand and after final judgment. *Id.*; *see also Resolution Tr.*, 43 F.3d at 1240 ("A waiver of the right of removal must be clear and unequivocal." (quoting *Beighley*, 868 F.2d at 782)).

specifically stated that the defendant intended to remove and had petitioned for rehearing solely to preserve the status quo pending removal.[118] The court concluded that the defendant was taking defensive action to avoid judgment in the state court and did not waive federal court jurisdiction.[119]

- Defendants did not waive their right to remove to federal court when defendants filed no pleadings in state court prior to removing and the court found that the unlawful detainer action a defendant filed in state court had no bearing on the removability of this quiet title suit.[120]

- Defendants did not waive their right to remove to federal court when defendants filed an answer to the complaint and participated in a hearing on a motion to dissolve a preliminary injunction that had been granted without notice, the purpose of which hearing was to preserve the status quo until a final hearing.[121] The court held that the mere filing of a pleading or other defense was not inconsistent with subsequent removal and that the hearing was not on the merits, so that defendant's participation did not constitute experimenting with the case in state court so as to waive its right to remove.[122]

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118. *See Resolution Tr.*, 43 F.3d at 1239 (citing *Ward*, 972 F.2d at 198).

119. *Id.* at 1240.

120. Chapman v. Deutsche Bank Nat'l Tr. Co., 651 F.3d 1039, 1045 (9th Cir. 2011). The issue came before the court of appeals after denial of remand and entry of final judgment based on the grant of a motion to dismiss the complaint. *Id.*; *see also* Laghaei v. Fed. Home Loan Mortg. Corp., 624 F. App'x 597, 597 (9th Cir. 2015) (rejecting contention that, by first filing an unlawful detainer action in state court, defendants waived their right to remove an action alleging state law claims concerning foreclosure of their home).

121. *See* Atlanta, Knoxville & N. Ry. v. S. Ry., 131 F. 657, 661 (6th Cir. 1904).

122. *Id.*; *see* PR Grp., LLC v. Windmill Int'l, Ltd., 792 F.3d 1025, 1026 (8th Cir. 2015) (filing of a motion to dismiss for lack of prosecution did not waive the right to remove, noting that the motion did not seek an adjudication of the merits); *see also* Kenny v. Wal-Mart Stores, Inc., 881 F.3d 786, 791 (9th Cir. 2018) (filing of demurrer in state court did not waive defendant's right to remove the case); Polito v. Molasky, 123 F.2d 258, 262 (8th Cir. 1941) (appointing an agent for service of process did not waive the right to remove); Phillips v. Mfrs. Tr. Co., 101 F.2d 723, 727 (9th Cir. 1939) (filing of motion to quash service did not waive right to remove). Similar district court holdings include the following: Dial v. Healthspring of Ala., Inc., 501 F. Supp. 2d 1348, 1360 (S.D. Ala. 2007) (holding that defendants did not waive their right to remove by serving notices of deposition in state court, "a necessary part of litigation in either court"), *vacated for lack of subject-matter jurisdiction*, 541 F.3d 1044 (11th Cir. 2008); Foley v. Allied Interstate, Inc., 312 F. Supp. 2d 1279, 1284–85 (C.D. Cal. 2004) (holding that defendant did not waive its right to remove by filing an answer, serving interrogatories and requesting an extension of time to respond to discovery, noting that none resulted in rulings on the merits); Brown v. Sasser, 128 F. Supp. 2d 1345, 1347–48 (M.D. Ala. 2000) (holding that defendants did not waive their right to remove by filing in state court an answer, affirmative defenses, a motion for more definite statement, and discovery requests, which were "not at all comparable to . . . dispositive motion[s]

- Defendants did not waive their right to remove to federal court when defendants filed a motion for new trial in state court before filing the removal petition, but filed the removal petition before the new trial motion could be heard.[123] The court viewed this conduct as "taking preliminary steps . . . to set aside a default judgment."[124]

- Defendants did not waive their right to remove to federal court when defendants moved to transfer venue, for a confidentiality order, to consolidate this suit with others, and filed special exceptions.[125] The court found that none of these activities submitted the case to adjudication on the merits, so there was no sufficiently clear and unequivocal waiver of the right to remove.[126] The court also noted that, at the time the parties agreed upon transfer, the case was not yet removable, so that agreement could not have waived the right to remove.[127]

- Defendants did not waive their right to remove to federal court when defendants filed a motion for summary judgment in state court before it was "unequivocally apparent that the case was removable."[128]

- Defendant did not waive its right to remove to federal court when

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addressing the merits . . . that arguably might . . . demonstrate an intent to litigate" in state court); Davila v. Hilton Hotels Int'l, 97 F. Supp. 32 (D.P.R. 1951) (holding that appointment of an agent for service of process did not waive the right to remove).

123. Beighley v. FDIC, 868 F.2d 776, 782 (5th Cir. 1989).

124. *Id.* Again, the issue came before the court of appeals after denial of remand and after final judgment. *Id.* at 779.

125. Tedford v. Warner-Lambert Co., 327 F.3d 423, 425 (5th Cir. 2003).

126. *Id.* at 428.

127. *Id.* The issue came before the court of appeals after denial of remand and upon certification of an interlocutory appeal. *Id.* at 429.

128. Akin v. Ashland Chem. Co., 156 F.3d 1030, 1036 (10th Cir. 1998). The issue came before the court of appeals after denial of remand and after final judgment. *Id.* at 1033. On the ground that the right to remove was apparent from the face of the complaint, the Tenth Circuit distinguished a district court case from the Eleventh Circuit in which "the court held that filing motions and scheduling hearings on motions indicated an intent to litigate in state court, which resulted in waiver of the right to remove the case." *Id.* at 1036 n.7. This suggests that the Tenth Circuit would have come out differently in *Akin* if the case had been obviously removable at the time the defendant moved for summary judgment—but, of course, there is no guarantee of that. *See* Grubb v. Donegal Mut. Ins., 935 F.2d 57, 59 (4th Cir. 1991) (holding that defendant did not waive its right to remove where it filed a motion for summary judgment in state court before the non-diverse defendants were formally dismissed and participated in a hearing on that motion before it knew that the non-diverse defendants might be dismissed); Preseau v. Prudential Ins., 591 F.2d 74, 79 (9th Cir. 1979) (holding that, after denial of remand and final judgment, neither Prudential's waiting until the day of trial nor any of its other conduct constituted a "waiver" of Prudential's right to seek removal, where the case was not removable until the day trial was to begin in state court and Prudential sought removal as soon as the Doe defendants were no longer part of the action, here because of dismissal).

defendant filed a third-party complaint about an hour after having filed its notice of removal. The court reasoned that the defendant had clearly indicated its desire to litigate in the federal, rather than the state, forum and "could not waive a right that it had already exercised."[129] Other cases similarly hold that post-removal conduct in the state court system does not waive the right to remove.[130]

- Defendants did not waive their right to remove to federal court when defendants filed a motion to intervene that the court regarded as wholly defensive and an appearance for a special purpose only, namely to protect property.[131]

- Defendants did not waive their right to remove to federal court when defendants consented to subject-matter jurisdiction and venue in a particular state court, where the agreement in which the defendants so consented did not address removal.[132]

Based on a principle quoted from *Wright et al.*, the Eleventh Circuit concluded that a defendant's mere filing of motions to dismiss within the time period Florida law allowed for filing a responsive pleading (a time period shorter than the removal statutes afford a defendant to remove)[133]

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129. Aqualon Co. v. Mac Equip., Inc., 149 F.3d 262, 264 (4th Cir. 1998), *abrogated in part on other grounds by* Grupo Dataflux v. Atlas Global Grp., L.P., 541 U.S. 567, 572 (2004). The issue came before the court of appeals after denial of remand and final judgment. *Id.*

130. *See, e.g.*, Ward v. Resolution Tr. Corp., 972 F.2d 196, 198 (8th Cir. 1992) (holding that defendants did not waive the right to remove when they requested a release of the record from the state appellate court in which the action had been pending at the time the Resolution Trust Corp. became a party, the case became removable and was removed, reasoning that defendants merely were attempting to transfer the record to the federal court as their motion did not request a ruling on the merits of the appeal or abandon federal jurisdiction, nor did the state court of appeals consider the merits of the appeal). The issue came up on appeal from judgment for the employee. *Id.*

131. Perpetual Bldg. & Loan Ass'n v. Series Dirs. of Equitable Bldg. & Loan Ass'n, 217 F.2d 1, 5 (4th Cir. 1954).

132. Weltman v. Silna, 879 F.2d 425, 427 (8th Cir. 1989), *aff'd*, 936 F.2d 358 (8th Cir. 1991).

133. *See* Yusefzadeh v. Nelson, Mullins, Riley & Scarborough, LLP, 365 F.3d 1244, 1246 (11th Cir. 2004) (per curiam). Under § 1446(b) of the U.S. Code:

> The notice of removal of a civil action or proceeding shall be filed within 30 days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within 30 days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.
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> . . . .

did not waive the defendant's right to remove, where the defendant did not seek to schedule a hearing on his motions to dismiss prior to filing its removal notice and the state court did not rule on his motions prior to the removal.[134] The court concluded that the defendant did not take sufficiently "substantial offensive or defensive actions" in state court to waive his right to remove.[135] It is noteworthy—for reasons that this Article will discuss below—that the court did not say that the defendant had to file his motions to dismiss when he did.[136]

Some cases *say* that a defendant may waive the right to remove by taking substantial defensive action in the state court before filing for removal,[137] but case decisions show that courts have not held merely defensive actions, through which the defendant did not seek affirmative relief, to waive the right to remove. For example, consider *Robertson v. U.S. Bank, N.A.*[138] There, in an action by borrowers who sought to rescind a loan agreement, where defendants were a trustee and a trust deed beneficiary assignee, the U.S. Court of Appeals for the Sixth Circuit held that the trustee did not waive its right to remove by filing objections to the borrowers' motion for a temporary injunction or to their motion to deem portions of the complaint admitted.[139] Interestingly, the court added that even if the trustee had waived its right to remove, that waiver did not bind the assignee, and that if the later-served assignee initiated removal, the trustee could consent; its prior waiver would not preclude that consent or the unanimity of defendants in removing.[140]

> . . . [I]f the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.

28 U.S.C. §§ 1446(b)(1), (3) (2012).

134. *Yusefzadeh*, 365 F.3d at 1246–47.

135. *Id.* at 1247; *see also* Cogdell v. Wyeth, 366 F.3d 1245, 1246, 1249 (11th Cir. 2004) (following *Yusefzadeh* and holding that Wyeth's motion to dismiss for failure to state a claim did not waive its right to remove, where Wyeth took no additional steps to have the state court rule on the motion and filed the removal notice before the state court could rule on the motion). The court again concluded that defendant did not take "such 'substantial offensive or defensive actions in state court' that it waived its right to remove the lawsuit." *Cogdell*, 366 F.3d at 1249 (quoting *Yusefzadeh*, 365 F.3d at 1246–47).

136. *See infra* notes 180–86 and accompanying text.

137. *See, e.g.*, Aqualon Co. v. Mac Equip., Inc., 149 F.3d 262, 264 (4th Cir. 1998), *abrogated in part on other grounds by* Grupo Dataflux v. Atlas Global Grp., L.P., 541 U.S. 567, 572 (2004).

138. 831 F.3d 757 (6th Cir. 2016).

139. *Id.* at 761.

140. *Id.* at 761–62; *see also* Resolution Tr. Corp. v. Bayside Developers, 43 F.3d 1230, 1240 (9th Cir. 1995) (holding that filing of petition for rehearing, filed in state court on the same date as notice of removal, did not waive Resolution Trust's right to remove where petition was filed solely for the defensive purpose of preserving the status quo pending removal).

Summing up, the appellate decisions and language send several messages, including the following: While defendants can waive their right to remove, the federal appellate courts will find such waivers only in narrow circumstances. For defendants' actions to disqualify them from removing, defendants must take their state court actions only after they know or should know that the case is removable. Notably, defensive behaviors will not waive the right to remove even if defendants were not required to engage in those defensive behaviors before filing their removal notice. Thus, for example, state courts may allow defendants a long time to file motions to dismiss for failure to state a claim, but defendants may file such motions in state court early on, without fear that doing so will preclude the later removal of the case. This is true even though such a motion to dismiss could lead to judgment on the merits, apparently because it also might lead merely to a requirement that the plaintiff amend the complaint. But if defendants go further and push for resolution of potentially dispositive motions or participate in hearings on such motions, courts may well find waiver. And if defendants seek, from the state court, an adjudication that necessarily will be on the merits (such as a summary judgment) or seek affirmative relief (as on a counterclaim, cross-claim or third-party claim that expands the scope of the litigation), it is likely that federal courts will find defendants to have waived their right to remove.[141]

This doctrine is friendly to defendants and keeps the federal courts open to cases that defendants want to remove to federal court, even if the defendants engaged in considerable defensive activity in the state court after they were aware that they could remove a case. This openness to removal is a choice. The federal appeals courts could have made it far easier for defendants to waive their right to remove and be "stuck" in state court, but they chose not to do so.

How consistent are the decisions of the federal district courts?

2. Federal District Court Decisions

The principles embraced by the federal courts of appeals concerning waiver of the right to remove are echoed in the opinions of the federal

141. The American Law Institute concluded similarly:

> [C]ourts are generally reluctant to grant a waiver-based remand of a removed action when the motion to remand is based on conduct rather than contract. The "clear and unequivocal" test is strictly applied to potentially offending behavior, and no waiver will be found when the removing party's pre-removal conduct was defensive in nature."

AM. LAW INST., FEDERAL JUDICIAL CODE REVISION PROJECT 584–85 (2004).

district courts; indeed, sometimes the courts of appeals cite to the district courts for the principles that the appellate courts embrace. But the district courts have found waiver of the right to remove in a number of cases.[142] Because of § 1447(d), some of the decisions that so found, and that remanded to state court on that basis, were held not to be reviewable in the federal courts of appeals.[143] To that extent, the district courts have been unsupervised and unfettered in their waiver-based remands to state court.

Nonetheless, the district courts' remands stack up well against the law as elaborated by the federal courts of appeals (when the latter have found jurisdiction to review waiver-based remands and when they have reviewed denials of remands that were sought on the basis of waiver of the right to remove). In line with waiver law as explained and applied by the courts of appeals are district court decisions that held that defendants *did* waive their right to remove to federal court by filing a permissive counterclaim,[144] a cross-claim,[145] or a third-party claim,[146] (all of which are permissive pleadings in which the defendant affirmatively seeks relief from the court) so long as defendants made the filing when the case had become, or foreseeably would become, removable. District courts also have held that defendants waived their right to remove to federal court by seeking to litigate issues on the merits in state court. In *Heafitz v. Interfirst Bank of Dallas*,[147] for example, the Federal Deposit Insurance Corporation (FDIC) was held to have waived its right to remove an action by arguing that plaintiff's claims were barred by the doctrine of *D'Oench, Duhme & Co. v. FDIC*.[148] Although the state court had not yet ruled on these motions when the FDIC filed for removal, the FDIC had taken the actions it could to seek a disposition on the merits that would have

142. *See infra* notes 144–56 and accompanying text.

143. *See* cases cited *supra* note 79.

144. Va. Beach Resort & Conference Ctr. Hotel Ass'n Condo. v. Certain Interested Underwriters at Lloyd's, 812 F. Supp. 2d 762, 767 (E.D. Va. 2011) (finding that defendant's filing of a permissive counterclaim in state court, eight days prior to filing its notice of removal, waived its right to remove); Acosta v. Direct Merchs. Bank, 207 F. Supp. 2d 1129, 1132–33 (S.D. Cal. 2002) (holding that defendant waived its right to remove by filing counterclaims and cross-claims, emphasizing that defendant need not have filed either, that the filings demonstrated intent to accede to the state court's jurisdiction, did not merely preserve the status quo and sought affirmative relief); Harris v. Brooklyn Dressing Corp., 560 F. Supp. 940, 942 (S.D.N.Y. 1983) (removal right waived by filing of permissive counterclaim; also commenting that merely filing an answer to the complaint or filing compulsory counterclaims do not waive the right to remove).

145. *Acosta*, 207 F. Supp. 2d at 1132–33.

146. Knudsen v. Samuels, 715 F. Supp. 1505, 1506 (D. Kan. 1989).

147. 711 F. Supp. 92 (S.D.N.Y. 1989).

148. 315 U.S. 447 (1942); *see Heafitz*, 711 F. Supp. at 94. The *Heafitz* court noted that an estoppel defense based on either a common law or statutory *D'Oench* doctrine went to the merits of the claims against the FDIC. *Heafitz*, 711 F. Supp. at 96–97.

resulted in dismissal of the lawsuit.[149] That was enough to waive the right to remove, in the view of this district court.[150]

Where removal comes on the heels of a ruling adverse to the defendant, federal courts are even more inclined to find waiver of the right to remove. The courts see the removal as improperly designed to obtain a de facto appeal of a state court ruling, and the defendant's state court motion practice as improper experimentation.[151] When defendants have sought merits rulings from the state court, federal courts also may be inclined to find waiver of the right to remove to avoid a waste of judicial resources, fearing that movement of the case to federal court may entail potentially extensive repetition.[152] But this concern about judicial economy typically is invoked only when defendants have run afoul of another of the lines between permissible and impermissible activity in state court.[153]

Consistent with appellate court decisions, district courts may hold that defendants waive the right to remove if they (defendants) go beyond filing motions to dismiss—to pursue scheduling or participating in hearings on the motions.[154] The courts tend to view this as indicating an

149. *Heafitz*, 711 F. Supp. at 94.

150. *Id.* at 96–97; *see also* Mims v. Deepwater Corrosion Servs., Inc., 90 F. Supp. 3d 679, 693–94, 702 (S.D. Tex. 2015) (remanding to state court, in part on the ground that defendants actions in state court, including filing of multiple summary judgment motions that were denied on the merits by the state court judge, raised a question whether defendants waived their right to remove that warranted remand under the principles that the removal statute is to be strictly construed, with any doubt being resolved in favor of remand); Wolfe v. Wal-Mart Corp., 133 F. Supp. 2d 889, 893–94 (N.D. W.Va. 2001) (holding that filing a summary judgment motion in state court waived defendant's right to remove, even though defendant was attempting to comply with a state court deadline for dispositive motions, where defendant could have taken steps to protect itself from this dilemma); Jacko v. Thorn Ams., Inc., 121 F. Supp. 2d 574, 576–77 (E.D. Tex. 2000) (holding that an employer had waived its right to remove when it filed its notice of removal only after it moved for, was orally heard on, and was granted, partial summary judgment in the state court; although the summary judgment motion was filed before the case became removable, defendant chose to proceed with the hearing on the motion after the case had become removable by virtue of the addition of a federal claim. The court found that defendant's participation manifested defendant's intention that the state court resolve part of the case.).

151. *See, e.g.*, Queen v. Dobson Power Line Constr. Co., 414 F. Supp. 2d 676, 679 (E.D. Ky. 2006) (finding waiver of the right to remove where defendant removed on the heels of an adverse ruling on its motion for partial summary judgment, and the court saw defendants as trying to "game the system").

152. *See, e.g.*, Zbranek v. Hofheinz, 727 F. Supp. 324, 325–26 (E.D. Tex. 1989).

153. *See, e.g.*, *id.* (holding defendants to have waived the right to remove by seeking an injunction, summary judgment, and an order requiring plaintiffs to replead; also noting the progress that had been made in state court, including a hearing that had been held, and expressing concern that removal would entail repetition and waste).

154. *E.g.*, Scholz v. RDV Sports, Inc., 821 F. Supp. 1469, 1471 (M.D. Fla. 1993) (holding that defendant waived its right to remove where he moved to dismiss and scheduled state court hearings on the motion).

intent to litigate, rather than merely to maintain the status quo, in state court.[155]

Courts sometimes say that "a party who voluntarily submits to [or invokes] the jurisdiction of a state court [as] by filing a permissive counterclaim . . . waives the right [to] remov[e]" to federal court.[156] But the reference to voluntarily submitting to the jurisdiction of a state court is misleading and really not relevant. Other activities of a defendant that equally manifest submission to the jurisdiction of the state court (such as filing an answer to the complaint[157] or motions directed against the complaint) are not regarded as waiving the right to remove,[158] and the right to remove belongs, initially, to all defendants in civil actions eligible for removal, regardless of whether the state court in which the action was filed has authority to assert personal jurisdiction over the defendants.[159] Defendants do not need to either challenge or forego challenges to personal jurisdiction in the state court to be entitled to remove, and, conversely, the fact that defendants have no choice but to submit to the state court's jurisdiction does not influence whether the defendants have waived the right to remove. What is important, therefore, really is not voluntary submission to the jurisdiction of the state court, but activities by defendants that go further and expand the scope of the dispute and seek affirmative relief from a state court. Those are among the specific activities of a defendant that courts regard as waiving the right to remove.

155. *Id.* Again, the issue came before the court of appeals after denial of remand and after final judgment. *Id.* at 779.

156. Harris v. Brooklyn Dressing Corp., 560 F. Supp. 940, 942 (S.D.N.Y. 1983) (first citing Bedell v. H.R.C. Ltd., 522 F. Supp. 732 (D. Ky. 1981); then citing George v. Al-Saud, 478 F. Supp. 773 (D. Cal. 1979)); *see also* Acosta v. Direct Merchs. Bank, 207 F. Supp. 2d 1129, 1131 (S.D. Cal. 2002) (speaking of invoking the state court's jurisdiction).

157. *See* Resolution Tr. Corp. v. Bayside Developers, 43 F.3d 1230, 1240 (9th Cir. 1994) ("In general, 'the right of removal is not lost by action in state court short of proceeding to an adjudication on the merits.' . . . [D]efensive action to avoid a judgment being entered automatically against [a party] . . . does not manifest an intent to litigate in state court, and accordingly, does not waive the right to remove." (quoting Beighley v. FDIC, 868 F.2d 776, 782 (5th Cir. 1989))); Cal. Republican Party v. Mercier, 652 F. Supp. 928, 931 (C.D. Cal. 1986) (filing a responsive pleading does not constitute acceptance of state court's jurisdiction so as to waive right of removal). The Federal Rules of Civil Procedure contemplate an answer in state court prior to removal. *See* FED. R. CIV. P. 81(c)(2) ("After removal, repleading is unnecessary unless the court orders it. A defendant who did not answer before removal must answer or present other defenses or objections . . . within [one of the three listed time periods]."). An answer (or motion for extension of time) may be seen as merely preserving the status quo.

158. *See, e.g.*, *Mercier*, 652 F. Supp. at 931.

159. *See* 28 U.S.C. 1441(a) (2012).

This Article would challenge another common recitation by the courts. Federal courts often say that a defendant's intent in engaging in its state court behavior is critical.[160] As one court put it,

> [i]f [a] motion is made [by defendant] only to preserve the *status quo ante* . . . no waiver has occurred. [But] if a motion seeks a disposition, in whole or in part, of the action on its merits, the defendant may not attempt to invoke the right to remove after losing on the motion.[161]

While the courts do uniformly find a waiver of the right to remove when a defendant has pushed for a disposition on the merits in state court, in other circumstances a defendant's intent to embrace the state court, or not to do so, is less clear. Courts may not really care about defendant's intent; they may impute one intent or another to the defendant depending upon whether they believe that the defendant's conduct warrants holding the defendant to have waived the right to remove. The continuing references to intent presumably derive from the very definition of waiver—which entails an intentional relinquishment of a known right—but if the doctrine were framed in terms of forfeiture, the concern with intent would fade away.[162] In a codification or common law restatement of the circumstances in which defendants will waive their right to remove, reliance on fictional intent could be abandoned, with nothing being lost.

In contrast to the cases described above, the district courts have held that a defendant did *not* waive the right to remove to federal court where

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160. *See, e.g.*, Bolivar Sand Co., Inc. v. Allied Equip., Inc., 631 F. Supp. 171, 173 (W.D. Tenn. 1986) ("The critical factor in determining whether a particular defensive action in the state court should operate as a waiver of the right to remove is the defendant's intent in making the motion.").

161. *Id.*; *see* Rothner v. Chicago, 879 F.2d 1402, 1418 (7th Cir. 1989) (no waiver where defendant opposed a motion for a temporary restraining order in state court); Atlanta, Knoxville & N. Ry. v. S. Ry., 131 F. 657, 660–63 (6th Cir. 1904) (finding no waiver of the right to remove by defendant's filing of an answer and participating in a hearing upon a motion to dissolve a preliminary injunction which had been granted without notice, because the hearing was not on the merits nor a trial of any question affecting the merits).

162. *See, e.g.*, United States v. Olano, 507 U.S. 725, 733 (1993) ("Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.'" (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938))); Freytag v. Comm'r, 501 U.S. 868, 894 n.2 (1991) (Scalia, J., concurring) (distinguishing between "waiver" and "forfeiture"). *Black's Law Dictionary* defines "forfeiture" as "[t]he loss of a right, privilege, or property because of a crime, breach of obligation, or neglect of duty," *Forfeiture*, BLACK'S LAW DICTIONARY (10th ed. 2014), whereas it defines "waiver" as "[t]he voluntary relinquishment or abandonment—express or implied—of a legal right or advantage," *Waiver*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("The party alleged to have waived a right must have had both knowledge of the existing right and the intention of foregoing it.").

a government-contractor defendant, who removed under the federal officer removal statute, filed both a motion to dismiss and a notice of removal on the date that its answer was due in state court and its removal notice was due in federal court. The court noted that although the statutory language interpreted in *Rothner v. City of Chicago*[163] has been deleted, most district courts in the Seventh Circuit continue to follow *Rothner*, and the Circuit has not revisited the question of waiver of the right to remove.[164] District courts also have held that a defendant did not waive his right to remove to federal court where the defendant took actions in state court that were alleged to waive the right to remove before it was ascertainable to him that the action was removable.[165] One cannot knowingly waive a right that one does not know he has. District courts also have held that a defendant did not waive the right to remove when the actions that defendant took in state court (that were alleged to constitute waiver of the right to remove) were merely defensive actions intended to thwart another party's offense, rather than offensive actions taken on defendant's initiative.[166]

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163. 879 F.2d 1402 (7th Cir. 1989).

164. *See* Perez v. Air & Liquid Sys. Corp., 223 F. Supp. 3d 756, 760 (S.D. Ill. 2016). For discussion of *Rothner*, see *supra* notes 22–53 and accompanying text.

165. *See, e.g.*, Taylor v. United Rd. Servs., Inc., 313 F. Supp. 3d 1161, 1173–74 (E.D. Cal. 2018) (holding that defendant did not waive its right to remove by moving for judgment on the pleadings in state court because at the time it was not apparent from the papers filed that the case was removable); Boggs v. Harris, 226 F. Supp. 3d 475, 485 (W.D. Pa. 2016) (holding no waiver where defendants filed cross-claims as a defensive strategy and before they had reason to suspect that the case would become removable); Graves v. Standard Ins. Co., 66 F. Supp. 3d 920, 925 (W.D. Ky. 2014) (holding that by defending in state court, insurer did not waive its right to remove insured's suit until it became clear, by a preponderance of the evidence, that the case met the jurisdictional amount requirement for federal diversity jurisdiction).

166. *See, e.g.*, Strong v. Green Tree Servicing, LLC, 716 F. App'x 259, 263 (5th Cir. 2017) (per curiam) (engaging in substantial discovery in state court did not waive defendant's right to remove the suit); *Boggs*, 226 F. Supp. 3d at 485–88 (holding no waiver where cross-claims were defensive, discovery was defensive, and to cease all discovery upon learning that the case had become removable would have violated the state court's orders and rules of procedure; noting that defendants' ADR activities were not akin to litigating the case, and to find that participation in such activities waived the right to remove would undercut the public policy favoring settlement, and any delay, expense, or loss of judicial economy flowing from a failure to remand did not justify finding waiver of the right to remand); Drexler v. Inland Mgmt. Corp., 509 F. Supp. 2d 560, 563 (E.D. Va. 2007) (holding that filing of a demurrer and seeking release of a *lis pendens* were not substantial defensive actions taken in an effort to obtain a final determination on the merits, as required for waiver of the right to remove, where defendant withdrew the demurrer prior to removal and prior to any ruling on it by the state court, and the equitable lien claim to which the *lis pendens* related was an effort to secure recovery, rather than going to the merits of the case); Hawes v. Cart Prods., Inc., 386 F. Supp. 2d 681, 687 (D.S.C. 2005) (holding that defendant did not waive its right to remove by moving in state court for relief from default, challenging service of process, moving to continue a hearing on damages, and moving to shorten the time for discovery responses).

Stemmle v. Interlake Steamship Company[167] illustrates the interaction that may exist between the time limit to remove and waiver doctrine, as well as the requirement that removability be ascertainable when a defendant takes the actions that allegedly constitute waiver of the right to remove.[168] In that case, there was a lack of clarity as to whether the plaintiff's claims were removable, despite diversity between the plaintiff and the defendant, because the claims appeared to be Jones Act[169] claims, unremovable under 28 U.S.C. § 1445(a).[170] This uncertainty delayed the date when the time to remove began to run.[171] It was during this time of uncertainty that the defendant filed a motion to dismiss the complaint for lack of personal jurisdiction and to dismiss particular counts on additional grounds.[172] Because it was reasonable for the defendant to believe that the plaintiff was asserting a Jones Act claim when the defendant filed its motions to dismiss and memorandum in support of that motion, the filing of those documents did not waive the defendant's right to remove, notwithstanding that the defendant filed its removal notice shortly after the district court denied the dismissal motion.[173] The defendant's inability to know whether the case was removable at the time of the filing of its potentially dispositive motions prevented its filing of those motions, alone or in combination with the state court's denial of the motions, from waiving the defendant's right to remove.[174] The district court noted that:

> [T]he Second Circuit does not appear to have endorsed a waiver exception to an otherwise timely removal. . . . [E]ven assuming *arguendo* that there is such a waiver exception to removal, courts have tended to limit the exception to instances where a defendant makes a dispositive motion in state court *after* it is apparent that the case is removable.[175]

Under the circumstances, the court found that the defendant did not manifest an intent to litigate in state court such that the defendant waived its right to remove.[176]

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167. 198 F. Supp. 3d 149 (E.D.N.Y. 2016).

168. *Id.*

169. Pub. L. No. 66-261, 41 Stat. 988 (1920) (codified as amended in scattered sections of 46 U.S.C.).

170. *Stemmle*, 198 F. Supp. 3d at 159–60.

171. *Id.* at 162.

172. *Id.* at 154–55.

173. *Id.* at 166–67.

174. *See id.*

175. *Id.* at 166.

176. *Id.* at 167; *see also* Vandeventer v. Guimond, 494 F. Supp. 2d 1255, 1262 (D. Kan. 2007) (holding that motion to dismiss did not waive the right to remove where, among other things, it was not clearly apparent that the defendant had the right to remove or that the case was

Few, if any, district court decisions finding waiver of the right to remove, or the contrary, are seriously questionable under the governing principles that have been articulated by the federal courts of appeals.[177]

D. *Tentative Conclusions: When Should There Be Waivers of the Right to Remove?*

In light of this case law, public policy considerations, and alternative ways in which the law might have developed, under what circumstances should defendants' state court conduct work a waiver of the right to remove from state court?

Starting at one extreme: Taking a defendant-friendly position to its logical conclusion would lead one to consider abolition of waiver of the right to remove. Because of the long history of judicial recognition of the waiver of the right to remove, it is hard to imagine that the courts themselves would cease to recognize such a waiver. But Congress could do so. Do policy or politics go so far as to indicate that nothing a defendant does should waive the right to remove? What would be the consequences of such a regime?

While such a regime would result in somewhat more cases being permanently removed to federal court, the increase would not be substantial, as courts infrequently find that defendants, by their conduct in state court, have waived the right to remove.[178] Every defendant would continue to be subject to all the limitations on what cases are removable, by when—if at all—cases must be removed, who must join in or consent to the removal, where (to which federal court) the suit must be removed,

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removable prior to the filing of the motion, which asserted improper naming, improper service, and immunity from suit); Engle v. R.J. Reynolds Tobacco Co., 122 F. Supp. 2d 1355, 1361 (S.D. Fla. 2000) (holding that attendance at a status conference, re-submission of pending motions to state court, and a request to postpone entry of final judgment did not waive the right to remove where it did not become apparent until after status conference that case was removable, and that filing of post-trial motions did not waive the right to remove where the ability to file such motions was limited by a deadline, and they were most likely filed to protect defendants' rights in state court, rather than to seek affirmative relief).

177. The American Law Institute's *Federal Judicial Code Revision Project* cited *Scholz v. RDV Sports, Inc*. as being in a minority, characterizing it as holding "that any action taken in state court, other than purely necessary defensive reactions, are sufficient to waive the right of removal." AM. LAW INST., *supra* note 141, at 586 & n.41. But even in *Scholz* the court found that defendant's scheduling of hearings on its motions to dismiss indicated intent to litigate in state court, which is not out of the main stream. *See* Scholz v. RDV Sports, Inc., 821 F. Supp. 1469, 1471 (M.D. Fla. 1993).

178. I did not do an empirical study of the numbers of cases in which defendants were held to have waived their right to remove and, so far as I know, no one else has done such a study. But the survey in this Article indicates that the number of those cases is relatively small. If it went to zero, there would be no significant increase in the number of cases successfully removed to federal court.

et cetera. Those limitations constrain removal far more frequently than does waiver doctrine based on state court conduct. If a defendant were to remove after several state court rulings had been made, the removal right would have to have arisen recently (or the time for removal would have expired), and the federal court would treat the state court rulings as if they were its own. Thus, the federal court could revisit those interlocutory rulings but would not be obliged to do so.[179] The state court activities of the parties and many of the state court judge's rulings would not need to be wasted, and if a defendant were perceived to have removed in an effort to escape earlier rulings (making the removal appeal-like), the federal court would be free to rebuff the "appeal" and adhere to the prior rulings. The potential for abuse thus does not seem extremely great. This point is important in part because a number of federal courts have expressed a greater inclination to find waiver of the right to remove when a defendant seems to have sought to escape from adverse state court rulings. Denial of removal may be an overreaction when the federal court is entirely capable of rebuffing a defendant's efforts to have the federal court revisit decisions made by state court judges, although efforts to get federal judges to reconsider state court rulings would demand some federal judicial time and effort. Moreover, if the federal district court believed that certain decisions of state court judges were erroneous, would it not be preferable to have the federal district court correct those decisions than to leave them to be corrected by a court of appeals? Of course, the losing party will be free to take an appeal whichever way the trial court ruled, but perhaps an appeal would be less likely if an appeal seemed less promising. All of this suggests that abolishing waiver of the right to remove would not be patently awful. But that does not mean that such abolition would be preferable.

The discussion of case law presented earlier shows that federal courts have not gone so far as to eliminate waiver of the right to remove, but it has rather strictly limited the circumstances in which defendants waive the right to remove cases to federal court. The common law is quite defendant friendly, and it protects access to the federal courts. But this is not an inevitable position. There are alternatives. For example, one alternative would be for federal courts to announce (thereby giving notice) that if a defendant voluntarily does more than it needs to do to protect itself in the state court proceedings, it should waive (or at least be in danger of waiving) the right to remove. The underlying ideas would be

179. *See* Quinn v. Aetna Life & Cas. Co., 616 F.2d 38, 40 (2d Cir. 1980) (per curiam) (following removal, the federal court was free to examine the state court decision denying the defendant's motion to dismiss); WRIGHT ET AL., *supra* note 1, § 3738 ("[O]rders or rulings issued by the state court prior to removal are not conclusive in the federal action after removal. However, . . . state-court rulings do remain binding on the parties unless and until formally set aside by the federal district court." (footnote omitted)).

that: (1) it is not unfair to require a defendant to remain in state court if it does more than necessary to protect itself in state court when it knows (or should know) that it has the option to remove, and (2) keeping the case in state court in those circumstances serves judicial economy and comity. Hence, removal where circumstances (1) and (2) are present arguably should be rejected, utilizing waiver or forfeiture as the justification for remand to state court.[180] Those ideas have some common-sense appeal.

To illustrate, under current law in many state court systems—as in the federal courts—a defendant does not waive the right to have a claim dismissed for failure to state a claim upon which relief can be granted if the defendant fails to so move early on.[181] In such a system, if a defendant *does* make such a motion immediately in response to the complaint, it is doing more than it needs to do to protect itself.[182] Arguably, for that reason, the defendant should be held to have waived the right to remove the case to federal court.[183] To further elaborate, if a defendant has grounds for a motion to dismiss that he must make at the first opportunity he takes in state court (similar to the manner in which Federal Rule 12(b), (g), and (h) work when the ground to dismiss is an absence of personal jurisdiction, improper venue, or some other things), the defendant could make that motion without waiving the right to remove. However, if the defendant, early on, filed a motion that it could raise later in state court

180. *See, e.g.*, City of Albuquerque v. Soto Enters., Inc., 864 F.3d 1089, 1098–1100 (10th Cir. 2017), *cert. denied*, 138 S. Ct. 983 (2018) (concluding that defendant's state court motion to dismiss the suit, in whole or in part, on the merits, manifested a clear intent to submit the case to the state court's jurisdiction unless the state's procedural rules compelled such participation and that where defendant filed its motion to dismiss—a filing for which there was no procedural need—seventy minutes before filing its removal notice, defendant waived its right to remove).

181. After the enactment of the Federal Rules of Civil Procedure, many state courts adopted the Federal Rules in large part, and the basic vision of the Federal Rules was influential even in those states that did not largely adopt the Federal Rules. *See* Jay Tidmarsh, *Procedure, Substance, and* Erie, 64 VAND. L. REV. 877, 922 n.181 (2011). *Compare* John B. Oakley & Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367, 1367 (1986) (analyzing the rules in states that largely adopted the Federal Rules or its philosophy, and states that did not), *with* John B. Oakley, *A Fresh Look at the Federal Rules in State Courts*, 3 NEV. L.J. 354, 383–84 (2002) (describing more divergence between federal and state practices in recent years). None of these articles focused particularly on Federal Rules 12(g) or (h).

182. *See, e.g.*, FLA. R. CIV. P. 1.140(h)(1)–(2).

183. It is true that immediate filing of the motion to dismiss for failure to state a claim may protect the defendant from litigation burdens that it otherwise could not avoid, including the burden of framing an answer to the complaint. But sometimes the defendant will have available to it motions to dismiss on other grounds that would be waived if not raised at the first opportunity, such as a motion to dismiss for lack of personal jurisdiction. *See, e.g.*, FLA. R. CIV. P. 1.140(h)(2). In that situation, it may not be necessary for the defendant to file the motion to dismiss for failure to state a claim in order to protect itself from litigation burdens such as answering the complaint and participating in discovery.

(for example, for lack of subject-matter jurisdiction or failure to join an indispensable party), that would constitute a waiver of its right to remove. For example, in *Yusefzadeh v. Nelson, Mullins, Riley & Scarborough, LLP*, the defendant moved to dismiss for lack of personal jurisdiction and for fatal defects in the complaint, including its bar by the statute of limitations.[184] While, under the Florida Rules, the former objection would have been waived if not raised within 20 days of receipt of the complaint,[185] the latter objection would have remained available. Under the Florida Rules, "[t]he defenses of failure to state a cause of action . . . may be raised by motion for judgment on the pleadings or at the trial on the merits in addition to being raised either in a motion under subdivision (b) or in the answer . . . ."[186] Under the approach posited here, that early making of the motion to dismiss for failure to state a claim would waive the defendant's right to remove.

Despite its initial appeal, the author of this Article has some doubt that the position under discussion would be desirable, for the following reasons. Under the proposed philosophy (that if a defendant does more than it needs to do to protect itself in the state court proceedings, it waives the right to remove a case), such waivers could become frequent and might be inadvertent—despite the effort to give fair notice to defendants—and hence harsh. Moreover, the proposed rule could require the federal courts to make a detailed study of each state's rules of civil procedure, and thereby introduce both a burden and a lack of uniformity into the law of waiver of the right to remove. Nonetheless, the position described illustrates that alternatives to the law of waiver that the federal courts have fashioned are possible and should be evaluated.

Another alternative would make the critical question the nature and extent of the defendant's activities in state court, once the defendant knew or should have known that the case was or had become removable, while avoiding absolute requisites such as actively seeking a decision on the merits of claims within the case or filing a permissive claim for relief—although those activities should continue to suffice for waiver or forfeiture of the right to remove. The problem with a test (such as this) that lacks a bright-line is that it would not give defendants an ideal amount of notice of the behavior they need to avoid in order not to waive the right to remove, although it would have the virtue of flexibility to deal with the myriad circumstances that arise.

Perhaps these are not the only alternatives. Preserving and even expanding state-court conduct that would waive the right to remove could have the benefits (depending on one's point of view) of sometimes

184. Yusefzadeh v. Nelson, Mullins, Riley & Scarborough, LLP, 365 F.3d 1244, 1245 (11th Cir. 2004) (per curiam).

185. FLA. R. CIV. P. 1.140(a)(1).

186. *Id.* at 1.140(h)(2).

preserving plaintiffs' choice of forum, and could tend to level the playing field because, as is demonstrated below, federal courts have been far more inclined to find waivers of the right to remand, based on plaintiffs' conduct in federal court, than they have been inclined to find waivers of the right to remove.[187] Preserving and even expanding waiver of the right to remove also would have benefits in reducing the federal docket and enhancing judicial economy, to a small extent. And it would not be unfair to defendants, so long as (1) they were given fair notice of the activities that would, or likely would, cause them to be held to have waived their right to remove *and* (2) the activities that disqualified a defendant from removing were not activities that the defendant needed to engage-in to effectively defend itself in state court. A virtue of the current state of the law is that, as applied, it generally satisfies these criteria, at least if defendants' attorneys read the treatises and cases. But a more capacious concept of waiver also could satisfy those criteria. Before reaching a final conclusion, it is illuminating to compare the common law of waiver of the right to obtain remand of an action back to state court.

IV. CONDUCT-DERIVED WAIVERS OF THE RIGHT TO REMAND TO STATE COURT

Before delving into conduct-based waivers of the right to remand to state court, this Article distinguishes defective motions to remand, which similarly result in federal courts' retention of cases.

A. *Comparing Defective Motions to Remand*

Just as defendants have the right to remove cases that fall within federal subject-matter jurisdiction and that do not fall into any category that Congress has made non-removable[188]—so long as defendants comply with the procedural requirements for removal—plaintiffs have the right to court-ordered remand of actions that fall outside federal subject-matter jurisdiction or that fall into any category that Congress has made non-removable or the removal of which violated the procedural requirements for removal, so long as plaintiffs comply with the procedural rules governing remand.

A district court could not properly deny remand to state court on the ground that a plaintiff waived its right to remand for lack of federal subject-matter jurisdiction. Objections to lack of federal subject-matter

187. *See infra* Section IV.B.

188. *See, e.g.*, 28 U.S.C. § 1445 (2012) (making certain categories of civil actions non-removable).

jurisdiction cannot be waived.[189] A district court could, however, properly deny remand to state court on the ground that a plaintiff waived its right to remand based on a defect in removal procedure (such as an absence of the required unanimity of defendants in joining or consenting to the removal, untimely removal, removal to the wrong federal venue, removal of a case in which a properly joined and served defendant was a citizen of the state in which the action was brought if that case fell exclusively within diversity jurisdiction, or the filing of incomplete or otherwise defective removal papers).[190] A plaintiff waives its objections to such defects if it fails to move to remand based on them[191] within 30 days of the filing of the notice of removal.[192] Denials of remand are reviewable by the federal appellate courts, but, in the absence of a statutory or common law exception to the final judgment rule, those denials will be appealable only after final judgment.[193]

Waivers of the right to a remand to state court that are a function of non-compliance with the statutory requirements for motions to remand, such as untimeliness of the motion, are not the focus of this Article. The focus here is other in-court conduct of a plaintiff or plaintiffs (or other parties) to the federal court proceedings that may constitute waiver or

189. *See* FED. R. CIV. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action."); Gonzalez v. Thaler, 565 U.S. 134, 141 (2012) ("Subject-matter jurisdiction can never be waived or forfeited."); Arbaugh v. Y & H Corp., 546 U.S. 500, 506, 514 (2006) ("The objection that a federal court lacks subject-matter jurisdiction may be raised by a party, or by a court on its own initiative, at any stage in the litigation, even after trial and the entry of judgment." (citation omitted)).

190. *See generally, e.g.*, George Lieberman, *A Guide to Removal Remand*, FED. LAW., Aug. 2009, at 47 (discussing some of the removal and remand procedures).

191. Note again the disagreement as to whether a conduct-based waiver of the right to remove is such a defect. *See supra* text accompanying note 79.

192. 28 U.S.C. § 1447(c). There are some decisions to the effect that if a plaintiff challenges a removal on one ground but fails to attack it on other grounds, that failure does not constitute waiver. *See, e.g.*, Mich. Affiliated Healthcare Sys., Inc. v. CC Sys. Corp., 139 F.3d 546, 549 (6th Cir. 1998) ("Perhaps the defect in the removal petition is procedural and could have been waived . . . . [H]owever, [plaintiff] here moved to remand, although on other grounds, before taking any other action in federal court." (citations omitted)). But that is a questionable interpretation of the statute.

193. *See supra* text accompanying note 66.

forfeiture of the right to remand.[194] Nonetheless, as discussed above,[195] useful lessons can be found in the ways in which the removal and remand statutes handle waivers based on statutory violations.

B. *Conduct in Federal Court*

1. Introductory Observations

Conduct of a plaintiff in federal district court proceedings may either precede the making of a remand motion or follow the making of that motion, and may precede the ruling on the remand motion or follow the decision denying the remand motion.[196] One could argue that because the remand statutes do not explicitly prohibit plaintiffs from engaging in conduct in the federal proceedings that follow removal, federal courts never should hold that engaging in such conduct waives a right to remand that plaintiffs otherwise would have. Alternatively, one could argue that so long as waivers of the right to remand have not been eliminated by the remand statutes, the courts appropriately may hold some conduct to have that effect. The question then would be "which conduct?" How should the silence of the statutes cut? Just as most federal courts have *not* found the silence of the removal statutes to prohibit federal courts from finding conduct-based waivers of defendants' right to remove,[197] federal courts

194. Some statutes provide rules for removals and remands that differ from those found in 28 U.S.C. § 1441. *See supra* note 13 and accompanying text. But it remains the case that waivers of the right to a remand to state court that are a function of noncompliance with whatever those statutory requirements for motions to remand may be are not the focus of this paper. The focus here is other conduct of a plaintiff or plaintiffs (or other parties) to the federal court proceedings that may constitute waiver of the right to remand, although courts sometimes do not clearly distinguish between waivers based on the failure to make a timely motion to remand and waivers based on other plaintiff conduct. *See, e.g.*, Am. Oil Co. v. McMullin, 433 F.2d 1091, 1093–95 (10th Cir. 1970) (noting both that plaintiff did not object to a removal that was defective because some defendants were citizens of the state in which the action was brought and that plaintiff participated in the case in a variety of ways, including filing motions to consolidate the removed case with another, to amend the complaint in the removed case, and to sell vehicles that had been attached, and citing other cases that involved these dual elements).

195. *See supra* notes 70–77 and accompanying text.

196. If the remand motion is granted, the case will be remanded to the state court and plaintiffs will have little reason or opportunity to engage in additional conduct in the federal court. There are some exceptions, however. Even after the remand decision, plaintiffs might, for example, move for an award of attorney's fees or costs, or for sanctions. *See* Moore v. Permanente Med. Grp., Inc., 981 F.2d 443, 445, 447 (9th Cir. 1992) (holding that a district court, after issuing an order of remand, may make an award of attorney's fees and costs in a separate order); *see also* Stallworth v. Greater Cleveland Reg'l Transit Auth., 105 F.3d 252, 256–57 (6th Cir. 1997) (following *Moore*). It seems highly unlikely that a court would hold such conduct to waive the right to remand, all the more so because the remand already will have been ordered in the circumstances described.

197. *See supra* notes 20–55 and accompanying text, and Section III.C.

have *not* found the silence of the remand statutes to prohibit federal courts from finding conduct-based waivers of plaintiffs' right to remand.[198]

The *Wright et al*., *Federal Practice and Procedure* and *Moore's Federal Practice* treatises have less to say about conduct-based plaintiff waivers of the right to remand than they do about conduct-based defendant waivers of the right to remove.[199] *Moore's* does offer this summary:

> A plaintiff may not voluntarily invoke and then disavow by way of remand motion federal jurisdiction following removal. Stated differently, a plaintiff may not take affirmative action in federal court after removal without risking waiving the right to remand, even when the 30-day period has not expired. Thus, for example, a plaintiff waives a claim of improper removal by stipulating to be bound by a decision in a consolidated action in federal court. Further, when a plaintiff voluntarily amends the complaint in federal court, the plaintiff ordinarily waives the right to seek remand.
>
> The Sixth Circuit held that a plaintiff's voluntary post-removal amendment to state a federal cause of action waived the right to object to removal even though a false statement by the defendant was the sole basis for . . . the plaintiff's amendment, which . . . provided federal jurisdiction. . . . The defendant then obtained summary judgment on the ground the plaintiff failed to state a claim . . . . Had the plaintiff moved to remand instead of amending its complaint, the district court would have granted the remand.[200]

The reader already should be struck by how different all of this is from the courts' approach to waiver of the defendants' right to remove.

Moore continues:

> A plaintiff's diligent objection to removal jurisdiction may render the waiver doctrine inapplicable. Stated differently, a timely objection to removal jurisdiction can preserve the jurisdictional claim, despite subsequent amendment of the complaint, even when other considerations ultimately outweigh that objection. Thus, for example, a plaintiff does not waive its right to challenge removal jurisdiction by amending its complaint in federal court to state a federal claim after the district court denied its motion for remand, particularly when there has been no trial on the merits and the case has consumed minimal judicial

198. *See supra* notes 20, 56–60 and accompanying text.

199. *See supra* notes 15–19 and accompanying text.

200. MOORE ET AL., *supra* note 2, § 107.151[2][g] (footnotes omitted).

> resources. Similarly, a post-remand-denial amendment to invoke federal law with respect to a[] . . . claim that the district court had already determined was actually a federal claim in disguise was not considered a purposeful invocation of federal jurisdiction that waived the plaintiff's right to contest removal.[201]

Like the treatises, this Article will focus directly on the court decisions.

2. U.S. Supreme Court and Federal Court of Appeals Decisions

Some cases that have been cited as instances of waiver-by-conduct of the right to remand to state court may be distinguished and better understood as involving the waiver of a procedural defect in the removal or the curing of the federal courts' initial lack of subject-matter jurisdiction, in the absence of a prior motion to remand. In these cases, the plaintiff did not timely seek remand and conducted activities in federal court only after its remand motion had been denied. As a result, they differ in their procedural posture from the cases in which most alleged waivers-by-conduct of the right to remand have been presented.

a. Distinguishable Cases

According to the U.S. Supreme Court and federal appeals courts, when do circumstances warrant a finding that plaintiffs (or other parties) have waived their right to remand? The Supreme Court purported to speak to the question in *In re Moore*,[202] where it denied a petition for writ of mandamus to compel remand of a case to state court where the plaintiff, instead of challenging the federal court's venue by filing a motion to remand, filed an amended complaint, signed a stipulation giving the defendant additional time to answer, and entered into successive stipulations for a continuance of the trial.[203] Although mandamus is an extraordinary writ, and denial of that writ sends a weaker message than a court might send if the case had gone to the court in another procedural posture, here it was clear that the Supreme Court found no error in the lower court's adjudication of the case.[204] The Court concluded that a plaintiff can waive the venue objection he has to the court to which a case has been removed, and that here both parties consented to the "jurisdiction," really the venue, of the federal court to

201. *Id.* (footnotes omitted).

202. 209 U.S. 490 (1908), *abrogated in part on other grounds by Ex parte* Harding, 219 U.S. 363 (1911).

203. *Id.* at 496, 508

204. *See id.* at 508.

which the action had been removed, the defendant through its removal to that court and the plaintiff through his failure to move to remand based upon a violation of the removal statute existing at the time and the affirmative activities noted above.[205] However, it is significant in assessing the importance of *In re Moore* to note that plaintiffs failed to seek remand.[206] The case thus offers nothing about the circumstances under which the Supreme Court would find waiver of the right to remand when the plaintiff *has* timely sought remand and conducted activities in federal court only after (or in large part after) its remand motion had been denied. The latter is the posture in which many waiver issues are presented to the district and intermediate appellate courts.

Before moving to cases in that posture, note one case in which the Second Circuit went so far as to hold that a plaintiff who had filed only state law claims that did not arise under federal law, and who had opposed removing defendants' motion to dismiss, had waived his (plaintiff's) right to remand by cross-moving for leave to file an amended complaint that added federal statutory and constitutional claims—notwithstanding that the district court had dismissed the case and denied as moot

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205. *Id.* at 512. Although the Court sometimes used the word "jurisdiction" loosely in *In re Moore*, at other times it clearly distinguished between what we would call jurisdiction and what we would call venue. It said:

> The contention is that[,] as this action could not have been originally brought in the Circuit Court for the Eastern District of Missouri by reason of the last provision quoted from § 1, it cannot[,] under § 2[,] be removed to that court, as the authorized removal is only of those cases of which[,] by the prior section[,] original jurisdiction is given to the United States Circuit Courts. But this ignores the distinction between the general description of the jurisdiction of the United States courts and the clause naming the particular district in which an action must be brought.

Id. at 501. Further:

> [C]learly the plaintiff, when brought into the Federal court by the process of removal, may . . . waive his objection to that court. So long as diverse citizenship exists[,] the Circuit Courts of the United States have a general jurisdiction. . . . [I]f any objection arises to the particular court which does not run to the Circuit Courts as a class[,] that objection may be waived by the party entitled to make it. . . . [A]fter the removal had been ordered, the plaintiff elected to remain in that court, and he is, equally with the defendant, precluded from making objection to its jurisdiction.

Id. at 506–07. In the view of the majority, the case did fall within diversity subject-matter jurisdiction, and it recognized that the parties could not waive objections to the same. *Id.* at 507–08.

206. *See id.* at 496.

plaintiff's motion to amend his complaint.[207] As in *In re Moore*, the plaintiff did not contest the removal, and the court deemed the plaintiff to have voluntarily amended to allege federal claims because he was entitled to amend his complaint as of right, notwithstanding that the district court in fact had disallowed the plaintiff's pleading amendment.[208]

Rather than a true case of waiver-by-conduct, *In re Moore* may be better understood as involving waiver of a procedural defect in the removal, and *Barbara v. New York Stock Exchange*,[209] the second case discussed above, should be recognized to have limited precedential value because it involved waiver of the right to remove through a voluntary cure of the federal court's initial lack of subject-matter jurisdiction, in the absence of a prior motion to remand.[210]

b. When Federal Question Claims are Added After Plaintiffs' Remand Motion was Denied

The bulk of cases deal with whether plaintiffs waive the right to remand when, after the federal district court has denied their motion to remand for lack of subject-matter jurisdiction or on the basis of other improper-removal contentions, the plaintiffs amend their complaint to add federal question claims or otherwise cause a basis for federal jurisdiction to exist. In frequently litigated terrain, in *Akin v. Ashland Chemical Co*.[211] and again in *Albert v. Smith's Food & Drug Centers, Inc*.,[212] the U.S. Court of Appeals for the Tenth Circuit held that plaintiffs whose cases had been removed to federal court and who then added one or more federal claims to their complaint thereby *waived* their right to remand, even though the plaintiffs had timely moved to remand and the plaintiffs did not add their federal claims until after the district courts denied their remand motions.[213]

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207. Barbara v. N.Y. Stock Exch., Inc., 99 F.3d 49, 55–56 (2d Cir. 1996), *abrogated on other grounds by* Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning, 136 S. Ct. 1562 (2016).

208. *Id.* at 55–56.

209. 99 F.3d 49 (2d Cir. 1996), *abrogated on other grounds by Manning*, 136 S. Ct. 1562.

210. *See infra* text accompanying notes 230–31 (discussing *Grubbs*).

211. 156 F.3d 1030 (10th Cir. 1998).

212. 356 F.3d 1242 (10th Cir. 2004).

213. *See id.* at 1248; *Akin*, 156 F.3d at 1036; *see also* Jurach v. Safety Vision, LLC, 642 F. App'x 313, 317 (5th Cir. 2016) (noting that where plaintiff had made her motion to remand the action conditional on the court denying her motion to amend, the district court's grant of plaintiff's motion to amend saved the court from having to decide whether a plaintiff may move for remand in the alternative, without waiving a procedural objection to removal); City of Cleveland v. Ameriquest Mortg. Sec., Inc., 615 F.3d 496, 500, 501 (6th Cir. 2010) (holding that plaintiff waived its right to appeal the district court's denial of its motion to remand for lack of unanimous consent to the removal where plaintiff joined a motion for an agreed order permitting plaintiff to

In *Kidd v. Southwest Airlines Co.*,[214] the Fifth Circuit conceded that the plaintiff did promptly protest the removal, but the court nonetheless held that voluntary amendment of the complaint, after denial of remand, *waived* the objection.[215] The court may have been influenced by the fact that the plaintiff added an entirely new cause of action rather than merely acquiescing in the district court's reasoning in support of its denial of remand.

This Article argues that a plaintiff should be able to take full advantage of the federal forum if she is stuck there, without waiving previously-made objections to removal. If the future federal judgment does hold up, it would likely preclude claims that derive from the same transaction or occurrence as the claims asserted in the case. Thus, a plaintiff would be put between a rock and a hard place if she had to decide between asserting claims to avoid preclusion and withholding the claims from consideration in order not to waive her objections to removal. No plaintiff should be put to that choice.

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file a second amended complaint, which motion provided that plaintiff would prosecute a particular claim, if at all, exclusively in the federal district court, as part of this case, and plaintiff did file such a complaint); Brough v. United Steelworkers of Am., 437 F.2d 748, 749–50 (1st Cir. 1971) (concluding that a plaintiff whose request for remand has been rejected does not waive his objection by then proceeding with the case on his theretofore pleaded theory of recovery, but where plaintiff amended his complaint to add a count that arose under federal law, he thereby waived any objection to the denial of remand). Other cases are similar except that the plaintiff's activity in the federal district court occurred while the motion to remand was pending. *See, e.g.*, Koehnen v. Herald Fire Ins., 89 F.3d 525, 528 (8th Cir. 1996) (holding plaintiff to have waived its right to remand where he moved for leave to file a supplemental garnishment complaint, moved for remand, vigorously briefed and argued the motion for leave while his remand motion was pending, and pressed the remand motion only after the court denied leave to file the supplemental garnishment complaint, stating that plaintiff would not be allowed to get at "second bite at the apple" in state court, noting that even just seeking leave to file the new complaint indicated consent to accept the jurisdiction of the federal court). In still other cases, plaintiffs apparently did not raise the issue of lack of subject-matter jurisdiction until the case was on appeal. *See, e.g.*, Sigmon v. Sw. Airlines Co., 110 F.3d 1200, 1202 (5th Cir. 1997) (rejecting plaintiffs' argument on appeal that district court lacked subject-matter jurisdiction over removed case where, whether or not the initial complaint arose under federal law, plaintiffs' amended complaint clearly did so); Hackler v. Indianapolis & Se. Trailways, Inc., 437 F.2d 360, 362 (6th Cir. 1971) (rejecting plaintiff's argument on appeal where plaintiff, who had not filed an amended complaint, merely argued that the removal notice was defective in ways relevant to the court's jurisdiction, where plaintiff went to trial on the merits without moving to remand). Some of these cases were characterized as holding that amending a complaint after removal can cure a jurisdictional defect. *See, e.g.*, Tolton v. Am. Biodyne, Inc., 48 F.3d 937, 941 & n.2 (6th Cir. 1995). Finally, in some instances, the plaintiff has been held to have waived a non-jurisdictional objection to removal—such as the violation of 28 U.S.C. § 1445(a)—when he failed to raise the matter on appeal, although he did raise it in the district court. *See, e.g.*, Feichko v. Denver & Rio Grande W.R.R., 213 F.3d 586, 591 (10th Cir. 2000).

214. 891 F.2d 540 (5th Cir 1990).

215. *Id.* at 546–47.

Some additional thoughts along the same lines: The Supreme Court decided many years ago that if a *defendant* fails in his efforts to remove a case and is forced to trial in the state court, he loses none of his rights by defending against the action.[216] Should it not equally be the case that if a plaintiff fails in her efforts to have a case remanded to state court after removal and is forced to litigate the case in federal court, she loses none of her rights by prosecuting—and even expanding—the action in federal court to the extent permitted by the Federal Rules of Civil Procedure? That seems to be the appropriate position, not merely because of its symmetry with the favorable treatment that the law affords to defendants who are stuck in a forum that they have unsuccessfully challenged, but also because of the fundamental fairness of the position that a litigant should lose no rights by forcefully defending against *or prosecuting* a case in the forum in which she is stuck, over her objection.

As *Kidd* indicates, some cases distinguished situations in which the plaintiff proceeded with the case as the court characterized it from situations in which the plaintiff introduced new claims, particularly federal question claims.[217] The deciding courts cited policies against giving the plaintiff an "out" from under adverse decisions on the merits made in the federal court.[218] In other words, as Judge Richard Posner of the Court of Appeals for the Seventh Circuit wrote in *Bernstein v. Lind-Waldock & Co.*,[219] after Bernstein's motion to remand was denied,

> [O]nce he decided to take advantage of his involuntary presence in federal court to add a federal claim to his complaint[,] he was bound to remain there. Otherwise he would be in a position where if he won his case on the merits in federal court he could claim to have raised the federal question in his amended complaint voluntarily, and if he lost[,] he could claim to have raised it involuntarily and to be entitled to start over in state court. He "cannot be permitted to invoke the jurisdiction of the federal court, and then disclaim it when he loses."[220]

One again should question whether this position is fair to the plaintiff.

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216. *See* Ins. Co. v. Dunn, 86 U.S. (19 Wall.) 214, 223 (1873); *see also* InfoSpan, Inc. v. Emirates NBD Bank PJSC, 903 F.3d 896, 901 (9th Cir. 2018) (holding that "once the issue of personal jurisdiction had been adjudicated on the merits against" the defendant, the defendant was entitled to "fully participate and defend the litigation," and noting that the defendant was even free to file and prosecute its own counterclaims).

217. *See Kidd*, 891 F.2d at 547.

218. *See, e.g.*, *id.* at 546–47.

219. 738 F.2d 179 (7th Cir. 1984).

220. *Id.* at 185–86 (quoting Brough v. United Steelworkers of Am., 437 F.2d 748, 750 (1st Cir. 1971)).

It puts the plaintiff to a dilemma: She might well find herself barred by preclusion doctrines from later asserting her federal claims if she does not add her federal claims to the removed suit, but if she does add them (under Judge Posner's view) she might well be held to have waived the error of improper denial of her motion to remand.[221] Even when preclusion might not be a risk, a plaintiff who has been forced to litigate in federal court might have other legitimate reasons to add claims. If the added claims are not sufficiently related to the removed claims to form an appropriate unit for trial, the district court judge can sever them under Rule 42.[222]

There is another reason that Judge Posner's (and similar) thinking is incorrect, or at least has been undercut, and should not carry the day. The Supreme Court's decision in *Caterpillar Inc. v. Lewis*[223] demonstrates the error of the approach advocated by Judge Posner and taken by the Tenth (and other) Circuits that embraced waiver of the right to remand based on the plaintiff's post-denial assertion of claims.[224] In *Caterpillar*, the Supreme Court explained that, by timely moving for remand, a plaintiff does all that is required to preserve his objection to removal and is not "required to seek permission to take an interlocutory appeal . . . in order to avoid waiving whatever ultimate appeal right he may have."[225] By implication, a plaintiff who has timely moved to remand is not required to limit her participation in the litigation of the case in federal court once her motion to remand has been denied. She is allowed to assert new federal claims as well as to fully prosecute and defend her earlier asserted claims, and if she loses she still can contend that she is entitled to start over in state court if the case ought to have been remanded—*unless* the case went to final judgment in a posture in which it could have been filed in federal court.

This "unless" is an important caveat to the "rule" (where it is the rule) advocated here that a plaintiff who timely but unsuccessfully moves to

221. One might respond that filing only state law claims in state court also puts the plaintiff at risk that res judicata will bar her federal claims arising out of the same transactions, while pleading the federal claims makes her civil action subject to removal. But some plaintiffs will not have split their federal and state claims. If the removal were otherwise defective, plaintiff would have a right to remand. A plaintiff is not necessarily "damned" if she does and "damned" if she doesn't plead the federal claims. The situation does not create unfairness analogous to that posed by Judge Posner's position.

222. FED. R. CIV. P. 42(b) ("For convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more separate issues [or] claims . . . .").

223. 519 U.S. 61 (1996).

224. *See id.* at 73–74.

225. *Id.* at 74; *see id.* at 74 n.11 (rejecting the argument that defendant effectively waived his objection to removal by failing to seek an immediate appeal of the district court's refusal to remand, while noting that this waiver argument had "attracted some support in [federal] Courts of Appeals' opinions").

remand may thereafter add federal claims without waiving the right to remand. If the case has gone to judgment and the question is whether to vacate the judgment because of improper removal despite the presence of subject-matter jurisdiction at the time of judgment, under *Caterpillar* the determinative question is whether overwhelming "considerations of finality, efficiency and economy" dictate that the judgment survive, assuming that the judgment is otherwise correct.[226] Where a case had been dismissed on a Rule 12(b)(6) motion and sent to arbitration, the Fifth Circuit vacated the judgment in the erroneously removed case because considerations of finality, efficiency, and economy did *not* dictate that the judgment survive;[227] but where cases went to judgment after jury trial, the Fifth Circuit allowed the judgments to stand because considerations of finality, efficiency, and economy did dictate that the judgment survive.[228] It should be observed that these results were reached under a doctrine other than waiver of the right to remand, not as a function of any waiver or forfeiture of the right to remand. In *Caterpillar*, it was not waiver of the right to remand that was the plaintiff's undoing, for the plaintiff had timely moved for remand; the plaintiff's plea for reversal was rejected because of what the Court found to be overwhelming considerations of finality and judicial economy.[229] The Fifth Circuit's decision was grounded in the same policies.

These same policy considerations also are relevant in situations in which a non-diverse plaintiff, post-removal, amends its complaint to add a federal question to a complaint that stated only state law claims, and objects to removal only when the case is on appeal after the plaintiff lost in the district court. But a plaintiff who objected to removal only after losing on the merits would have to be asserting an objection based on lack of subject-matter jurisdiction; any other objection would have come too late. The objection of lack of subject-matter jurisdiction cannot be waived, and federal question jurisdiction over a removed action normally is determined as of the date of removal. These doctrines suggest that cases

226. *Id.* at 75.

227. *See* McAteer v. Silverleaf Resorts, Inc., 514 F.3d 411, 414–16 (5th Cir. 2008) (concluding that argument for remand was not rendered moot by plaintiff begrudgingly amending her complaint to add ERISA claims and that considerations of finality and efficiency did not counsel against hearing the merits of her appeal where the claims had been dismissed in favor of arbitration); *see also* Waste Control Specialists, LLC v. Envirocare of Tex., Inc., 199 F.3d 781, 782–83, 786–87 (5th Cir.) (reaching a similar result in a case dismissed for failure to state a claim where plaintiffs amended and added claims to avoid dismissal), *withdrawn and replaced in part on other grounds on reh'g*, 207 F.3d 225 (5th Cir. 2000).

228. *See In re* 1994 Exxon Chem. Fire, 558 F.3d 378, 391–92, 399–400 (5th Cir. 2009) (observing that the alleged defects in removal included removal under the All Writs Act, 28 U.S.C. § 1651, violation of the "forum-defendant rule," and a third argument).

229. *Caterpillar*, 519 U.S. at 74–77.

that found waiver of the right to complain about the removal for lack of subject-matter jurisdiction were erroneous. However, the determinative piece of the puzzle is *Grubbs v. General Electric Credit Corp.*, which held that where, after improper removal, the case was determined on the merits *without objection* and the federal court entered judgment, the jurisdictional issue on appeal is whether the federal district court would have had jurisdiction over the case as then configured, had it originally been filed in federal court.[230] Waiver or forfeiture seems not to have been the crux. Articulated or not, consideration of finality, efficiency, and economy likely were overriding.[231]

The Fourth Circuit has added that, in the context of arguments for complete preemption, some different considerations than finality, efficiency, and economy apply:

> An erroneous determination by the district court that a particular claim is completely preempted significantly shifts the nature of the law that would be applied to the claim. The state claim wrongfully determined to be completely preempted would be analyzed as a federal claim under federal law. Upon a remand to a state court [for lack of federal question], however, the state claim would be analyzed under the appropriate state law, which law may contain rules of decision substantially different from the rules contained in federal law. Wrongful removal here would thus destroy [a] legitimate state claim, rather than (as in the case of a wrongfully-removed diversity action) simply change the identity of the deciding court.[232]

In such circumstances, the analysis should end with the conclusion that a plaintiff did not waive its right to remand by acquiescing in the district court's holding that one or more of its claims was completely preempted. If the district court erred, the case should be remanded to state court.

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230. Grubbs v. Gen. Elec. Credit Corp., 405 U.S. 699, 702 (1972); *see also* Kidd v. Sw. Airlines Co., 891 F.2d 540, 546–47 (5th Cir 1990) (following *Grubbs* and holding that where, after improper removal, the case was determined on the merits without objection, and the federal court entered judgment, the jurisdictional issue on appeal was whether the federal district court would have had jurisdiction over the case as then configured had it originally been filed in federal court; here plaintiff's post-removal amendment of the complaint to add a federal ERISA claim gave the federal court jurisdiction).

231. *See Grubbs*, 405 U.S. at 702–06. It is true, however, that one or more of the cases that the Court relied on in *Grubbs* involved waiver. *See, e.g.*, Mackay v. Uinta Dev. Co., 229 U.S. 173, 176–77 (1913) (mentioning that "[I]f there was any irregularity in docketing the case or in the order of the pleadings[,] [that] irregularity was waivable and [did not] . . . deprive [the court] of the power to determine the case.").

232. King v. Marriott Int'l, Inc., 337 F.3d 421, 426 (4th Cir. 2003) (citation omitted).

As *Caterpillar* foreshadowed, in a number of circuits the law has evolved to the position that the plaintiff's decision to add a federal claim (or create another basis of jurisdiction) does *not* waive the objection to removal.[233] The Fourth and Fifth Circuits have held that, in certain circumstances, a plaintiff who timely but unsuccessfully moved to remand may thereafter add federal claims without waiving the right to remand.[234]

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233. *See, e.g.*, *In re* 1994 Exxon Chem. Fire, 558 F.3d at 398–400; Negrón-Fuentes v. UPS Supply Chain Sols., 532 F.3d 1, 5–6 (1st Cir. 2008) (holding that plaintiff did not waive his objection to federal jurisdiction after removal by filing an amended complaint after the district court denied his motion to remand, where the new complaint merely clarified that his estoppel claim rested in part on federal law, as the district court already had held; noting that the plaintiff may have feared that the district court would dismiss the case if he did not make the conforming amendment, as is the practice in some circuits); Waste Control Specialists, LLC v. Envirocare of Tex., Inc., 199 F.3d 781, 787 (5th Cir.) (holding that plaintiff did not waive its right to challenge jurisdiction by amending its complaint to add a federal claim after the district court refused to remand for lack of jurisdiction), *withdrawn and replaced in part on other grounds on reh'g*, 207 F.3d 225 (5th Cir. 2000); O'Halloran v. Univ. of Wash., 856 F.2d 1375, 1379–80 (9th Cir. 1988) (holding that when the district court ordered plaintiff to amend her complaint after denying remand, filing of second amended complaint alleging federal law violations did not moot the question whether the removal was proper or waive the right to continue to seek remand); *see also King*, 337 F.3d at 426 (holding that the plaintiff, by her amendment to the complaint, did no more than make explicit what the district court had held, namely that her claim was completely preempted, and that plaintiff did not thereby waiver her objection to removal or her right to remand to state court); McLeod v. Cities Serv. Gas Co., 233 F.2d 242, 244–45 (10th Cir. 1956) (holding no waiver of objection to removal or right to remand where plaintiffs timely objected to the untimeliness of the removal and re-pled in federal court only after the district court denied remand and ordered plaintiffs to amend their pleadings); Thomas v. Great N. Ry., 147 F. 83, 87 (9th Cir. 1906) (holding that a plaintiff who was compelled either to submit to a post-removal dismissal or amend his complaint after the district court denied remand to state court did not waive his objection of erroneous removal).

234. *See* Camsoft Data Sys. v. S. Elecs. Supply, Inc., 756 F.3d 327, 331, 333–34 (5th Cir. 2014) (affirming remand to state court, but on different grounds, where a plaintiff had added federal claims after its motion to remand for lack of jurisdiction had been denied, the case later went to partial judgment in the federal court and supplemental claims were ordered remanded to state court); *King*, 337 F.3d at 426, 428 (holding that plaintiff did not waive her objection to removal by amending her state law complaint to explicitly assert a claim under § 502 of ERISA, where the amendment merely made explicit what the district court had held in concluding that her claim was completely preempted, and vacating the judgment and instructing that the case be remanded to state court after holding that the claim was not completely preempted by ERISA). In *King*, King had moved to remand, or in the alternative to amend her complaint to allege new claims, including an explicit ERISA anti-retaliation claim. *King*, 337 F.3d at 423. "The district court denied King's motion to remand, and granted her motion to amend her complaint." *Id.* at 423–24. It later granted summary judgment to defendants. *Id.* at 424. On appeal, King appealed the district court's denial of her motion to remand her wrongful discharge claim. *Id.* Distinguishing *Caterpillar*, *see supra* text accompanying notes 223–29, the court held that it was important to reach the question whether the plaintiff's original claim was completely preempted because wrongful removal would destroy King's legitimate state claim, rather than (as in the case of a wrongfully removed diversity action) simply change the identity of the deciding court. *King*,

The U.S. Court of Appeals for the First Circuit has now also held that a plaintiff who amends his complaint to explicitly invoke federal law after his motion to remand has been denied does not thereby waive his right to remand, at least when his amendment merely conforms to a district court's prior determination that his removed civil action pled a completely preempted (and hence federal) claim.[235] The court noted that it is the practice in some circuits to require such a conforming amendment and that "if amendment were required, treating it as a waiver would force the party to forego his objection or face dismissal and then a res judicata bar if that objection failed on appeal."[236]

Summing up this subsection, plaintiffs can waive their objections to procedurally improper removals by failing to raise their objections in a timely manner, and plaintiffs can lose an available objection to lack of subject-matter jurisdiction by adding federal question claims to a removed case and allowing it to go to judgment in that posture. In such instances, federal courts are entitled to reject subsequent remand motions,

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337 F.3d at 426. Thus, considerations of finality, efficiency, and economy were not determinative. *Id.* In *Camsoft Data*, the Fifth Circuit relied on the plaintiff's timely motion to remand and the absence of a trial on the merits to indicate that neither finality (which the court said was lacking here) nor economy dictated that the case should remain in federal court despite its improper removal, where the decided claims were decided on the basis of Federal Rule of Civil Procedure 12. *Camsoft Data*, 756 F.3d at 331, 333–34, 336, 337; *see also Waste Control Specialists*, 199 F.3d at 782–83, 787 (holding that plaintiff's objection to removal when court lacked federal question—or any other basis of—subject-matter jurisdiction over the case preserved its objection even though plaintiff later amended its complaint to state a federal claim and the case went to judgment in that posture). In *Waste Control Specialists*, the court viewed *Caterpillar*'s concerns about finality and economy to be particularly pertinent to diversity cases and, in any event, to carry little weight where the case was dismissed for failure to state a claim. *Id.* at 785 n.2, 787; *accord* Gonzalez v. Weeks Marine, Inc., 203 F. App'x 574, 575–76 (5th Cir. 2006) (per curiam) (noting that although a plaintiff waives her objection to removal by actively participating in a case after removal, such waiver can occur only when the plaintiff failed to object to the removal; here, because plaintiff timely objected to the removal as barred by the Jones Act, the waiver argument was unavailing); *see also* Kelly v. Carr, 691 F.2d 800, 805–06 (6th Cir. 1980) (finding that amendment adding federal claims did not cure lack of federal jurisdiction deriving from lack of derivative jurisdiction in federal court).

The Tenth Circuit distinguished some of the Fourth and Fifth Circuit cases cited above by reference to the weakness of the finality and efficiency concerns in those cases and the narrowness of the amendments in the Fourth and Fifth Circuit cases, as compared with those in the Tenth Circuit cases. *See* Albert v. Smith's Food & Drug Ctrs, Inc., 356 F.3d 1242, 1248 (10th Cir. 2004) (distinguishing *King* and *Waste Control Specialists*). In *Albert*, the Tenth Circuit acknowledged that *if* it had concluded that the district court's decision on the merits of Albert's claims should be affirmed, the holding in *Caterpillar* would have made it unnecessary to address the challenge to the denial of the motion to remand. *Id.* at 1247. However, because the court concluded that the district court's ruling on Albert's ADA claim had to be reversed, the court needed to consider the correctness of the order denying remand. *Id.*

235. *Negrón-Fuentes*, 532 F.3d at 5–6.

236. *Id.* at 6.

although in neither instance is the rationale really a matter of the waiver of the right to remand. In the former situation, the basis of the decision is the untimeliness of the objections, and in the latter situation the decision is dictated by considerations of finality, efficiency, and economy. But when plaintiffs make timely remand motions, raising meritorious objections to removal, and district courts erroneously deny their remand motions, plaintiffs should not be held to waive their right to remand by subsequently adding federal question (or other jurisdiction-creating) claims to their complaints. The district and appellate courts do not consistently so hold, but they have done so increasingly in the wake of Supreme Court decisions including *Insurance Co. v. Dunn*,[237] *Grubbs v. General Electric Credit Corp.*,[238] and *Caterpillar Inc. v. Lewis*.[239] Under current law, such plaintiffs can still be defeated by policies favoring finality, efficiency, and economy if the improperly removed cases go to judgment, but courts and others should recognize that this is not a function of waiver of the right to remand.

c. Other Federal Court Activity

Moving to other forms of federal court activity, plaintiffs who both amended their complaint in ways that did not affect subject-matter jurisdiction and participated in discovery in federal court sometimes have been held to have waived their right to remand, with the court not addressing whether one or the other alone would have sufficed to waive the right to remand.[240] And some federal appeals courts have held that plaintiffs waived their right to remand merely by participating in discovery in the federal court.[241] These decisions seem plainly wrong,

237. 86 U.S. (19 Wall.) 214 (1873); *see supra* note 216 and accompanying text.

238. *See supra* notes 230–31 and accompanying text.

239. *See supra* notes 223–29 and accompanying text.

240. *See, e.g.*, Johnson v. Odeco Oil & Gas Co., 864 F.2d 40, 42 (5th Cir. 1989) (upholding remand denial where plaintiff had attended depositions and added defendants in an amended complaint); Lanier v. Am. Bd. of Endodontics, 843 F.2d 901, 905 (6th Cir. 1988) (disagreeing with plaintiff's argument that her activities were "defensive" and upholding denial of remand where plaintiff entered into stipulations with defendant, filed requests for discovery, intended to amend the complaint in the removed case when she filed a separate suit in federal court, and demanded trial by jury).

241. *See* Johnson v. Helmerich & Payne, Inc., 892 F.2d 422, 423 (5th Cir. 1990) (holding that the plaintiffs waived their right to remand for lack of unanimity in the removal by propounding interrogatories and requesting documents before moving to remand); Harris v. Edward Hyman Co., 664 F.2d 943, 945–46 (5th Cir. 1981) (per curiam) (finding that the plaintiff served discovery requests on defendants and responded to a request for production of documents and affirming the district court's determination that plaintiff's acts constituted waiver). The opinion in *Harris* does not make entirely clear the timing of the various acts of participation in relation to the plaintiff's making, or the court denying, the plaintiff's motion to remand. *Harris*, 664 F.2d at 945. In other cases finding waiver, a plaintiff's district court activity included both

particularly if the discovery activity occurred after the denial of remand. Plaintiffs should not be required to essentially forfeit the case or set themselves up for a motion to dismiss for failure to prosecute in order to preserve their ability to appeal the denial of remand. If the amendment or discovery activity preceded the court's ruling on the motion to remand (or preceded even the motion to remand), the question may be closer, but even then, the realities of litigation must be recognized. The Federal Rules of Civil Procedure will require plaintiffs to make early mandatory pre-discovery disclosures and to respond to discovery requests within prescribed periods of time; plaintiffs may be required to engage in discovery planning.[242] It is not realistic to expect plaintiffs whose motions for remand are pending or have not yet been made to avoid all efforts to take or respond to discovery, on pain of being held to have waived their right to remand.

Some appellate courts have recognized this. The Eleventh Circuit held that plaintiffs' attempt to preserve the timeliness of possible future discovery, by filing a status report stating their understanding that a court order did not bar discovery on the merits while their motion to remand was pending, did not waive their right to object to removal.[243] And the same circuit more recently, although in an unpublished opinion, held that where plaintiffs promptly moved for remand, their participation in discovery five times while their motion for remand was pending did not waive their objection to removal.[244] It is not clear why the court regarded it as important that plaintiffs did not delay in seeking remand. If plaintiffs delay so much that they thereby waive their objections to defects in removal procedure, that alone will be reason to deny their remand motion. If their remand motion is timely, it is not clear why the timing of the

discovery and additional behavior other than the amendment of pleadings. *See, e.g.*, Fin. Timing Publ'ns, Inc. v. Compugraphic Corp., 893 F.2d 936, 940 (8th Cir. 1990) (holding that plaintiff that assured defendant that plaintiff would not object to the untimeliness of the removal, "participated without objection in a pretrial conference, engaged in [unspecified] discovery . . . subjected itself to the authority of a federal magistrate [judge]," appealed one of the magistrate's orders to the district court, and then waited until after defendant filed a motion for summary judgment before objecting to the timeliness of the removal, waived its right to remand). In this instance, the untimeliness of the remand motion in-and-of-itself was grounds to find waiver of the right to remand. *Id.* The rest was "icing on the cake," although the court relied on the plaintiff's activities rather than on the untimeliness of its motion to remand. *See id.*

242. *See* FED. R. CIV. P. 16(a)–(c) (regarding pretrial conferences); *id.* at 26(a) (regarding mandatory pre-discovery disclosure); *id.* at 30(b) (regarding depositions by oral examination); *id.* at 33(b)(2) (regarding interrogatories); *id.* at 34(b)(2)(A) (regarding production of documents, electronically stored information, and things); *id.* at 36(a)(3) (regarding requests for admissions).

243. *See* Pacheco de Perez v. AT&T Co., 139 F.3d 1368, 1381 n.15 (1998). The filing implicitly sought clarification from the court. *See id.*

244. *See* Taylor Newman Cabinetry, Inc. v. Classic Soft Trim, Inc., 436 F. App'x 888, 894 (11th Cir. 2011) (per curiam).

motion should matter in determining whether participation in discovery should waive the right to remand.[245] The reader will recall that courts do not penalize defendants for taking actions in state court (such as filing motions to dismiss on various grounds) before they need to do so.[246] Courts have refused to hold that such actions waive the right to remove.[247] Correspondingly, courts should not penalize plaintiffs for taking action in federal court (such as making motions or engaging in discovery) when they are doing so in conformity with the Federal Rules but not under court order. Courts should refuse to hold that such actions waive a right to remand that plaintiffs otherwise would enjoy.

Activities that involve neither pleadings nor discovery also have been held to waive the right to remand.[248] Courts sometimes say that the extent of a plaintiff's conduct in the federal proceedings determines whether the plaintiff has waived its statutory right to remand, and that decisions on waiver and remand lie in the discretion of the district court.[249] When trial

245. *See, e.g.*, Paxton v. Weaver, 553 F.2d 936, 942 (5th Cir. 1977) (holding that plaintiffs' assertion of counterclaims did not moot the issue of the propriety of the removal and noting that plaintiffs had renewed their motions for remand after substantial discovery).

246. *See supra* text at notes 180–86.

247. *See* Section III.C.

248. *See* McCall v. Scott, 239 F.3d 808, 813 n.2 (6th Cir.) (holding that plaintiff's argument of improper removal was waived by its stipulation to be bound by the decision in a consolidated federal court suit), *amended by* 250 F.3d 997 (6th Cir. 2001); Nolan v. Prime Tanning Co., 871 F.2d 76, 78–79 (8th Cir. 1989) (upholding denial of remand sought by plaintiffs who contested motions for summary judgment, voluntarily dismissed a defendant, proposed a joint scheduling order, filed for default judgment against a different defendant, and sought remand only after several unfavorable rulings).

249. *See, e.g.*, Gomez v. Martin Marietta Corp., No. 92-3754, 1993 WL 17684, at *1 (E.D. La. Jan. 19, 1993) ("The dispositive issue is . . . 'the extent of a plaintiff's conduct in the federal proceedings' . . . ." (quoting Johnson v. Odeco Oil & Gas Co., 864 F.2d 40, 42 (5th Cir. 1989))); *cf.* Johnson v. USAA Cas. Ins., 900 F. Supp. 1310, 1313 (M.D. Fla. 2012) (holding that plaintiff insureds did not waive their right to remand of their breach of contract action against their insurer, although they filed a case management report in federal court, sought mediation, and requested the identity of the insurer's corporate representative in order to depose him, where the insureds filed a motion to remand only three days after the removal notice was filed, the case management report was mandated by a standing court order, and insureds acted to bring their deposition notice to the attention of the insurer's representative to conform with a Federal Rule of Civil Procedure); Knowles v. Hertz Equip. Rental Co., 657 F. Supp. 109 (S.D. Fla. 1987) (holding that plaintiffs did not waive their right to remand although they filed answers to affirmative defenses, discovery requests and motions, and moved to continue trial, where they raised and the court decided no substantial issue and defendants failed to show prejudice from a remand to state court or that the work done in federal court would be wasted). None of the plaintiffs' actions in *USAA Casualty Insurance* or *Knowles* affirmatively sought the federal court's intervention or induced detrimental reliance by the defendant. Cases that illustrate the invocation of discretion in the remand decision, in the context of alleged waivers of the right to remand, include: Koehnen v. Herald Fire Ins., 89 F.3d 525, 529 (8th Cir. 1996); Johnson v. Odeco Oil & Gas Co., 864 F.2d 40, 42 (5th Cir. 1989); Lanier v. Am. Bd. of Endodontics, 843 F.2d 901, 905 (6th Cir. 1988).

and appellate courts make waiver decisions, they should consider points, such as those made above, concerning the realities of district court litigation[250] as well as the need for plaintiffs to have fair advance notice of what activities in federal court may waive their right to a remand to state court.

There appear to be few published opinions in which federal appellate courts held that plaintiffs (or other parties) did *not* waive their right to have a case remanded to state court. However, federal appellate courts have held that plaintiffs (or other parties) did not waive their right to have a case remanded to state court when they complained of lack of federal subject-matter jurisdiction[251] or failed to seek remand in a prior-filed, virtually identical suit.[252]

3. District Court Decisions

When speaking of the circumstances in which plaintiffs waive their right to remand, federal district courts sometimes speak of the need for plaintiffs to have engaged in affirmative conduct that would render remand offensive to fundamental principles of fairness.[253] Some report that "[g]enerally, this standard is met only if the plaintiff files multiple motions in the district court or loses a dispositive one."[254] District courts also sometimes say that "[a] plaintiff can waive its objection to removal by acquiescing in the federal court's jurisdiction."[255]

It should be noted, as it was in connection with waiver of the right to remove,[256] that the grounding of waiver in acceptance of (or acquiescence in) the court's jurisdiction is off the mark. Plaintiffs have no choice but to acquiesce in the federal court's subject-matter jurisdiction if that jurisdiction exists under Article III of the United States Constitution and the applicable congressional jurisdictional statutes. If the federal court lacks subject-matter jurisdiction over the removed case, the plaintiffs'

250. *See supra* notes 241–47 and accompanying text.

251. *See, e.g.*, Herrick Co. v. SCS Commc'ns, Inc., 251 F.3d 315, 332–33 (2d Cir. 2001); Hurt v. Dow Chem. Co., 963 F.2d 1142, 1146 (8th Cir. 1992); Hudson v. Smith, 618 F.2d 642, 644 (10th Cir. 1980) (noting that it was the removing defendant who made the argument after losing on the merits); Basso v. Utah Power & Light Co., 495 F.2d 906, 910 (10th Cir. 1974).

252. *See* Cornus Corp. v. GEAC Enter. Sols., Inc., 356 F. App'x 993, 994 (9th Cir. 2009).

253. *See, e.g.*, Olds v. Wynn Las Vegas, LLC, No. 2:12-cv-357-RCJ-RJJ, 2012 WL 4792919, at *2 (D. Nev. Oct. 9, 2012); Beard v. Lehman Bros. Holdings, Inc., 458 F. Supp. 2d 1314, 1323 (M.D. Ala. 2006).

254. *Olds*, 2012 WL 4792919, at *2 (first citing Bearden v. PNS Stores, Inc., 894 F. Supp. 1418, 1424 (D. Nev. 1995); and then citing *Koehnen*, 89 F.3d at 528).

255. Piper Jaffray & Co. v. Severini, 443 F. Supp. 2d 1016, 1020 (W.D. Wis. 2006).

256. *See supra* text accompanying notes 156–59.

acquiescence cannot confer jurisdiction on the federal court.[257] Moreover, when a case is removed to federal court, that court is regarded as having personal jurisdiction over the plaintiff, just as the state court had personal jurisdiction over the plaintiff by virtue of the plaintiff having voluntarily submitted itself to the court's jurisdiction by filing there. Personal jurisdiction is a non-issue; the plaintiff has no choice but to accept the jurisdiction of the federal court over the plaintiff's "person." In short, it makes little sense to speak of waiver of the right to remand by dint of the plaintiff having accepted the jurisdiction of the federal court. However, there are voluntary activities by which plaintiffs may *embrace* the federal forum by choosing to expand the scope of the removed litigation. That idea may better articulate what the courts are thinking about when they speak of acquiescing in the federal court's jurisdiction. A key question is how the courts will define that universe of activities: Which affirmative acts will waive the right to remand and which will not? An early case spoke of the need for "the invitation and procurement by the plaintiff of affirmative action by the federal court."[258] But it said nothing more to define what sort of affirmative action by the court the opinion writer had in mind.

Framing the issue in terms of affirmative conduct that would render remand offensive to fundamental fairness makes the nature and extent of the plaintiff's conduct in the federal proceedings determinative.[259] It also implicitly recognizes a role for discretion in the district courts that must make the decision.[260]

Some district courts have said that plaintiffs waive the right to remand when they litigate the substance of their claims on the merits in federal court (through summary judgment proceedings or trial), but not when they merely engage in limited discovery in conformity with the Federal

257. *Cf. supra* text accompanying notes 223–25, 229–31 (regarding improper removals that lead to federal court judgments in cases in which federal jurisdiction existed at the time of judgment). There also are some borderline cases in which failure to object to the allegations of the removal notice and to move to remand for lack of subject-matter jurisdiction were construed as admissions that certain defendants were sham defendants, joined to destroy complete diversity. *See, e.g.*, Caswell v. Olympic Pipeline Co., 484 F. App'x 151, 153 (9th Cir. 2012). This comes close to a waiver of the defense of lack of subject-matter jurisdiction.

258. Kramer v. Jarvis, 81 F. Supp. 360, 361 (D. Neb. 1948).

259. Fontenot v. Glob. Marine, Inc., 703 F.2d 867, 871 (5th Cir. 1983) (concluding that plaintiff waived his right to remand this improperly removed case by litigating it without objection for thirteen months, participating in pretrial conferences, filing a motion for summary judgment and repeatedly acknowledging the jurisdiction of the federal court); Baites v. State Farm Mut. Auto. Ins., No. 2:9 5CV175–S–B, 1996 WL 33370656, at *2 (N.D. Miss. Feb. 20, 1996) (citing Harris v. Edward Hyman Co., 664 F.2d 943, 945–46 (5th Cir. 1981) (per curiam) (concluding that plaintiff waived her right to remand of the improperly removed case by participating in discovery both as a poser of discovery requests and as a respondent to such requests)).

260. *See Fontenot*, 703 F.2d at 871; *Baites*, 1996 WL 33370656, at *2.

Rules or local civil rules and oppose motions that are filed against them.[261]

Like the federal intermediate appellate courts, some federal district courts have held that plaintiffs (or other parties) have waived their right to have a case remanded to state court when, before moving to remand, they amended their complaint to clearly give rise to federal jurisdiction,[262] or when they engaged in considerable or significant substantive pre-trial litigation, such as attending depositions and engaging in other discovery.[263]

By contrast, federal district courts have held that plaintiffs or other parties have *not* waived their right to have a case remanded to state court when they have filed a jury demand, a certificate of interested parties, or an answer to claims asserted against the plaintiff by other parties.[264] Many local rules require the filing of a certificate of interested parties, and the Federal Rules of Civil Procedure require the filing of a jury demand and the plaintiff's answer to claims against her.[265] None of the foregoing prejudices the defendant.

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261. Lapoint v. Mid-Atl. Settlement Servs., Inc., 256 F. Supp. 2d 1, 3–4 (D.D.C. 2003); *see also* Borg-Warner Leasing v. Doyle Elec. Co., 733 F.2d 833, 835 n.2 (11th Cir. 1984) (holding that plaintiff waived a forum-defendant defect because the case "proceeded without objection to consideration on the merits").

262. *See, e.g.*, Moffit v. Balt. Am. Mortg., 665 F. Supp. 2d 515, 517 (D. Md. 2009) (holding that plaintiff waived the right to remand by filing an amended complaint that alleged a federal question claim, before moving to remand), *aff'd sub nom.* Moffit v. Residential Funding Co., 604 F.3d 156 (4th Cir. 2010); *see also supra* notes 202–06 and accompanying text (discussing findings of waiver where plaintiffs took action in federal court and failed to seek remand).

263. *See, e.g.*, Busby v. Capital One, N.A., 841 F. Supp. 2d 49, 53 (D.D.C. 2012) (finding waiver of objections to procedural defects in removal where plaintiff filed several motions, opposed defendants' motions and filed an interlocutory appeal in federal court); Courville v. Texaco, Inc., 741 F. Supp. 108, 110–12 (E.D. La. 1990) (holding that plaintiff waived the right to remand this wrongly removed Jones Act case by filing an identical case in federal court, participating in extensive discovery including taking depositions, failing to request a stay of discovery, filing a motion to sever, and participating in pre-trial conferences, among other things); Green v. Zuck, 133 F. Supp. 436, 438 (S.D.N.Y. 1955) (estopping plaintiff from asserting a right to remand for a procedural defect where plaintiff had sought and the court had denied both a motion to remand for lack of jurisdiction and demand for jury trial, when the statute set out no specific time by which a motion to remand for procedural defects had to be made); Chevrier v. Metro. Opera Ass'n, 113 F. Supp. 109, 110 (S.D.N.Y. 1953) (in an era when the statute set out no specific time by which a motion to remand had to be made, waiving the right to remand by failing to move for remand until after plaintiff had served notices of motions concerning discovery that plaintiff sought, entered into stipulations, and argued a discovery-related motion on which plaintiff lost).

264. *See, e.g.*, *See* Olds v. Wynn Las Vegas, LLC, No. 2:12-cv-357-RCJ-RJJ, 2012 WL 4792919, at *3 (D. Nev. Oct. 9, 2012).

265. *See* FED. R. CIV. P. 12(a)(1)(B); *id.* at 38(b)(1); *id.* at 81(c)(3); Student A. v. Metcho, 710 F. Supp. 267, 269 (N.D. Cal. 1989) (noting that Federal Rule 81(c) requires that a jury demand be filed within 10 days of removal); Midwestern Distrib., Inc. v. Paris Motor Freight Lines, Inc.,

Federal district courts also have held that plaintiffs or other parties have not waived their right to have a case remanded to state court when they requested injunctive relief as an alternative to remand; [266] objected to discovery requests from other parties;[267] participated in motion practice that did not adjudicate any merits issues;[268] sought dismissal of claims asserted against the plaintiff;[269]opposed motions such as a motion for summary judgment;[270] or obeyed court orders.[271] Likewise, federal courts have held that parties did not waive their right to remand when they engaged in limited discovery. The courts sometimes explicitly recognized that the Federal Rules' mandatory pre-discovery disclosure Rules and the discovery Rules themselves make this conduct appropriate and perhaps necessary.[272]

The outcome of cases in which the issue was whether plaintiffs waived their right to remand by seeking entry of default against a defendant has varied with other particulars of the cases. The majority of courts that have addressed the question have decided against waiver by seeking entry of default against a defendant.[273]

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563 F. Supp. 489, 495 (E.D. Ark. 1983) (finding no waiver by plaintiff for filing responsive pleadings).

266. *See* Piper Jaffray & Co. v. Severini, 443 F. Supp. 2d 1016, 1021 (W.D. Wis. 2006).

267. *See* Fehrman v. Hearst Consol. Publ'ns, Inc., 170 F. Supp. 95, 96 (D. Md. 1959).

268. *See* Beard v. Lehman Bros. Holdings, Inc., 458 F. Supp. 2d 1314, 1323–24 (M.D. Ala. 2006) (finding no waiver where plaintiff moved to transfer or reassign the case and acquiesced in an extension of time for defendant to answer).

269. *See* Cont'l Ins. v. Foss Mar. Co., No. C 02–3936 MJJ, 2002 WL 31414315, at *7–8 (N.D. Cal. Oct. 23, 2002) (finding that plaintiff did not waive its right to remand by moving to dismiss a counterclaim).

270. *See* CMH, Inc. v. Canal Place Mgmt., No. CIV. A. 92–4201, 1993 WL 70252, at *2 (E.D. La. Mar. 10, 1993), *stay denied by* 1993 WL 92498 (E.D. La. Mar. 24, 1993).

271. *See* Apoian v. Am. Home Prods., Corp., 108 F. Supp. 2d 454, 455, 459 (E.D. Pa. 2000).

272. *See* Barahona v. Orkin, No. CV 08-04634-RGK (SHx), 2008 WL 4724054, at *3 (C.D. Cal. Oct. 21, 2008) (finding federal discovery minimal); Anderson v. Kaz, Inc., No. 08-CV-253-BR, 2008 WL 2477559, at *3 (D. Or. June 12, 2008) (finding no waiver where plaintiff merely made a request for production of documents and did not attend other proceedings); Baites v. State Farm Mut. Auto. Ins., No. 2:95CV175–S–B, 1996 WL 33370656, at *2 (N.D. Miss. Feb. 20, 1996) (finding participation in discovery de minimis); Kearney v. Dollar, 111 F. Supp. 738, 740 (D. Del. 1953) (mentioning that plaintiff filed interrogatories after the argument on the motion to remand and while the motion was pending, and that the plaintiff's motion for injunction was intended merely to preserve the matter in controversy).

273. *Compare* Fletcher v. Solomon, No. C-06-05492 RMW, 2006 WL 3290399, at *3–4 (N.D. Cal. Nov.13, 2006) (finding that concerns of fairness demanded remand although plaintiffs' unsuccessful request to enter default might constitute affirmative conduct that could justify denial of their motion to remand), *and* Innovacom, Inc. v. Haynes, No. C 98-0068 SI, 1998 WL 164933, at *2 (N.D. Cal. Mar. 17, 1998) (granting motion to remand, finding that plaintiff's requests for entries of default and a jury trial did not make it unfair to remand), *with* Riggs v. Plaid Pantries Inc., 233 F. Supp. 2d 1260, 1270–72 (D. Or. 2001) (denying motion to remand, reasoning in part that filing a request to enter default is sufficient availment of the federal court's jurisdiction to

Occasionally, a court has suggested that factors other than whether plaintiff has affirmatively sought the federal court's intervention are relevant. Other factors courts have proposed include "1) [t]he nature and gravity of the defect in removal; 2) [p]rinciples of comity and judicial economy; [and] 3) [r]elative prejudice to the parties, including deference to the plaintiff's choice of forum . . . ."[274] Another district court also invoked the basic notions that the removing party has the burden of persuasion on the proposition that the plaintiffs waived their right to remand, and that doubts about the propriety of removal—and arguably about whether plaintiffs waived their right to remand—should be resolved against federal jurisdiction.[275]

Courts often do not articulate these factors, and it is difficult to know how frequently the factors are significant in the resolution of waiver issues. One also might question whether they should be significant. Consider each of the factors articulated above. First, theoretically, the nature and gravity of the defect in removal is entirely distinct from whether courts should hold plaintiffs' activities to have waived the right to remand, but it would be understandable if courts were more reluctant to find such a waiver when the defects in removal are not merely "technical." However, the most fundamental defect would be lack of federal subject-matter jurisdiction, which is not waivable—no matter what plaintiffs do—so plaintiffs cannot waive their right to remand for lack of federal subject-matter jurisdiction. There is no clear hierarchy in the gravity of other defects in removal, although there might be consensus on some rankings of the seriousness of defects; for example, that the removal of an action in violation of 28 U.S.C. § 1445 is a graver defect than slight untimeliness of the filing of the removal notice.[276]

Second, it has been argued that comity (presumably favoring remand) is more important in diversity cases than in federal question cases because the former involve the application and interpretation of state law.[277]

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waive the right to remand; however, prior to filing her remand motion, plaintiff had engaged in additional activity that the court regarded as having waived her right to remand based on procedural defects in the removal).

274. Midwestern Distrib., Inc. v. Paris Motor Freight Lines, Inc., 563 F. Supp. 489, 493 (E.D. Ark. 1983) (footnotes omitted) (citing these factors in addition to conduct "affirmatively [seeking] the federal court's intervention"); *see also* Johnson v. USAA Cas. Ins., 900 F. Supp. 2d 1310, 1312–13 (M.D. Fla. 2012) (showing that despite the court's recitation of these factors, it did not explicitly use them in concluding that plaintiff's filing of a court-ordered case management report, their suggestion of mediation prior to the removal, and their Federal Rule 30(b)(6) request for identification of a knowledgeable deponent did not waive their right to remand).

275. *See Johnson*, 900 F. Supp. 2d at 1313.

276. *See Midwestern Distrib.*, 563 F. Supp. at 493 n.4 (offering as an illustration that removal by a citizen of the forum state would favor remand more than violation of the thirty-day removal requirement would support remand).

277. *See id.* at 493 n.5.

However, the lines are not so clear. For example, federal question cases may contain supplemental state law claims that also might reasonably affect the weight to be afforded to "comity." Similarly, when federal abstention doctrines, federal supplemental jurisdiction, and other discretionary doctrines apply in removed cases, one might see the waiver question as relatively unimportant because a court might conclude that, even if the plaintiff waived its right to remand, a case needed to be remanded under one of the other foregoing doctrines.

At first blush, matters of judicial economy seem relevant in light of the strict and short time limits (thirty days from removal) on motions to remand for anything other than lack of subject-matter jurisdiction. Significant concerns about judicial economy would rarely arise, however, from the perspective of avoiding wasted federal court efforts—outside the contexts in which a belated realization of a subject-matter jurisdiction problem or some other late occurrence (like the joinder of a non-diverse party under 28 U.S.C. § 1447(e)[278]) ousted the federal court of jurisdiction. Thus, there infrequently would be reason to fear that remand to state court would result in a significant waste of judicial or party time, money, or effort, particularly because the parties' activities in federal court remain part of case history and the federal court's decisions remain binding unless and until altered by the state court. Similarly, when considerable pre-trial work had been done in state court before removal, much of it need not be wasted or have to be repeated if a removed case remained in federal court. From the perspective of avoiding wasted state-court efforts, judicial economy would be fostered by remand, rather than by waiver of the right to remand.

Third, either party could suffer from being compelled to litigate in the forum that it does not prefer. That "prejudice" typically will be a function of the respective court systems' qualities. A plaintiff may have legitimate reasons to be concerned that it will be disadvantaged in federal court,[279]

278. Section 1447(e) states that "[i]f after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court." 28 U.S.C. § 1447(e) (2012).

279. Among the reasons are the federal courts' relatively tight standards to survive a motion to dismiss for failure to state a claim, the emphasis upon proportionality requirements in discovery, the shifting of costs to plaintiffs who seek (particularly electronic) discovery, the frequency with which motions for summary judgment burden plaintiffs and may be granted against plaintiffs—particularly in certain categories of cases—and the poor success rate of plaintiffs in removed cases. *See, e.g.*, FED. R. CIV. P. 26(b)(1) (including proportionality factors in the statement on permissible scope of discovery); Ashcroft v. Iqbal, 556 U.S. 662, 677–78 (2009) (interpreting Federal Rule of Civil Procedure (8)(a) to call for "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face,'" so that the "factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged" (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007))); Zubulake v. UBS Warburg

but defendants also may have grounds to argue that they will be disadvantaged in state court. If a plaintiff did seek post-removal rulings from a federal court and her motion to remand was motivated by unhappiness with those rulings, she might feel prejudiced by having to remain in federal court—but in that situation the courts generally are averse to forum shopping,[280] rather than solicitous of litigant-perceived prejudice. Such a plaintiff's fear of prejudice would likely not deter a federal court from holding that the plaintiff waived her right to remand.

Fourth, it is true that the defendant would have the burden to persuade the federal court that the plaintiff waived its right to remand, but the burden of persuasion seldom seems to be an important factor in these cases; the evidence generally is not close to equipoise. Similarly, it does not appear that the notion that doubts about the propriety of removal should be resolved in favor of remand actually plays a role in many courts' decisions. Even if a court subscribes to that idea in its proper place, that is, when judging the propriety of removal, the issue here is distinct. The question is not the propriety of the removal but whether the plaintiff has somehow waived its right to remand when the removal was improper.

All in all, the particular set of recommended factors noted above[281] seems to be of very limited utility.

C. *When Then Should Plaintiffs be Found to Have Waived the Right to Obtain Remand Back to State Court?*

In light of this case law concerning waiver of the right to remand and that concerning waiver of the right to remove, as well as public policy

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LLC, 216 F.R.D. 280, 289–90 (S.D.N.Y. 2003) (ordering plaintiff to pay 25% of the $166,000 cost of restoring certain backup tapes); INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., CIVIL CASE PROCESSING IN THE FEDERAL DISTRICT COURTS 50 (2009), https://iaals.du.edu/sites/default/files/documents/publications/pacer_final_1-21-09.pdf [https://perma.cc/36SB-VVD5] ("In each of the eight most common case types, defendants filed more Rule 56 motions than plaintiffs. In seven of those eight case types, defendants also had a higher success rate with respect to the granting or partial granting of summary judgment."); 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, 593 (1998) (discussing the very low percentage of removed cases that plaintiffs win).

280. *See, e.g.*, Ficken v. Golden, 696 F. Supp. 2d 21, 27 & n.5 (D.D.C. 2010) (holding that plaintiffs waived any right to remand based on procedural defects in removal where plaintiffs filed two complaints in federal court that largely duplicated the complaint in the removed suit, and noting the impropriety of remand when plaintiffs have "expressly engage[d] in forum shopping"); Maybruck v. Haim, 290 F. Supp. 721, 723 (S.D.N.Y. 1968) (noting that to constitute a waiver of the right to remand, there must be conduct that "would render it offensive to fundamental principles of fairness to remand, as where the party seeking remand has been unsuccessful in litigation of a substantial issue").

281. *See supra* text accompanying notes 274–75.

considerations and other factors discussed above, under what circumstances should plaintiffs' federal court conduct work a waiver of the right to have a case remanded to state court?

Starting at one extreme: Pursuing the plaintiff-friendly position to its logical conclusion would lead one to consider abolishing waiver of the right to a remand. Because of the long history of judicial recognition of the waiver of the right to remand, however, it is hard to imagine that the courts themselves would cease to recognize the possibility of such a waiver. But Congress could do so. Do policy or politics go so far as to indicate that nothing a plaintiff does should waive the right to remand of an improperly removed case? What would be the consequences of such a regime?

If a case had been removed that was outside federal subject-matter jurisdiction, the case would have to be remanded, outside the circumstances described in Supreme Court cases such as *Grubbs v. General Electric Credit Corp.* and *Caterpillar Inc. v. Lewis*.[282] Not to do so would keep before the federal courts a case that Congress had not authorized those courts to hear, and that might even be outside the judicial power of the United States under Article III of the Constitution.[283] Even if, in some circumstances, a plaintiff somehow had waived the right to demand such a remand, federal courts would have their own independent obligation to remand the case.

Beyond that, a regime that recognized no conduct-based waivers of the right to have a case remanded to state court would result in somewhat fewer removed cases remaining in federal court. But the decrease would not be substantial in the grand scheme of things.[284] Every plaintiff would continue to be subject to all the limitations on what cases (or claims, under 28 U.S.C. § 1441(c)) are subject to remand, and to the time requirements concerning when remand motions have to be filed.[285] Those limitations and requirements far more frequently constrain remand than does conduct-based waiver doctrine.

A plaintiff's right to remand based on procedural defects in the removal expires thirty days after the filing of the notice of removal.[286] A plaintiff has more time to move for remand only if the grounds for the

282. *See* Caterpillar Inc. v. Lewis, 519 U.S. 61, 64 (1996); Grubbs v. Gen. Elec. Credit Corp., 405 U.S. 699, 705 (1972).

283. *See* U.S. CONST. art. III, § 2; 28 U.S.C. § 1441(a).

284. I did not do an empirical study of the numbers of cases in which plaintiffs were held to have waived their right to remand and, so far as I know, no one else has done such a study. But the survey in this Article indicates that the number of those cases is relatively small. If it went to zero, there would be no significant increase in the number of cases retained by the federal court.

285. *See* 28 U.S.C. § 1441(c).

286. *See id.* § 1441(e)(1).

motion are lack of federal subject-matter jurisdiction or discretion grounded in abstention, the supplemental jurisdiction statute, 28 U.S.C. § 1367(c), or other discretion-granting law.[287] Thus, the federal court often will not have had time or occasion to have made many rulings when a plaintiff moves for remand. If a plaintiff did move to remand after several federal court rulings had been made, and if the remand were ordered, the state court would treat the federal court rulings as if they were its own. Thus, the state court could revisit those interlocutory rulings but would not be obliged to do so. The federal court activities of the parties and many of the federal judge's rulings would not need to be wasted, and if a plaintiff were perceived to have sought remand in an effort to escape earlier rulings (making the remand potentially appeal-like), the state court would be free to rebuff the "appeal" to it and adhere to the prior rulings. The potential for abuse raised by elimination of conduct-based waiver of the right to remand thus does not seem extremely great. By analogy to what occurs when waiver of the right to remove is at issue, courts may feel a greater inclination to find waiver of the right to remand when a plaintiff appears to have sought to escape from adverse federal court rulings. But, as the analysis above indicates, denial of remand, based on waiver, might be an over-reaction because the state court is entirely capable of rebuffing a plaintiff's efforts to have the state court revisit decisions made by federal court judges, although efforts to get state judges to reconsider federal court rulings would demand some state judicial time and effort. Moreover, if the state court believed that certain decisions of federal judges were erroneous, would it not be preferable to have the state trial court correct those decisions than to leave them to be corrected by a court of appeals? Of course, the losing party will be free to take an appeal whichever way the trial court ruled, but an appeal presumably would be less likely if success on the appeal seemed less promising. All of this suggests that abolishing waiver of the right to remand would not be patently awful. But that does not mean that such abolition would be preferable.

The discussion of case law presented earlier shows that federal courts have not gone so far as to eliminate waiver of the plaintiff's right to a remand to state court.[288] Indeed, to the contrary, many courts have been rather open to holding that plaintiffs waived the right to remand by engaging in commonplace behaviors in federal court such as amending pleadings, taking and responding to discovery requests, making multiple motions, and "acquiescing" in the federal court's jurisdiction. In the preceding sections I argued that the "acquiescence" in the court's

287. *See id.* § 1367(d).

288. *See supra* Section IV.B.

jurisdiction is a myth and that courts err when they predicate a waiver of the right to remand on amendments of the complaint that provide a basis for federal jurisdiction when those amendments were made only after the court denied plaintiff's motion to remand.[289] Plaintiffs should not be put between the Scylla of claim preclusion and the Charybdis of waiver of the right to remand. Moreover, just as defendants have been recognized to have the right to defend vigorously in the forum in which they are stuck, plaintiffs should be recognized to have the right to litigate vigorously in a forum that they cannot escape. Thus, courts should not penalize plaintiffs for taking action in federal court (such as making motions or engaging in discovery) in conformity with the Federal Rules, just as defendants may engage in many sorts of litigation activities in state court without endangering their right to remove. Courts should refuse to hold that routine litigation activity waives a right to remand that plaintiffs otherwise would enjoy. Existing case law demonstrates that many federal courts hold plaintiffs to have waived their right to remand by engaging in activities that would not, if performed by defendants, waive the right to remove—activities that do not approach litigating the case on the merits.[290] There are *no* good reasons for this discrepancy and the courts, and perhaps Congress, should eliminate it. Because of the current discrepancies, the need for change in the common law governing waiver of the right to remand is far greater than the need for change in the common law governing waiver of the right to removal.

Generally, federal courts (mostly district courts) have drawn the line for defendants at pushing for resolution of potentially dispositive motions and seeking from the state court an adjudication on the merits or affirmative relief on claims that defendants introduced into the litigation.[291] Those behaviors can be expected to elicit a holding that the defendant waived its right to remove, if the plaintiff makes the waiver argument. Why? Because the defendant knows that the case is removable (that knowledge is one of the requirements for the waiver) and nonetheless pushes for resolution in state court, and/or seeks relief from the state court on claims that the defendant voluntarily brought there,

289. *See supra* text following note 215 through text accompanying note 239, and text accompanying notes 256–57.

290. *See supra* text accompanying notes 240–73. What can explain the differences in approach? The consequence of each is to favor federal courts; both holding that defendants have not waived their right to remove and holding that plaintiffs have waived their right to remand do so. But the consequence of each also is to favor defendants over plaintiffs; both holding that defendants have not waived their right to remove and holding that plaintiffs have waived their right to remand do so. Federal courts may choose or mold their doctrines in order to attain these consequences, or the explanations for the divergence in the waiver doctrines may lie elsewhere and these consequences may be just that and no more. It is very difficult to know.

291. *See supra* text accompanying notes 94–177.

although it could have brought them in the federal court to which it could remove the case.[292] Are there parallels for plaintiffs? The answer turns out to be "no." When a plaintiff is in federal court against its will and over its objection, it still must seek an adjudication on the merits and relief on the claims that it introduced into the litigation; otherwise, it eventually would face dismissal, with prejudice, for failure to prosecute the action.[293] A plaintiff does not have the power to remand the case to state court, corresponding to a defendant's power to remove a case to federal court.[294] Thus, all the plaintiff can do is to *move to* remand; if that fails, plaintiff's only choice is to litigate vigorously in federal court, and appeal the denial of its remand motion when the opportunity arises, either in conjunction with an authorized interlocutory appeal or after final judgment.

Of course, looked at from a defendant-friendly perspective, the opposite—easy waiver of plaintiff's right to remand—is desirable. It tends to bolster defendants' statutory right to remove and the interests of the federal system in hearing the types of cases in which the right to remove has been afforded. On the other hand, removals increase the federal courts' docket, and they tend to subject plaintiffs to burdens imposed exclusively, or to a unique degree, by the federal court system, interfering with plaintiffs' ability to recover in meritorious suits. Some might say that easy waiver of the plaintiffs' right to remand would not be unfair to plaintiffs, so long as they were given fair notice of the activities that would, or likely would, cause them to be held to have waived their right to remand. But the determination of fairness has to include more than notice, and the discussion above demonstrates that easy waiver of the plaintiff's right to remand is not fair.[295] It is both asymmetrical with the court's narrow findings of waiver of the right to remove, and ignores the realities of federal litigation, in which motions, discovery, and many other activities are required if one is a plaintiff in federal court. While federal courts uniformly have rejected the position that a defendant will

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292. If a defendant asserts a counterclaim that is compulsory under the state rules, that, in and of itself, would not support waiver of the right to remove. *See, e.g.*, Koch v. Medici Ermete & Figli S.R.L., No. CV 13–1411 CAS (PJWx), 2013 WL 1898544, at *3 (C.D. Cal. May 6, 2013) (finding that filing of compulsory counterclaim did not waive defendant's right to remove). *See generally* 77 C.J.S. *Removal of Cases* § 3 (2018) (stating the right to remove is not waived by the filing of an answer to the complaint or by the filing of a compulsory counterclaim); WRIGHT ET AL., *supra* note 1, § 3721 (stating that waiver will not occur when the defendant's participation in the state action was dictated by the rules of that court).

293. *See* FED. R. CIV. P. 41(b) ("If the plaintiff fails to prosecute . . . a defendant may move to dismiss the action . . . . Unless the dismissal order states otherwise, a dismissal under this subdivision (b) . . . operates as an adjudication on the merits.").

294. *See* 28 U.S.C. §§ 1441(a), 1447 (2012).

295. *See supra* notes 216–22, 240–42, 293–94 and accompanying text.

waive its right to remove if it does more than it needs to do in state court, some federal courts have come close to the position that plaintiffs who do more than they need to do in federal court, post-removal, may waive their right to remand.[296] There is no justification for this anti-plaintiff attitude. It both gives plaintiffs inadequate notice of the federal court conduct that they must avoid, and it is "substantively" unfair to plaintiffs, who should be permitted to prosecute their cases as the Federal Rules permit, without endangering their right to remand. From a public policy standpoint, restricting waiver of the right to remand also would help to preserve plaintiffs' choice of forum where state and federal courts have concurrent subject-matter jurisdiction. The effect on federal dockets would be small.

Should it matter whether plaintiffs' federal court activity occurs before they move to remand or afterward, including after their motion to remand has been denied? For all of the reasons, including Supreme Court precedents, argued above, nothing a plaintiff does in federal court after its motion to remand has been denied should waive a right to remand to state court that the plaintiff otherwise would have. If the grounds for remand are defects in removal procedure (or defendant's waiver of the right to remove), plaintiff's opportunity to make a timely remand motion is short: thirty days after the filing of the notice of removal.[297] Nothing the plaintiff does in that short time to pursue the case it filed, except *perhaps* making and actively pursuing dispositive motions such as Rule 12(e) motions to strike insufficient defenses or motions for summary judgment, should disqualify the plaintiff from seeking remand on the basis of a procedural defect in removal or of defendant's waiver of the right to remove. If the grounds for remand are defects in subject-matter jurisdiction (including § 1447(e) additions of parties who destroy subject-matter jurisdiction),[298] or matters within the district court's discretion, plaintiff has a longer opportunity to make a timely remand motion. Before moving to remand, plaintiff may take actions that go beyond pursuing the case it filed, such as adding parties or claims. Insofar as those actions do not affect the federal courts' subject-matter jurisdiction (or the matters within its discretion), they should not affect the plaintiff's right to later seek remand. If the activities are permitted by the Federal Rules, they should stand, and if the activities are not permitted by the Federal Rules, they should be disallowed—but leave intact the case as it was removed. Insofar as plaintiff's post-removal activities do affect the federal courts' subject-matter jurisdiction, the activities may alter plaintiff's right to have the case remanded to state court, under Supreme Court cases such as *Grubbs* and *Caterpillar*, but that is distinguishable from waiver or

296. *See* Lieberman, *supra* note 190.

297. 28 U.S.C. § 1447(c).

298. *Id.* § 1447(e).

forfeiture of the right to remand, and is justified based on different considerations.

V. RECOMMENDATIONS FOR CHANGE

The choice between the basic positions of relatively easy versus difficult waiver of the right to remove or obtain remand can be undergirded by politics. Even the choice between the view that the removal statutes are silent on the ability to waive the right to remove (or remand) and hence no waivers should be permitted, and the position that the waivability of statutory rights is a pervasive background principle not explicitly rejected by the removal statutes and hence that waivers of the right to remove (or to obtain remand) should be permitted, seems difficult to make, except by reference to political preferences. Because the circumstances in which removal is permitted and in which remand is required or permitted are almost entirely a function of congressional choices, it is unsurprising—indeed, it is essentially tautological—that the choices between the alternative positions are inherently political determinations.[299] But when Congress has been silent on the waivability of the right to remove (or to obtain remand of) a case and on the circumstances in which courts should find such a waiver, any judicial effort to arrive at a conclusion based on legislative intent is a stretch. Such effort may say more about particular judges' views of the importance of competing values and policies than about congressional intent, if there is any.[300]

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299. *See* Aaron-Andrew P. Bruhl, *The Jurisdiction Canon*, 70 VAND. L. REV. 499, 504 (2017).

300. *See id.* at 558–60.

> Judges with a principled commitment to the primacy of state governments, or a principled commitment to restraints on the unelected federal judiciary, should favor principles that tend to reduce the scope of federal jurisdiction. Judges who are suspicious of local authority and fear that state judges are unduly accountable will prefer the centralization and relative insulation of the federal judiciary. But federal jurisdiction also has political stakes in the somewhat less lofty sense that the availability of the federal forum helps some identifiable types of litigants and hurts others. Federal jurisdiction has always been a tool for advancing social and economic interests . . . and so we should not be surprised to see it remain so today.
>
> The preferred forum for any particular group shifts over time as social circumstances and the composition of the judiciary changes. In the 1960s and 1970s, federal court was generally regarded as the superior forum for those seeking to advance civil rights, sue manufacturers of defective products, or pursue other "liberal" goals. In more recent times, some of those preferences have changed. Although generalizations are perilous, today the federal court has

Nonetheless, one can make the decision to mold the law of waiver—as to removal and remand—to minimize the influence of politics and to enhance the roles of fairness and equality, grounded in the realities of litigation. Since courts have failed to act on their own to remedy the imbalance and unfairness in the common laws of waiver of the rights to remove and to obtain remand to state court, Congress should enact a subsection to 28 U.S.C. § 1447 that would prod courts in the right direction.

Here is the proposed language:

28 U.S.C. § 1447 (d)[301]:

> In any case removed from State court, on motion by a party the district court may hold that the defendant (or other removing party) waived the right to remove the case. A motion to remand on the ground that the defendant (or other removing party), by its conduct in State court, waived the right to remove the case must be made within 30 days after the filing of the notice of removal under section 1446(a). The provisions of section 1447(c) regarding costs, expenses, and attorney fees shall govern a remand pursuant to this subsection. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.
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> Likewise, in any case removed from State court, opposition to a motion to remand on the ground that the

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become the preferred venue for business defendants trying to fight off consumer class actions, employment-discrimination cases, and similar civil suits.

. . . .

Given the political nature of disputes over jurisdiction, it is perhaps understandable that the traditional canon of narrow construction of jurisdictional statutes can itself become politicized. That the jurisdiction canon is unfavorable to business interests probably helps to explain the Supreme Court's skepticism toward the canon over the last decade or so. . . . [G]reater access to federal jurisdiction means lower odds of recovery for plaintiffs.

. . . In particular, the canon has become the target of an interest-group campaign. In *Dart Cherokee* [*Basin Operating Co. v. Owens*, a] recent case about removal procedure . . . the Washington Legal Foundation and other pro-business groups filed an amicus brief in order to "urge the Court to strongly disavow the existence of a presumption against removability."

Id. (footnotes omitted).

301. Existing § 1447(d) would become § 1447(e) and existing § 1447(e) would become § 1447(f). For the current text, see 28 U.S.C. § 1447(d).

> plaintiff or other party, by its conduct in federal court, waived the right to have the case remanded to State court must be made within 30 days after the filing of the motion to remand, whether the remand motion was made under section 1447(c) or on other grounds.
>
> When deciding whether a defendant (or other removing party), by its conduct in State court, waived the right to remove the case and whether a plaintiff or other party, by its conduct in federal court, waived the right to have the case remanded to State court, the federal court must apply equivalent standards in judging whether the conduct in question constituted a waiver of the right to such a change in the forum. The courts, by their decisions or otherwise, shall give the parties fair notice of the activities that would cause them to be held to have waived their right to remove or to obtain remand, and shall not base waivers on most activities in which the parties engaged to effectively defend or prosecute the case. Presumptively, only activities by which parties sought and actively pursued dispositions on the merits by a court may form the basis for a federal court's conclusion that the defendant (or other removing party) waived its right to remove or a plaintiff or other party waived its right to remand, under this section; and nothing a party does after its motion to remand has been denied shall be held to waive a right to remand under this section that the party otherwise would enjoy. Differences between the responsibilities of defendants and the responsibilities of plaintiffs may result in differences in how the announced standards apply, without violating the prescription to apply equivalent standards.
>
> Nothing in this section shall be interpreted to alter the dictates of Supreme Court precedents that deny remand to State court when a removed case has gone to judgment while in a posture that would have rendered the case properly removable.

Advisory Notes should explain that federal courts ordinarily should not hold that conduct that would not waive the right to remove nonetheless waives the right to remand to state court. But the Notes should acknowledge and should advise courts and parties that a plaintiff whose case has been removed to federal court, and whose motion to

remand has been denied, may be required by the Federal Rules of Civil Procedure or court orders to engage in activities in prosecuting the action, including seeking resolution on the merits, that, if engaged in by defendants in state court, could properly lead to a holding that a defendant waived its right to remove. In taking appropriate action to conclude the federal trial court proceedings, a plaintiff would not waive its right to appeal the denial of its motion to remand. Defendants, by taking appropriate defensive action in state court, similarly would not waive their right to remove a lawsuit nor any right the defendants might have to appeal the rejection of their removal. The Advisory Notes also should distinguish remands predicated on the Supreme Court's decisions in *Grubbs* and *Caterpillar,* and reiterate that the new section (proposed here) does not alter the dictates of those cases.

CONCLUSION

Removal to federal court and remand to state court are matters closely regulated by Congress. A decreasing number of aspects of the law of removal and remand are governed by judge-made doctrines. Waiver of the right to remove through state court conduct and waiver of the right to remand through federal court conduct are among the areas that Congress has not touched. On close examination, one finds that the doctrines that the courts have molded in these domains are not evenhanded. Defendants are held to have waived their right to remove far less frequently than plaintiffs are held to have waived their right to remand. This Article has argued that the discrepancy in treatment is not defensible, and that both requirements of fair notice and substantive requirements of fairness, grounded in the realities of litigation, require the standards for determining waivers of the rights to remove and remand to be fundamentally rethought. This Article proposed new approaches, which are set forth in part as proposed legislation, because courts apparently need to be prodded by Congress to change what they have been doing.