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The Ins and outs of Federal Court: A Practitioner's Guide to Removal and Remand

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THE INS AND OUTS OF FEDERAL COURT: A PRACTITIONER'S GUIDE TO REMOVAL AND REMAND

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I. INTRODUCTION

'Tis a litigious day and age in which we live. Thus must the discerning practitioner decide whether to proceed in state court, if it be the more favorable forum, or to move to federal court, if the law and circumstances so allow. Title 28, §§ 1441-1448 pave the way for excursions between the courts, though a trip to one court does not guarantee that it will be the final destination. A party choosing to file in state court often finds itself whisked into federal court, and a party preferring the federal forum frequently finds itself redirected to state court. The practitioner must navigate between the courts with great care. The road from state court to federal court is fraught with potholes, and the road back to state court can be bumpy and costly, to say the least.

It is in this vein that this Article attempts to roadmap the paths between state and federal court. Part II discusses the authorities and practicalities guiding removal from state to federal court. Part III plots the procedural course for a successful removal. Part IV charts the way back for remand to state court. Finally, Part V surveys appellate review of the excursions between state and federal court.

II. STATUTORY AUTHORITY AND PRACTICAL CONSIDERATIONS GUIDING REMOVAL

Section 1441 of Title 28 of the United States Code provides the basis for removal jurisdiction:

> (a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending . . . .[1]

In essence, § 1441(a) provides that a case may be removed from state to federal court only when it could have been brought in federal court in the first place.[2] Thus, with the exception of specific statutory mandates and prohibitions,[3] the

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1. 28 U.S.C. § 1441(a) (1994).
2. Cervantes v. Bexar County Civil Serv. Comm'n, 99 F.3d 730, 733 (5th Cir. 1996).
3. *See infra* notes 30-31 and accompanying text.

test for determining removal jurisdiction is the same as that applied for determining original federal question and diversity jurisdiction. Paragraph (b) of § 1441 confirms this, stating the following:

> (b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties, or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.[4]

Section 1441(a) further provides that only defendants may remove a case from state to federal court. That is, "the right to remove a case from state to federal court is vested exclusively in the defendant."[5] Before embarking on this process, however, the prudent defendant should examine several practical considerations. While fear of local prejudice and the notion that state judges are not competent to adjudicate federal questions originally drove defendants to remove cases,[6] in modern times, removal is driven more by practical and strategic concerns. Defendants should thus assess such things as jury verdicts, trial rules and procedure, and the availability, caseload, and personality of federal judges in making the decision of whether to remove a case to federal court. In particular, a defendant carefully should consider the following:

> 1. With regard to juries, the geographic scope of the jury pools, the number of jurors required to reach a verdict, and the rules governing jury demand in each forum;
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> 2. With regard to procedure, familiarity with the respective procedural rules, the time frame and production requirements of each court, each court's general treatment of motion practice, and the various disclosure and discovery rules; and
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> 3. With regard to judges, the case load of each judge, his or her general degree of familiarity with files, the manner in which the judge took the bench, *i.e.*, by election or appointment, and the methods by which the judge may be removed from the case.[7]

In short, before invoking the federal jurisdiction, the defendant should consider whether removal is in his best interest. Of course, the plaintiff will likely have considered the same basic factors and, given the plaintiff's choice of the state forum, the defendant may very well find that the federal forum better advances his concerns. Assuming this to be the case, however, the defendant must move

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4. 28 U.S.C. § 1441(b) (1994).

5. DAVID HITTNER ET AL., RUTTER GROUP PRACTICE GUIDE: FEDERAL CIVIL PROCEDURE BEFORE TRIAL - 5TH CIR. ED. 2:615 (1994) ("[The] plaintiff who has chosen to commence the action in state court cannot later remove to federal court.").

6. *Id.* at 2:597.

7. *Id.* at 2:576-87.1.

swiftly and with great care. Delayed or misguided steps along the removal path may jeopardize the defendant's chances of having his case heard in federal court.

III. THE REMOVAL ROADMAP

Five basic considerations govern the proper removal of a case from state to federal court: who, what, where, when, and how. "Who" determines which party may remove a case to federal court, and "what" dictates which sorts of cases may be removed. "Where" governs the place to which the case may be removed, while "when" governs the timing of that removal. Finally, "how" regulates the method by which a case may be removed. Each of these considerations is addressed below. Before expounding upon them, however, two basic tenets of removal jurisdiction should be recognized: first, removal statutes are strictly construed, and all doubts regarding removability are resolved in favor of remand to state court.[8] Second, the burden of establishing removal jurisdiction rests with the party seeking removal, and this burden applies both to establishing federal jurisdiction and to following the appropriate procedures for removal.[9]

A. "Who" May Remove a Case from State to Federal Court?

As stated, only defendants may remove a case from state to federal court.[10] This rule is not as simple as it sounds, however. In cases involving multiple defendants, all defendants properly joined and served in the action must join in the notice of removal.[11] This general rule triggers several corollary rules. First, if a properly joined defendant who has been served with notice of the state action refuses to join in the notice of removal, the case may not be removed.[12] Second, a defendant who has not been served by the plaintiff in the state action need not join in the notice of removal.[13] Finally, federal law determines which parties are "defendants" for removal purposes, and simply because a party is aligned as a defendant by the plaintiff does not mean that the court will treat him as a defendant for removal purposes.[14] Instead, federal courts apply a functional test of party status, assessing which parties are attempting to achieve a particular result and which parties are resisting that effort.[15] It is on this basis that the "plaintiffs" and the "defendants" are aligned.

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8. Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100 (1941).

9. Allen v. R & H Oil & Gas Co., 63 F.3d 1326, 1335 (5th Cir. 1995); Gaitor v. Peninsular & Occidental S.S. Co., 287 F.2d 252, 253-54 (5th Cir. 1961).

10. 28 U.S.C. § 1441(a) (1994).

11. Smilgrin v. New York Life Ins. Co., 854 F. Supp. 464 (S.D. Tex. 1994). All defendants must concur in removal and file their notice of removal within thirty days from when the first defendant was served with state court process. A defendant who does not initially join in the removal may do so, but only if done within the thirty days allotted for removal. Getty Oil Corp. v. Insurance Co. of N. Am., 841 F.2d 1254, 1263 (5th Cir. 1988). *But see* Doe v. Kerwood, 969 F.2d 165, 169 n.15 (5th Cir. 1992) (noting exceptions to rule may be recognized based on equitable concerns and on a case-by-case basis). *See also* McKinney v. Board of Trustees, 955 F.2d 924, 927 (4th Cir. 1992) (allowing each defendant thirty days from time of service).

12. *Doe*, 969 F.2d at 167; Acme Brick Co. v. Agrupacion Exportadora de Maquinaria Ceramica, 855 F. Supp. 163 (N.D. Tex. 1994).

13. Pullman Co. v. Jenkins, 305 U.S. 534 (1939); Wesley v. Mississippi Transp. Comm'n, 857 F. Supp. 523 (S.D. Miss. 1994).

14. Chicago v. Stude, 346 U.S. 574 (1954).

15. OPNAD Fund, Inc. v. Watson, 863 F. Supp. 328 (S.D. Miss. 1994).

A few other principles guide the courts in analyzing "defendants" for removal purposes. When faced with the removal of separate and independent claims under 28 U.S.C. § 1441(c), the courts consider only those defendants implicated by the removed claims in assessing removal jurisdiction.[16] Similarly, the presence of certain defendants is disregarded by federal courts in reviewing removal jurisdiction, such as defendants only nominally or formally joined,[17] defendants fraudulently joined,[18] and defendants whose identities are unknown.[19] Finally, federal circuit courts are split on whether a third-party defendant may remove a case from state to federal court. While the Fifth and Eleventh Circuits have held that a third-party defendant may remove a case (assuming federal jurisdiction exists)[20] other circuits have refused to allow third-party defendants to remove cases where the original defendants have refused to do so.[21] In almost any circuit, moreover, it would appear that the "third-party defendant" seeking to remove must be joined actually and properly in the action before removal may occur. At least one court has held that removal by an alleged third-party defendant was defective because, at the time of the removal, the party seeking to join the third-party defendant had not yet received court permission to join him as a party. Absent such permission, the third-party defendant had no right to remove the case, as it could not appear voluntarily to do so and could not be forced to appear involuntarily in order to take that action.[22]

Finally, because the power of removal is vested exclusively in the defendant, a plaintiff may not remove its own case to federal court after it has filed suit in state court. This is true even if the defendant asserts a counter-claim against the plaintiff, and the plaintiff believes that the counter-claim triggers federal jurisdiction.[23] At least one circuit has noted a quasi-exception to this rule, however, holding that in arbitration enforcement proceedings, the first party to invoke court assistance is deemed the plaintiff for removal purposes. Thus, the opposing party is deemed the defendant and may seek removal of the state case, and it is immaterial that this party may actually have been the party to initiate the arbitration proceedings.[24]

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16. *Acme Brick Co.*, 855 F. Supp. at 165.

17. Tri-Cities Newspapers, Inc. v. Tri-Cities Printing Pressman Local 349, 427 F.2d 325, 326-27 (5th Cir. 1970). *Cf.* Summit Mach. Tool Mfg. Corp. v. Great N. Ins. Co., 883 F. Supp. 1529 (S.D. Tex. 1994) (insurance broker not merely nominal party where plaintiff could assert claim against insurance broker and his company for damage to property).

18. *See* Dodson v. Spiliada Maritime Corp., 951 F.2d 40 (5th Cir. 1992); Farias v. Bexar County Bd. of Trustees, 925 F.2d 866 (5th Cir. 1991); B., Inc. v. Miller Brewing Co., 663 F.2d 545 (5th Cir. 1981).

19. *Farias*, 925 F.2d at 871. *Cf.* Tompkins v. Lowe's Home Ctr., Inc., 847 F. Supp. 462 (E.D. La. 1994) (suit naming diverse employer and fictitious employee remanded for lack of complete diversity when it was discovered that employee was domiciled in same state as plaintiff, only one employee was implicated in plaintiff's action, and employee's citizenship was established at commencement of action).

20. *In re* Surinam Airways Holding Co., 974 F.2d 1255, 1259 (11th Cir. 1992); Carl Heck Engineers, Inc. v. La Fourche Parish Police Jury, 622 F.2d 133, 135-36 (5th Cir. 1980).

21. *See, e.g.*, Lewis v. Windsor Door Co., 926 F.2d 729, 732 (8th Cir. 1991); Thomas v. Shelton, 740 F.2d 478, 486 (7th Cir. 1984).

22. Delgado v. Shell Oil Co., 890 F. Supp. 1324 (S.D. Tex. 1995). The Texas court also held that the third-party's right to remove did not run from receipt of a courtesy copy of the petition prior to that court's grant of leave to file the third-party complaint. *Id.* at 1343.

23. *See, e.g.*, Shamrock Oil & Gas Corp. v. Sheets, 33 U.S. 100 (1941); Ballards' Serv. Ctr., Inc. v. Transue, 865 F.2d 447, 449 (5th Cir. 1989).

24. Oppenheimer & Co. v. Neidhardt, 56 F.3d 352, 356 (2d Cir. 1995). The Fifth Circuit does not appear to have addressed this quasi-exception.

B. "What" Types of Cases May Be Removed?

The bulk of reported cases dealing with removal issues address whether federal jurisdiction exists in the first place. Because federal courts are courts of limited jurisdiction,[25] the removed case must be one which, at the time of the removal, could have been brought in federal court initially.[26] There are several bases upon which a court may rest federal removal jurisdiction. The first two — and the primary two — are diversity and federal question jurisdiction.[27] Governed by 28 U.S.C. § 1332, diversity jurisdiction exists when:

> the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between —
> (1) citizens of different States;
> (2) citizens of a State and citizens or subjects of a foreign state;
> (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and
> (4) a foreign state . . . as plaintiff and citizens of a State or of different States.[28]

Federal question jurisdiction exists over "all civil actions arising under the Constitution, laws, or treaties of the United States."[29] There are, however, several special statutes that also confer federal jurisdiction for removal purposes. These statutes concur the following: claims against federal officers and members of the armed forces, certain civil rights claims, foreclosure actions against the United States, removal of actions by the Resolution Trust Corporation and Federal Deposit Insurance Corporation, claims related to bankruptcy cases, cases concerning federal regulation of international and foreign banking, arbitration agreements or awards falling under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, actions involving the International Monetary Fund or the International Bank for Reconstruction and Development, actions in which the postal service is a party, and actions against foreign states.[30] Similarly, several special statutes prohibit the removal of certain types of claims. Among these are as follows: state court actions based on the Securities Act of 1933, state court actions against a railroad arising under the Federal Employers'

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25. Coury v. Prot, 85 F.3d 244, 248 (5th Cir. 1996).

26. Cervantez v. Bexar County Civil Serv. Comm'n, 99 F.3d 730, 733 (5th Cir. 1996).

27. *See, e.g.*, Robert F. Daley, Jr., *Basic Removal Practice and Procedure*, 6 S.C. LAW. 25 (1995) (two basic grounds for removal are federal question and diversity jurisdiction).

28. 28 U.S.C. § 1332(a) (1994). Other diversity jurisdiction statutes include 28 U.S.C. § 1330(a) (1994) (actions against foreign states); 28 U.S.C. § 1350 (1994) (alien's action for tort); and 28 U.S.C. § 1354 (1994) (land grants from different states).

29. 28 U.S.C. § 1331 (1994).

30. *See* 28 U.S.C. § 1442 (1994) (federal officers sued or prosecuted); 28 U.S.C. § 1442(a) (1994) (members of armed forces sued or prosecuted); 28 U.S.C. § 1443 (1994) (civil rights cases); 28 U.S.C. § 1444 (1994) (foreclosure actions against the United States); 12 U.S.C. §§ 1441(a)(1)(3) (1994) and 1819(b)(2)(D) (1994) (removal of actions by the RTC and FDIC); 28 U.S.C. § 1452 (1994) (claims related to bankruptcy cases); 12 U.S.C. § 632 (1994) (cases concerning federal regulation of international and foreign banking); 9 U.S.C. § 205 (1994) (arbitration agreement or award falling under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards); 22 U.S.C. § 286(g) (1994) (actions involving International Monetary Fund or International Bank for Reconstruction and Development); 39 U.S.C. § 409 (1994) (actions in which postal service is a party); 28 U.S.C. § 1441(d) (1994) (actions against a foreign state).

Liability Act, certain state court actions against common carriers, state court actions arising under states' workers' compensation laws, state court Jones Act claims, certain admiralty actions arising under the "saving to suitors" clause, state court actions under the Death on the High Seas Act, and certain state court domestic violence actions.[31] Because the bulk of removal disputes involve diversity or federal question jurisdiction,[32] this Article will concentrate only on those actions.[33]

1. Diversity Jurisdiction as a Basis for Removal to Federal Court

Statutory diversity jurisdiction exists over controversies between citizens of different states, and between a state or citizen thereof and a foreign state or its citizens, provided the amount in controversy exceeds $75,000, exclusive of interest and costs.[34] For diversity jurisdiction to exist, diversity must be complete.[35] That is, all plaintiffs must be diverse in citizenship from all defendants, and no plaintiff may have the same citizenship as any of the defendants.[36] Even assuming complete diversity exists, a defendant may not invoke diversity jurisdiction if any defendant is a citizen of the state where the suit was filed.[37] Thus, if a defendant is sued in his home state, there is no removal jurisdiction, even if good diversity exists.

Further, the test for diversity jurisdiction applies both at the time suit was filed and the time the removal notice was filed.[38] Thus, a change in a party's citizen-

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31. *See* 15 U.S.C. § 77v(a) (1994) (actions based on Securities Act of 1933); 28 U.S.C. § 1445(a) (1994) (actions against a railroad arising under FELA); 28 U.S.C. § 1445(b) (1994) (actions against common carriers); 28 U.S.C. § 1445(c) (1994) (actions arising under states' workers' compensation laws); 46 U.S.C. § 688 (1994) (Jones Act claims); 28 U.S.C. § 1333 (1994) (admiralty actions under "saving to suitors" clause); 46 U.S.C. § 761 (1994) (actions under Death on the High Seas Act); 28 U.S.C. § 1445(d) (1994) (domestic violence actions).

32. Gordon D. Polozola, Note, *The Battle of Removal—Is Delay the Ultimate Weapon?: A Note on* Martine v. National Tea Co., 54 LA. L. REV. 1419 (1994) (parties attempting removal rely primarily on diversity and federal question jurisdiction).

33. For a thorough discussion of the special statutory grounds conferring and prohibiting the exercise of federal jurisdiction, *see* Fred Shannon & Barbara Nellermoe, *To Federal Court and Back Again: Significant Changes to Removal and Remand Statutes, in* SAN ANTONIO TRIAL LAWYERS ASSOCIATION SEMINAR: PITFALLS IN THE PLAINTIFF'S CASE—AND HOW TO AVOID THEM (1989).

34. 28 U.S.C. § 1332 (1994).

35. *See* Vasquez v. Alto Bonito Gravel Plant Corp., 56 F.3d 689 (5th Cir. 1995); Bankston v. Burch, 27 F.3d 164 (5th Cir. 1994). In contrast to the rules requiring only served defendants to join in the notice of removal, both served and unserved defendants must satisfy the diversity of citizenship requirement. *See, e.g.*, Zaini v. Shell Oil Co., 853 F. Supp. 960 (S.D. Tex. 1994).

36. There are a few exceptions to this rule: first, the federal interpleader statute, 28 U.S.C. § 1335, only requires that there be two adverse claimants who are of diverse citizenship, even if all claimants are not diverse from each other; second, in the class action setting, only the citizenship of the named parties is counted in determining citizenship. Snyder v. Harris, 394 U.S. 332 (1969).

37. 28 U.S.C. § 1441(b) (1994). Most courts hold that this rule is not jurisdictional and, thus, if a plaintiff fails to challenge the removal by a timely motion to remand, the defect will be waived. *See In re* Shell Oil Co., 932 F.2d 1518 (5th Cir. 1991); Korea Exchange Bank v. Trackwise Sales Corp., 66 F.3d 46 (3d Cir. 1995). *But see* Hurt v. Dow Chem. Co., 963 F.2d 1142 (8th Cir. 1992) (holding the no-local-defendants rule is jurisdictional in nature). By contrast, lack of complete diversity has been held to be a jurisdictional defect, and thus incapable of waiver. Horton v. Scripto-Tokai Corp., 878 F. Supp. 902 (S.D. Miss. 1995); Metroplex Infusion Care, Inc. v. Lone Star Container Corp., 855 F. Supp. 897 (N.D. Tex. 1994).

38. Coury v. Prot, 85 F.3d 244, 249 (5th Cir. 1996).

ship after suit or after removal will not affect diversity jurisdiction.[39] This temporal limitation does not apply in cases where a nondiverse party has been voluntarily dropped from the case by the plaintiff after filing but before removal. In that case, the citizenship of the nondiverse party will be disregarded and diversity jurisdiction will exist, assuming complete diversity of all other parties.[40]

a. Determination of Citizenship

Several detailed rules govern the determination of a party's citizenship. First, the citizenship of an individual, for diversity purposes, is determined by "domicile" and not mere residence. Domicile is a question of federal law and is said to be the place of a party's fixed and permanent home or the place where the party intends to return whenever absent.[41] This rule applies to United States citizens[42] as well as to permanent resident aliens.[43] And, in cases of doubt about an individual's domicile, federal courts look to such factors as where the party pays taxes, owns a home, votes, banks, registers cars, spends time, and the like.[44] A change in domicile occurs only if an individual begins physically to reside in a new state and evidences a desire to remain in that domicile indefinitely.[45] Thus, usually, a party who has a domicile will not lose it until it affirmatively acquires a new one.[46]

By contrast, a corporation may have more than one place of citizenship. A corporation is deemed a citizen of any state in which it is incorporated as well as the

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39. St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283 (1938); *Coury*, 85 F.3d at 248. However, if a party manages to change his citizenship before the action is filed, diversity jurisdiction can be created. Minnesota Mining & Mfg. v. Kirkevald, 87 F.R.D. 317, 320 (D. Minn. 1980).

40. *See* S.W.S. Erectors, Inc. v. Infax, Inc., 72 F.3d 489 (5th Cir. 1996); Weems v. Louis Dreyfus Corp., 380 F.2d 545 (5th Cir. 1967). This exception does not apply when the nondiverse party is involuntarily dismissed, as, for example, on a summary judgment motion. Canova v. C.R.C., Inc., of La., 602 F. Supp. 817 (M.D. La. 1985). Moreover, the nondiverse defendant must actually have been dismissed by the time the removal notice is filed for the voluntary dismissal rule to apply. *See, e.g.*, Vasquez v. Alto Bonito Gravel Plant Corp., 56 F.3d 689 (5th Cir. 1995) (settlement not yet approved by court and thus settling, nondiverse defendant was not yet dismissed).

41. Stine v. Moore, 213 F.2d 446, 448 (5th Cir. 1954).

42. In the case of dual citizenship, only the American nationality is recognized. *Coury*, 85 F.3d at 248. Thus, for diversity to exist, the parties must satisfy the provision relating to diversity between United States citizens and may not rely upon the "alienage" provision of § 1332. *Id.*

43. 28 U.S.C. § 1332(a) (1994). By contrast, true "aliens" or persons who are citizens of another country and not residing in the United States permanently are diverse from United States citizens due to "alienage," that is, suits involving these parties would trigger 28 U.S.C. § 1332 dealing with suits between a citizen of the United States and a citizen of a foreign country.

44. *See, e.g.*, *Coury*, 85 F.3d at 251 (considering places litigant exercises civil and political rights, pays taxes, owns property, has driver's licence, maintains bank accounts, belongs to clubs, has business or place of employment, and maintains home).

45. *Coury*, 85 F.3d at 251.

46. *Id.* It is possible for an individual to have no domicile. For instance, suppose *X* is a citizen of the United States but is domiciled in England. *X* would not satisfy diversity requirements as to *Y*, a citizen of Louisiana, because *X* would not be a citizen of any "state" for diversity purposes. *See, e.g.*, *Id.* (to be a citizen of a state, individual must be citizen of the United States and be domiciled in a state). *See also* Smith v. Carter, 545 F.2d 909 (5th Cir.), *cert. denied*, 431 U.S. 955 (1977).

one state in which it has its principle place of business.[47] A corporation's principle place of business is where the bulk of its total corporate activity takes place,[48] and there can only be one principle place of business for the corporation. Thus, no matter how far-flung the corporation's activities, it is not a citizen of each and every state in which it operates. Rather, citizenship attaches only in those states of incorporation and the one state in which the corporation most heavily performs.

The citizenship of unincorporated associations, such as partnerships, joint ventures, unions, and the like, is the citizenship of each of their individual members.[49] With regard to limited partnerships, this includes both general and limited partners.[50] In situations involving representative parties, generally the citizenship of the one who has the legal right to sue and who represents those with beneficial interests will control. Thus, for example, a trust is a citizen of the state of citizenship of each of its individual trustees.[51] There are exceptions to this rule, however, in instances of estates of decedents, infants, and incompetents. The legal representative of an estate is a citizen only of the state of citizenship of the decedent,[52] and the legal representative of an infant or incompetent is a citizen only of the state of citizenship of the infant or incompetent.[53]

Finally, special rules exist to control certain specific litigation settings. As mentioned previously, a general rule of diversity jurisdiction is that complete diversity must exist for diversity to attach. However, the courts have carved out several exceptions to this rule when the circumstances so demand. First, if between the time suit is filed and removal is noticed, a nondiverse party is voluntarily dismissed, then that party's citizenship will be disregarded at the time diversity jurisdiction is tested. Second, diversity of citizenship need not exist as to third-party claims, either between the plaintiff and the third-party defendant or the third-party plaintiff and the third-party defendant.[54] Third, the citizenship of parties merely nominally or formally joined will be disregarded by the courts.

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47. 28 U.S.C. § 1332(c)(1). A similar rule applies to insurers sued pursuant to a direct action statute. Section 1332(c)(1) of Title 28 of the United States Code provides that

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

This proviso does not apply, however, unless the suit is against the insurer. It does not apply to suits by the insurer. Northbrook Nat'l Ins. Co. v. Brewer, 493 U.S. 6 (1989).

48. Toms v. Country Quality Meats, Inc., 610 F.2d 313, 315 (5th Cir. 1980).

49. United Steelworkers of Am. v. R.H. Bouligny, Inc., 382 U.S. 145 (1965); Bankston v. Burch, 27 F.3d 164 (5th Cir. 1994). However, it should be noted that states and their alter ego agencies elude diversity jurisdiction because they are not considered to be citizens at all for diversity purposes. Texas Dep't Hous. & Community Affairs v. Verey ASSR, 68 F.3d 922 (5th Cir. 1995).

50. Carden v. Arkoma Assocs., 494 U.S. 185 (1990); *Bankston*, 27 F.3d at 168.

51. This is true of trusts generally. Susquehanna & Wyoming Valley R.R. & Coal v. Blatchford, 78 U.S. (11 Wall.) 172 (1870); Navarro Sav. & Loan Ass'n v. Lee, 446 U.S. 458 (1980) (business trust).

52. 28 U.S.C. § 1332(c)(2) (1994).

53. *Id.*

54. *See, e.g.*, Stemmler v. Burke, 344 F.2d 393 (6th Cir. 1965); Smith v. Philadelphia Trans. Co., 173 F.2d 721 (3d Cir.), *cert. denied*, 338 U.S. 819 (1949) (plaintiff and third-party defendant); Huggins v. Graves, 337 F.2d 486 (6th Cir. 1964); Southern Milling Co. v. United States, 270 F.2d 80 (5th Cir. 1959) (third-party plaintiff and third-party defendant).

Fourth, parties subsequently joined to a suit, such as parties joined as part of a compulsory counter-claim[55] or parties who join as intervenors of right,[56] generally do not affect diversity jurisdiction. Finally, parties fraudulently joined by a plaintiff in an effort to defeat diversity jurisdiction will be ignored by the federal courts in ascertaining whether diversity exists.[57]

b. Calculating the Amount in Controversy

Once it is determined that diverse citizenship exists, the court next investigates the amount in controversy. Section 1332 provides that the amount in controversy must exceed $75,000, exclusive of interest and costs. Unlike the citizenship requirement, the jurisdictional amount element need only be satisfied at the time of removal.[58] At that point, the court will look to the face of the complaint to determine whether the amount exists.[59] If the answer is not apparent from the face of the complaint or if a party challenges the damages amount ascribed, then the court will proceed by way of one of two possible tests: (1) the preponderance of the evidence test or (2) the legal certainty test.[60]

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55. *See, e.g.*, H. L. Peterson Co. v. Applewhite, 383 F.2d 430 (5th Cir. 1967). In the case of the permissive counter-claim, however, diversity of citizenship must exist. Reynolds v. Maples, 214 F.2d 395 (5th Cir. 1954). Moreover, a party who is found to be an indispensable party and who destroys diversity may be joined only at the court's discretion and, if joined, necessitates remand of the case to state court. Bankston v. Burch, 27 F.3d 164, 167-68 (5th Cir. 1994); Hensgens v. Deere & Co., 833 F.2d 1179 (5th Cir. 1987). Correlatively, the court may, in its discretion, choose to dismiss a nondiverse, indispensable party, if such dismissal will not prejudice the remaining defendants. Elliott v. Tilton, 69 F.3d 35 (5th Cir. 1995).

56. *See, e.g.*, Phelps v. Oaks, 117 U.S. 236 (1886); Smith Petroleum Serv., Inc. v. Monsanto Chem. Co., 420 F.2d 1103 (5th Cir. 1970).

57. *See* Farias v. Bexar County Bd. of Trustees, 925 F.2d 866 (5th Cir. 1991). Defendants seeking to remove such a case have the burden of establishing fraudulent joinder. Fraudulent joinder will be recognized if a defendant successfully proves actual fraud in naming the nondiverse defendant or demonstrates that there is no possible way that the plaintiff may recover against the nondiverse defendant under the facts alleged and the relevant law. *See* Dodson v. Spiliada Maritime Corp., 951 F.2d 40 (5th Cir. 1992); B., Inc. v. Miller Brewing Co., 663 F.2d 545 (5th Cir. 1981). *See, e.g.*, LeJeune v. Shell Oil Co., 950 F.2d 267 (5th Cir. 1992) (state law does not impose vicarious liability on plant manager unless he owed a personal duty to plaintiff); Carriere v. Sears, Roebuck & Co., 893 F.2d 98 (5th Cir. 1990) (co-worker was immune from suit unless he committed intentional misconduct, which was not alleged). A similar rule applies to fraudulent assignments. *See, e.g.*, Smilgrin v. New York Life Ins. Co., 854 F. Supp. 464 (S.D. Tex. 1994) (assignment of 1% of interest in order to defeat diversity jurisdiction).

58. 28 U.S.C. § 1332. *See* Richard Schilffarth & Assocs. v. Commonwealth Equity Servs., 715 F. Supp. 246, 247 (E.D. Wis. 1989).

59. St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283 (1938); S.W.S. Erectors v. Infax, Inc., 72 F.3d 489 (5th Cir. 1996).

60. For a thorough exposition of the various standards applicable in determining the amount in controversy, see Jack E. Karns, *Removal to Federal Court and the Jurisdictional Amount in Controversy Pursuant to State Statutory Limitations on Pleading Damage Claims*, 28 CREIGHTON L. REV. 1091 (1996). Karns carefully traces the case law of each circuit, noting that a circuit split exists as to the standard applicable in determining jurisdictional amount when the plaintiff has failed or is precluded from alleging a particular sum of damages. Karns concludes that the Fifth and Eleventh Circuits still apply the "legal certainty" test in such a situation, that the Sixth Circuit applies the "more likely than not" test, and that the Third and Seventh Circuits apply the "reasonable probability" test. It should be noted, however, that since the publication of Mr. Karns article, the Fifth Circuit has relaxed its jurisdictional amount standard, and now applies the preponderance of the evidence test whenever the complaint in issue does not contain an allegation of a damages amount. *See* Allen v. R & H Oil & Gas Co., 63 F.3d 1326 (5th Cir. 1995). For a more general recount of diversity and the requirement of jurisdictional amount, see Charles A. Carlson, *Trial Lawyers Forum: Removal to Federal Court on the Basis of Diversity Jurisdiction: The "Amount in Controversy" Controversy*, 69 FLA. BAR J. 77 (1995).

The preponderance of the evidence test applies in cases where the plaintiff has failed to plead a set or determined amount of damages.[61] In certain states, such as Louisiana and Texas,[62] this virtually always will be the case, as the state procedural rules expressly prohibit plaintiffs from pleading a sum certain in damages. In applying the preponderance of the evidence test, the court refers to summary-judgment types of evidence.[63] The defendant need only prove by a preponderance of such evidence that the plaintiff's claim exceeds the $75,000 jurisdictional amount.[64] The court, in assessing the defendant's claim, will look first to the face of the complaint and, if the jurisdictional amount is not apparent, will then consider facts set forth in the removing party's petition, any affidavits submitted, the parties' discovery responses, and other summary-judgment-type evidence.[65] Mere conclusory allegations of removal jurisdiction are not sufficient to satisfy the preponderance of the evidence test.[66] Moreover, the plaintiff may avoid all of this by filing a binding stipulation or affidavit with his complaint conclusively limiting its damages to less than $75,000.[67] In fact, even if the plaintiff's statement does not conclusively limit its damages, the court will still find removal jurisdiction lacking, if the defendant fails to rebut the plaintiff's statement with other evidence.[68]

The legal certainty test, by contrast, applies in those cases where the plaintiff has pleaded a set amount of damages in excess of the jurisdictional amount.[69] This usually only occurs in cases where the plaintiff has invoked the jurisdiction of the federal court.[70] In such cases, if the damages amount pled appears to have been pled in good faith, then the federal court will accept the stated amount as a presumptively correct assessment of the plaintiff's claim. Only if it appears, "to a legal certainty, that the claim is really for less than the jurisdictional amount," will the court dismiss the claim for lack of diversity jurisdiction.[71]

Finally, in those cases where the plaintiff has pleaded a set amount of damages and that sum is less than the jurisdictional amount, then a combination of the preponderance of the evidence and the legal certainty tests applies.[72] In such cases, the plaintiff's damages allegation is accepted as presumptively correct, unless the defendant can show that it was made in bad faith.[73] The defendant may do this by way of the preponderance of the evidence test. That is, the defendant need only show by a preponderance of summary-judgment-type evidence

61. *Allen*, 63 F.3d at 1335; De Aquilar v. Boeing Co., 11 F.3d 55, 58 (5th Cir. 1993).
62. *See, e.g.*, TEX. R. CIV. P. ANN. r. 47 (West 1996); LA. CODE CIV. PROC. ANN. art. 893 (West 1997).
63. *S.W.S. Erectors*, 72 F.3d at 482.
64. *De Aquilar*, 11 F.3d at 58.
65. *Allen*, 63 F.3d at 1335.
66. *Id. See also* Gaus v. Miles, Inc., 980 F.2d 564 (5th Cir. 1992).
67. *De Aquilar*, 47 F.3d at 1412.
68. *See* Asociacion Nacional de Pescadores v. Dow Quimica de Colombia S.A., 988 F.2d 559, 565 (5th Cir. 1993).
69. St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283 (1938).
70. *See De Aquilar*, 47 F.3d at 1409.
71. *Id.* at 1409 (quoting St. Paul Indem. Co., 303 U.S. at 288-90).
72. *Id.* at 1410-12.
73. *Id.* at 1410 (noting a plaintiff may abuse the system by pleading a damages amount below the jurisdictional amount, all along knowing that state laws allow it to recover in excess of that amount).

that the amount in controversy actually exceeds the jurisdictional amount.[74] If the defendant succeeds in this endeavor, then the plaintiff must come forward with proof that, to a legal certainty, it will not recover more than the stated amount. The plaintiff may carry this burden by pointing to state law precluding recovery in excess of that amount or, if the plaintiff has been insightful enough, may rely upon the binding stipulation or affidavit filed along with its complaint that limits its recovery to less than the jurisdictional amount.[75]

In calculating the jurisdictional amount, the court also must take into account the types of damages alleged and the number of parties in the case. Section 1332 clearly provides that interest and costs are not counted in determining whether the $75,000 amount is met.[76] An exception exists, however, for interest claims which form part of the underlying obligation, such as a promissory note, or which are an essential ingredient of the underlying claim.[77] Attorneys' fees, unlike interest and costs, are not statutorily excluded from the calculation of the jurisdictional amount. Thus, if provided for by contract or statute, attorneys' fees are included in determining the jurisdictional amount.[78] Similarly, claims for punitive damages may be cumulated with compensatory damages claims to achieve the required $75,000 amount.[79] Finally, in cases where a plaintiff seeks injunctive or declaratory relief, the amount in controversy equates to the value of the right sought to be protected or the extent of the injury sought to be prevented.[80] Suits to compel arbitration similarly look to the amount of the potential underlying award to determine the jurisdictional amount in controversy.

The number of parties in the case and the method of their joinder also influences the jurisdictional amount. In general, a single plaintiff may aggregate all of his damages claims against a particular defendant, regardless of whether those claims are related to each other.[81] Likewise, the claims of two or more plaintiffs against a particular defendant may be aggregated, provided they seek to enforce a single title or right that emanates from a common and undivided interest.[82] If the plaintiffs' claims are separate and distinct, however, then their damage demands may not be cumulated.[83] Similarly, the claims of a single plaintiff against multiple and unrelated defendants may not be cumulated to meet the jurisdictional amount.[84]

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74. *Id.* at 1412.
75. *Id.*
76. 28 U.S.C. § 1332 (1994).
77. *See, e.g.*, Brown v. Webster, 156 U.S. 328 (1895).
78. For a thorough exposition of the various standards applicable in determining the amount in controversy, *see* Karns, *supra* note 60.
79. *See* Bell v. Preferred Life Assurance Soc'y of Montgomery, 320 U.S. 238 (1943); Allen v. R. & H. Oil & Gas Co., 63 F.3d 1326 (5th Cir. 1995).
80. Webb v. Investacorp., 89 F.3d 252, 256 (5th Cir. 1996).
81. *See* Jones Motor Co. v. Teledyne, Inc., 690 F. Supp. 310 (D. Del. 1988). Although this was clearly the rule under the pre-1988 amendment law, the amended version of 28 U.S.C. § 1367 casts the viability of this rule into doubt. Supplemental jurisdiction now requires that all of the claims form part of the same case or controversy. 28 U.S.C. § 1367 (1994).
82. Troy Bank v. G.A. Whitehead & Co., 222 U.S. 39 (1911); Allen v. R & H Oil & Gas Co., 63 F.3d 1326, 1331-32 (5th Cir. 1995) (defining a common, undivided right as one which contemplates only one right of recovery as opposed to separate rights of recovery).
83. *Allen*, 63 F.3d at 1331.
84. Jewell v. Grain Dealers Mut. Ins. Co., 290 F.2d 11 (5th Cir. 1961).

Finally, in class action cases, special rules apply in testing the requirement of jurisdictional amount. Several circuits have held that claims for punitive damages and attorneys' fees may be aggregated and then attributed, as a whole, to compensatory damages claims in satisfaction of the $75,000 amount.[85] For example, in *Allen v. R & H Oil & Gas Co.*,[86] the Fifth Circuit, interpreting Mississippi law, and determined that the sum of all punitive damages claims may be attributed as a whole to each individual class plaintiff's jurisdictional amount requirement.[87] The court reached a similar decision with regard to attorneys' fees in *In re Abbott Laboratories*,[88] but articulated a much broader rule in the process. In *Abbott Laboratories*, the court applied Louisiana law, which provided that all class plaintiffs' attorneys' fees claims could be aggregated and attributed to each named plaintiff in satisfaction of his jurisdictional amount.[89] The court then noted that the Judicial Improvements Act of 1990[90] overruled *Zahn v. International Paper Co.*[91] and held that the doctrine of supplemental jurisdiction provides a hook for the exercise of subject matter jurisdiction over the *unnamed* plaintiffs' claims.[92] Thus, after *Abbott Laboratories*, even in those cases where punitive damages or attorneys' fees may only be aggregated in satisfaction of the named class plaintiffs' jurisdictional amounts, the courts still have subject matter jurisdiction to entertain the unnamed plaintiffs' claims, even if they are for less than the $75,000 jurisdictional amount.

2. Federal Question Jurisdiction Grounding Removal Jurisdiction

A second popular basis for invoking removal jurisdiction is grounded upon federal question jurisdiction. Section 1441(b) of Title 28 of the United States Code provides that federal district courts have federal jurisdiction over cases arising under the Constitution, laws, and treaties of the United States.[93] A case is deemed to "arise under" federal law for § 1331 purposes whenever federal law, either expressly[94] or impliedly,[95] creates the cause of action upon which the plaintiff is suing.[96] A case also may "arise under" federal law even if state law creates

85. *See, e.g.*, Tapscott v. MS Dealer Service Corp., 77 F.3d 1353 (11th Cir. 1996) (aggregating punitive damages for purposes of determining amount in controversy); *Allen*, 63 F.3d at 1326 (also aggregating punitive damages claims and attributing whole amount to each individual plaintiff); *In re* Abbott Lab., 51 F.3d 524, 525-26 (5th Cir. 1995) (aggregating attorney's fees and attributing the whole amount to each named plaintiff).

86. 63 F.3d 1326 (5th Cir. 1995).

87. *Allen*, 63 F.3d at 1326.

88. 51 F.3d 524 (5th Cir. 1995).

89. *Abbott Labs.*, 51 F.3d at 525-26.

90. 28 U.S.C. § 1367 (1994) (providing for supplemental jurisdiction over related claims).

91. 414 U.S. 291 (1974).

92. *Abbott Labs.*, 51 F.3d at 527-29.

93. *See also* 28 U.S.C. § 1331 (1994) (original federal question jurisdiction); Great N. Ry. Co. v. Alexander, 246 U.S. 276 (1918); Cervantez v. Bexar County Civil Serv. Comm'n, 99 F.3d 730 (5th Cir. 1996).

94. *See* Feibelman v. Packard, 109 U.S. 421 (1883).

95. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

96. *See* Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1 (1983). The suit must "really and substantially" involve a dispute regarding the "validity, construction or effect" of the law "upon the determination of which the result depends." Shulthis v. McDougal, 225 U.S. 561, 569 (1912). *See also* Gully v. First Nat'l Bank, 299 U.S. 109, 117 (federal question jurisdiction requires that the federal issue "be an element, and an essential one, of the plaintiff's cause of action").

the actionable right, provided it is necessary for the plaintiff to plead and prove a substantial proposition of federal law in making its case. Generally, no cases other than those falling within these two enumerated categories will be considered to "arise under" federal question jurisdiction in satisfaction of § 1331. Removal based on federal question jurisdiction is tested at the time the removal notice is filed.[97]

In determining whether federal question jurisdiction exists, courts generally look to the fact of the plaintiff's "well-pleaded complaint."[98] If, on the face of the plaintiff's complaint, no federal question is apparent, then federal removal jurisdiction does not exist.[99] The mere fact that a complaint may raise a federal defense to the plaintiff's claim does not satisfy the federal question requirement.[100] The plaintiff is the master of its complaint, and the plaintiff ultimately decides what law to rely upon and in which court to file suit. The plaintiff, by filing in state court and refusing to include a federal claim, thus may preclude the defendant from removing to federal court, even if a federal claim might also have been alleged in the complaint.[101]

Of course, like any general rule, there are exceptions to the "well-pleaded complaint" principle. A plaintiff may not defeat federal question jurisdiction merely by "artfully casting" a federal cause of action as a state law claim.[102] Secondly, some areas of federal law so pervade a particular field of law that they completely preempt state law, thereby rendering the cause of action filed in state court removable.[103] Finally, in those instances in which Congress has expressly provid-

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97. *Cervantez*, 99 F.3d at 733; Coker v. Amoco Oil Co., 709 F.2d 1433 (11th Cir. 1983); Libhart v. Santa Monica Dairy Co., 592 F.2d 1062 (9th Cir. 1979). Thus, even if a plaintiff amends its complaint to drop a federal claim, removal jurisdiction will still exist. In such cases, the federal court has discretion, however, to dismiss the remaining state law claims or to remand the action back to state court. Similarly, a post-removal amendment to the plaintiff's petition to add a federal claim will not cure lack of removal jurisdiction. However, in such cases, the defendant may try to remove again based upon the newly alleged federal question jurisdiction. *See, e.g.*, S.W.S. Erectors, Inc. v. Infax, Inc., 72 F.3d 489, 492-94 (5th Cir. 1996).

98. *Gully*, 229 U.S. at 113; Kramer v. Smith Barney, 80 F.3d 1080, 1082 (5th Cir. 1996).

99. Caterpillar, Inc. v. Williams, 482 U.S. 386 (1987).

100. Oklahoma Tax Comm'n v. Graham, 489 U.S. 838 (1989). *See also* Gaar v. Quirk, 86 F.3d 451, 454 (5th Cir. 1996); *Kramer*, 80 F.3d at 1082. This is true even if the plaintiff concedes that the federal question is the only true issue in the case. *See, e.g., Caterpillar*, 482 U.S. at 393.

101. *See* Great N. Ry. v. Alexander, 246 U.S. 276, 281 (1918). *See also* Carpenter v. Wichita Falls Indep. Sch. Dist., 44 F.3d 362, 366 (5th Cir. 1995); Willy v. Coastal Corp., 855 F.2d 1160, 1167 (5th Cir. 1988); Aaron v. National Union Fire Ins. Co. of Pittsburgh, 876 F.2d 1157, 1161 n.7 (5th Cir. 1989).

102. *See* Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394 (1981). *See also* Gaar, 96 F.3d at 454; Eitman v. New Orleans Serv., Inc., 730 F.2d 359 (5th Cir.), *cert. denied*, 469 U.S. 1018 (1984) (failure to plead federal claim was in bad faith and mere attempt to defeat jurisdiction). *But see Willy*, 855 F.2d at 1160 (plaintiff's complaint not subject to "artful pleading" limitation where plaintiff had alternative state law claim).

103. *See, e.g.*, Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58 (1987) (ERISA); *Kramer*, 80 F.3d at 1082 (same); Avco Corp. v. Aero Lodge No. 735, 390 U.S. 557 (1968) (LMRA); Smith v. Houston Oilers, Inc., 87 F.3d 717 (5th Cir. 1996) (same); Kollar v. United Transp. Union, 83 F.3d 124 (5th Cir. 1996) (RLA). *See also* Masters v. Swiftships Freeport, Inc., 867 F. Supp. 555 (S.D. Tex. 1994) (for complete preemption to occur, federal statute must include civil enforcement provision that creates federal cause of action and protects same interest protected by the preempted state law, provides a specific jurisdictional grant to federal courts over such action, and shows a clear congressional intent to preempt state law). The interaction between federal preemption and federal law as a defense is a gray one. Complete preemption occurs only when federal law occupies the entire field of liability, thus rendering state relief impermissible. In such cases, the plaintiff's claim must be recharacterized as a federal one. *Avco Corp.*, 390 U.S. at 557. If, however, federal law merely provides that a particular remedy under state law would violate federal law, and the field is not completely preempted, then the plaintiff may still press his claim in state court. In the latter case, federal preemption is merely a defense to the state claim, and thus does not trigger removal jurisdiction. *See* Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 12 (1983). *See also* Hartle v. Packard Elec., 877 F.2d 354 (5th Cir. 1989); Carway v. Progressive County Mut. Ins. Co., 183 B.R. 769 (S.D. Tex. 1995).

ed by statute for removal of a particular type of action, the plaintiff may not avoid the federal forum by filing in state court. Removal in such cases is a matter of statutory right, and the defendant, therefore, has the right to remove.[104]

Similarly, in instances where a complaint appears to raise a federal claim, exceptions exist to the recognition of federal question jurisdiction. A suit may be dismissed for lack of federal question jurisdiction where the alleged federal claim clearly appears to be "immaterial and made solely for the purpose of obtaining jurisdiction."[105] A suit may also be dismissed for lack of jurisdiction where the federal question proves to be "wholly insubstantial and frivolous" in nature.[106] Finally, and as previously discussed, certain federal claims may not be removed based on congressional mandates against removal. In such cases, removal is prohibited by statute.[107]

Thus, with a few exceptions, federal question jurisdiction will exist if the complaint contains a claim "arising under" federal law. In such cases, the entirety of the case may be removed to federal court.[108] This is true even if non-federal issues must also be determined because supplemental jurisdiction provides a jurisdictional hook. The doctrine of supplemental jurisdiction provides that "supplemental jurisdiction [shall attach to] all [additional] claims that are so related to claims in the action within [the district court's federal jurisdiction] that they form part of the same case or controversy."[109] Thus, pursuant to § 1367, state claims forming part of the same case or controversy as the federal claims may also be tried by the federal court.[110]

3. Separate and Independent Claims

Similarly, state and federal claims which are "separate and independent" also may be tried in federal court, provided the mandates of 28 U.S.C. § 1441(c) are satisfied. Section 1441(c) provides the following:

> Whenever a separate and independent claim or cause of action within [federal question] jurisdiction . . . is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court

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104. *See supra* note 30 and accompanying text (listing federal statutes conferring federal jurisdiction for removal purposes).

105. Bell v. Hood, 327 U.S. 678, 681 (1946). *See also* Cervantez v. Bexar County Civil Serv. Comm'n, 99 F.3d 730, 734 (5th Cir. 1996).

106. *Id.* at 683.

107. *See supra* note 31 and accompanying text.

108. *See* New Orleans, Mobile & Texas R.R. Co. v. Mississippi, 102 U.S. 135 (1880).

109. 28 U.S.C. § 1367 (1994).

110. Similarly, supplemental jurisdiction allows the federal court to continue to hear the case even after the claims over which it had subject matter jurisdiction have dropped out. *See* Doddy v. Oxy USA, Inc., 101 F.3d 448 (5th Cir. 1996). Once subject matter jurisdiction has attached, the court has the discretion to keep or remand the state law claims. *Id. See also* Smith v. Texas Children's Hosp., 84 F.3d 152 (5th Cir. 1996). In making the decision whether to keep or remand the claims, however, the court should "exercise [its] discretion in a way that best serves the principles of economy, convenience, fairness, and comity." *Doddy*, 101 F.3d at 456. If the federal claim is eliminated early in the federal proceeding, the court has a "powerful reason" to remand the state law claims to state court. *Id.*

> may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.[111]

By definition, removal under § 1441(c) is limited to cases in which the removable "separate and independent" claim arises under federal question jurisdiction. It should be noted, moreover, that § 1441(c) need not be invoked when the claims sought to be removed are related, as supplemental jurisdiction provides the jurisdictional hook in such cases.

Thus, in short, § 1441(c) comes into play only when unrelated claims are joined in a state court suit. When this occurs, the law allows the defendant to remove the entire case to federal court, provided one or more claims satisfy federal question jurisdiction. Such removal is subject to the court's discretion to remand the "separate and independent" claims, however, if those claims are governed predominantly by state law.[112] For a remand order to be proper, the claims remanded must be (1) separate and independent claims, (2) joined with a federal claim, (3) otherwise nonremovable, and (4) involve a matter over which state law predominates.[113]

The Supreme Court has defined "separate and independent" claims as claims arising from different sets of acts and different wrongs inflicted upon the plaintiff. That is, "where there is a single wrong to plaintiff, for which relief is sought, arising from an interlocked series of transactions, there is no separate and independent claim . . . ."[114] The Fifth Circuit has bifurcated the "separate and independent" inquiry, defining "separateness" as the Supreme Court did in *American Fire & Casualty Co. v. Finn*,[115] and adding an additional test for "independentness." According to this Circuit, a claim that "involve[s] 'substantially the same facts'" is not independent.[116] In making this determination, the allegations of the complaint control.[117] Thus, in *Eustus v. Blue Bell Creameries*,[118] the Fifth Circuit found that an employee's claim for intentional infliction of emotional distress emanating from the employee's termination was not separate and independent from a Family and Medical Leave Act claim, but the employee's claim for tor-

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111. 28 U.S.C. § 1441(c) (1994).

112. *Id.*

113. Eustus v. Blue Bell Creameries, L.P., 97 F.3d 100, 104 (5th Cir. 1996). In many circuits, it is unclear whether § 1441(c) allows the federal court to remand the entire case or only those claims governed by state law. Some courts have allowed remand of cases in their entirety, while others refuse to do so, holding once subject jurisdiction attaches the federal court may not remand the claim. For a thorough analysis of the power of federal courts to remand pursuant to § 1441(c), *see* Edward Hartnett, *A New Trick from an Old and Abused Dog: Section 1441(c) Lives and Now Permits the Remand of Federal Question Cases*, 63 FORDHAM L. REV. 1099 (1995). Notably, as demonstrated by *Eustus*, the Fifth Circuit has refused to extend § 1441(c) to allow remand of the entire case, stating instead that a district court has no discretion to remand a case over which it has subject matter jurisdiction. *Eustus*, 97 F.3d at 106. *See also* Buchner v. FDIC, 981 F.2d 816 (5th Cir. 1993).

114. *See* American Fire & Cas. Co. v. Finn, 341 U.S. 6, 14 (1951). *See also Eustus*, 97 F.3d at 104. Notably, while federal law supplies the test for what is a "separate and independent" claim, state law must be applied to determine the character of the plaintiff's claim. That is, state law is employed to determine whether the claim partakes of federal jurisdiction under federal question or diversity jurisdiction. *See* Bentley v. Halliburton Oil Well Cementing Co., 174 F.2d 788 (5th Cir. 1949).

115. 341 U.S. 6 (1951).

116. *Eustus*, 97 F.3d at 104.

117. *Id.*

118. 97 F.3d 100 (5th Cir. 1996).

tious interference with a prospective employment contract was separate and independent and, accordingly, could be remanded.

C. To "Where" Must the Case Be Removed?

Once it is determined that a case is removable, the next question is to "where?" The obvious answer is "to federal court," but a not-so-obvious venue rule governs the exact federal court.[119] Section 1441 provides that a case removable from state to federal court should be removed "to the district court for the United States for the district and division embracing the place where such action is pending."[120] In simpler terms, the state case should be removed to the federal court presiding over the same geographic area as the state court from which it was removed. Venue in the federal court will be proper if venue in the sister state court was proper.[121] If the case is removed to the wrong federal court, the plaintiff promptly must raise this procedural defect by a timely motion to remand; otherwise, the defect is waived.[122] If such a challenge is timely made, however, the remedy is to transfer the case to the appropriate federal district court, assuming subject matter jurisdiction is not in question.[123]

Once a case has been removed to federal court, either party may move to transfer the case to the appropriate venue pursuant to § 1404(a). This is true even if venue is proper in the transferring district.[124] Moreover, a party may also move to dismiss the federal case under § 1404(a) pursuant to *forum non conveniens*.[125] The Fifth Circuit just recently upheld such a transfer, determining that a wrongful death suit premised on the crash of a Mexican airplane in Mexico would be more appropriately tried in Mexico.[126]

D. "When" Must a Case Be Removed from State to Federal Court?

The next step to ensuring proper removal of a case to federal court involves the timing of removal. Section 1446 governs this inquiry:

> (a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal . . . .

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119. 28 U.S.C. § 1441 (1994). In determining the appropriate venue, the removal statute, not the federal venue statutes, controls. *See* Tamminga v. Suter, 213 F. Supp. 488, 493 (N.D. Iowa 1962).

120. 28 U.S.C. § 1441(a) (1994). *See also* 28 U.S.C. § 1446 (1994) (notice of removal must be filed in "district and division within which [state] action is pending").

121. Venue in the federal court may even be proper if venue in the state court was not proper, as some courts construe the removal to a particular federal court as a waiver of any venue challenges. *See, e.g.*, Seaboard Rice Milling Co. v. Chicago R.I. & P.R. Co., 270 U.S. 363, 46 S. Ct. 247 (1926).

122. Cook v. Shell Chem. Co., 730 F. Supp. 1381 (M.D. La. 1990).

123. S.W.S. Erectors, Inc. v. Infax, Inc., 72 F.3d 489, 493 n.3 (5th Cir. 1996).

124. St. Cyr v. Greyhound Lines, Inc., 486 F. Supp. 724 (E.D.N.Y. 1980).

125. *See, e.g.*, De Aquilar v. Boeing, Inc., 11 F.3d 55 (5th Cir. 1993); *In re* Disaster at Riyadh Airport, Saudi Arabia, 540 F. Supp. 1141 (D.D.C. 1982).

126. *De Aquilar*, 11 F.3d at 58-59.

> (b) The notice of removal of a civil action or proceeding shall be filed within thirty 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 thirty 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.[127]

Thus, in general, the defendant must file the notice of removal within thirty days of receipt of the pleading setting forth a removable cause of action.

The courts are split, however, regarding whether the time for filing the removal notice runs from mere receipt of the pleading, regardless of whether it has been served, or only from the time of formal service.[128] The former rule, and the one sanctioned by the language of § 1446, is known as the "receipt rule." Pursuant to the "receipt rule," the time for removal runs from the time the defendant actually receives the pleading, regardless of whether formal service has occurred.[129] In this regard, provided the pleading has been filed, receipt of a courtesy copy of the pleading by the defendant starts the removal clock ticking.[130] As stated, this rule seems to be expressly sanctioned by § 1446, which states that the removal notice must be filed within thirty days of receipt of the pleading, whether receipt occurred "through service or otherwise."[131]

Nonetheless, some courts view this rule as a harsh one, and instead apply the "proper service rule." Pursuant to the "proper service rule," the thirty-day delay in which a notice of removal must be filed is triggered only upon proper service of process of the pleading containing the ground for removal.[132] These courts rationalize that the "or otherwise" language contained in § 1446(b) either was intended by Congress to apply only to those states in which suit commences without proper service[133] or is simply too ambiguous to be enforceable.[134]

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127. 28 U.S.C. §§ 1446(a) and (b). The notice of removal in criminal prosecutions must be filed within thirty days of arraignment, if arraignment occurs, or any time before trial, if arraignment does not occur. 28 U.S.C. § 1446(c) (1994).

128. An excellent review of this subject matter was written by Robert P. Faulkner, *The Courtesy Copy Trap: Untimely Removal from State to Federal Court*, 52 MD. L. REV. 374 (1993). Faulkner surmises that the receipt rule, not the proper service rule, is the rule required by the wording of the statute. Faulkner recognizes the unfairness inherent in this rule, however, and therefore calls for congressional reform.

129. *See* Reece v. Wal-Mart Stores, Inc., 98 F.3d 839 (5th Cir. 1996); Roe v. O'Donahue, 38 F.3d 298 (7th Cir. 1994); Tech-Hills Assoc. v. Phoenix Home Life Mut. Ins. Co., 5 F.3d 963 (6th Cir. 1993); Blair v. Williford, 891 F. Supp. 349 (E.D. Tex. 1995); Burr v. Choice Hotels, Int'l, 848 F. Supp. 93 (S.D. Tex. 1994); James v. Pan Am. Life Ins. Co., No. 91-0821, 1991 U.S. Dist. LEXIS 11564 (E.D. La. Aug. 13, 1991); York v. Horizon Fed. Sav. & Loan Ass'n, 712 F. Supp. 85 (E.D. La. 1989); Kurtz v. Harris, 245 F. Supp. 752 (S.D. Tex. 1965).

130. *See, e.g.*, Reece, 98 F.3d at 842 (period for removal begins on receipt of file-stamped copy of petition in mail, even if petition was not signed).

131. 28 U.S.C. § 1446(b) (1994). *See, e.g.*, Reece, 98 F.3d at 841 (plain language of § 1446 mandates adherence to the "receipt rule").

132. *See* Valentine Sugars, Inc. v. Phillips Petroleum Co., No.89-2524, 1989 U.S. Dist. LEXIS 16028 (E.D. La. Jan. 19, 1990); Thomason v. Republic Ins. Co., 630 F. Supp. 331 (E.D. Ca. 1986); Hunter v. American Express Travel Related Servs., 643 F. Supp. 168 (S.D. Miss. 1986); Love v. State Farm Mut. Auto Ins. Co., 542 F. Supp. 65 (N.D. Ga. 1982); Rodriquez v. Hearty, 121 F. Supp. 125 (S.D. Tex. 1954).

133. *Love*, 542 F. Supp. at 67 (in such states, the action commences prior to receipt of the petition and, therefore, has the potential to deprive the defendant of the removal option because he will not receive a pleading containing a removable claim until after the removal delay has run).

134. Marion Corp. v. Lloyds Bank, 738 F. Supp. 1377 (S.D. Ala. 1990). *See also* Hunter, 643 F. Supp. at 169.

A subpart of the "when" inquiry involves "who" must receive the removable petition for the thirty-day delay to begin running. Obviously, in the business context, receipt by or service upon an authorized agent is sufficient to start the delay period running.[135] What of receipt by or service upon an unauthorized agent, however? Some courts have held that this is insufficient to trigger the thirty-day period for removal.[136]

Similarly, in cases involving multiple defendants, does the thirty day period begin upon receipt by or service upon the first defendant or upon receipt by or service upon the last one? The Fifth Circuit has held that all defendants must join in the notice of removal within thirty days of receipt of the petition by the first defendant.[137] Other courts have held that this rule unfairly penalizes later-served defendants, however, and, thus, allows each defendant to join in the notice of removal within thirty days of receipt or service of its petition.[138]

Finally, if, by chance, the above rules are violated and the defendant fails to file his removal notice timely, most courts hold that they lack the discretion to extend the thirty-day time delay.[139] In fact, at least one court has held that the period may not even be extended pursuant to Federal Rule of Civil Procedure 6(e), which adds an additional three days to take action following service by mail.[140] Of course, the defendant's failure to file the notice of removal timely will be of no consequence if the plaintiff also fails to file a motion to remand timely. Failure to file a notice of removal timely is considered to be a procedural removal defect and, thus, is waivable if not timely challenged.

1. Removability Not Ascertainable from Original Petition

Application of the thirty-day rule for removing state court actions becomes trickier when the petition does not clearly evidence a removable claim. The thirty-day period begins to run only once the defendant receives a "'paper from which it may first be ascertained' that the case is . . . removable."[141] Thus, if on the face of the initial petition, it is not apparent that a removable claim exists, the

135. *See* Tech-Hills Assoc. v. Phoenix Home Life Mut. Ins. Co., 5 F.3d 963 (6th Cir. 1993); Getty Oil Corp. v. Ins. Co. of N. Am., 841 F.2d 1254 (5th Cir. 1988).

136. *See, e.g.*, Reece v. Wal-Mart Stores, Inc., 98 F.3d 839, 843-44 (5th Cir. 1996) (The court noted that a corporation is not deemed to have received a petition just because anyone in the company is served, but declined to establish a bright-line test for determining whose receipt is sufficient to start the delay period running. In *Reece*, however, the petition was received by the CEO of the company, and that was sufficient to trigger the removal delay period). *Cf.* TEX. BUS. CORP. ACT ANN. art. 2.11 (permitting service on selected officers); LA. CODE CIV. PROC. ANN. art. 1261 (West 1995) (permitting service on corporation's designated agent or, if not, on any officer); MISS. R. CIV. P. 4(d)(4) (permitting service on any officer).

137. *Getty Oil Corp.*, 841 F.2d at 1254.

138. McKinney v. Board of Trustees, 955 F.2d 924 (4th Cir. 1992). Even the Fifth Circuit has suggested it may create exceptions to its "joinder within thirty days of receipt by the first defendant" rule, when the equities so demand. Doe v. Kerwood, 969 F.2d 165, 169 n.15 (1992).

139. *See, e.g.*, Buchner v. FDIC, 98 F.3d 816 (5th Cir. 1993); Ortiz v. General Motors Acceptance Corp., 583 F. Supp. 526 (N.D. Ill. 1984).

140. *See* Ross v. Barrett Centrifugals, 580 F. Supp. 1510 (D. Me. 1984). *But see* Student A v. Metcho, 710 F. Supp. 267 (N.D. Ca. 1989) (granting three day extension). Obviously, the FED. R. CIV. P. 6(e) extension is only applicable in those circuits following the "proper service" rule for computing the delay period.

141. 28 U.S.C. § 1446(b) (1994). *See* S.W.S. Erectors, Inc. v. Infax, Inc., 72 F.3d 489, 494 (5th Cir. 1996); Burks v. Amerada Hess Corp., 8 F.3d 301, 305 (5th Cir. 1993) (Notice of removal must be filed within thirty days of receipt of document from which it may first be ascertained removal jurisdiction exists).

time period for filing a notice of removal does not run until receipt of "a pleading, motion, order or other paper" from which removability may be ascertained.[142] Most courts hold that removability must be discovered from a "paper." That is, changes in the law,[143] court orders,[144] and verbal communications[145] from opposing counsel do not suffice to trigger the removal time delay. The Fifth Circuit has held, moreover, that the "other paper" must somehow come about through a voluntary act of the plaintiff. Thus, while an affidavit of defense counsel attesting to the presence of a removable claim is not an "other paper" that will trigger the thirty-day delay period, a transcript of the plaintiff's deposition testimony is sufficient to start the delay.[146]

Finally, both in diversity and federal question settings, uncertainties about whether a removable claim exists may or may not render the complaint's removability uncertain. Some courts hold that for diversity purposes, a defendant is accountable not only for his own state of citizenship but also for the state of citizenship of the plaintiff.[147] With regard to the amount in controversy, interrogatories, requests for admission, and other discovery devices may be used to ferret out the true value of the plaintiff's claim.[148] Finally, with regard to federal question jurisdiction, the federal nature of the claim generally must be ascertainable from the face of the plaintiff's complaint. Thus, if the claim is uncertain, the right to remove the action usually is triggered only once the defendant receives notice that the action is, in fact, based on a federal claim.[149] It also must be remembered that removal jurisdiction is tested, in the case of diversity jurisdiction, both at the time the complaint and the time the removal petition is filed, and in the case of federal question jurisdiction, only at the time the removal petition

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142. 28 U.S.C. § 1446(b) (1994).

143. *See, e.g.*, Phillips v. Allstate Ins. Co., 702 F. Supp. 1466 (C.D. Ca. 1989) (new Act of Congress permitting removal not a "paper" triggering thirty-day delay).

144. *S.W.S. Erectors*, 72 F.3d at 494.

145. *See, e.g.*, Chapman v. Powermatic, Inc., 969 F.2d 160 (5th Cir. 1992) (delay runs only from receipt of a "paper affirmatively revealing on its face" the presence of a removable claim). *See also* Leffal v. Dallas Indep. Sch. Dist., 28 F.3d 521 (5th Cir. 1994) (same). *Cf.* Mielke v. Allstate Ins. Co., 472 F. Supp. 851 (E.D. Mich. 1979) (mere knowledge that removable claim exists is sufficient).

146. *S.W.S. Erectors*, 72 F.3d at 494. *See* Morrison v. National Ben. Life Ins. Co., 889 F. Supp. 945 (S.D. Miss. 1995) (motion for leave to amend petition to allege amount in controversy greater than jurisdictional amount deemed "other paper" triggering delay); Rivers v. International Matex Tank Terminal, 864 F. Supp. 556 (E.D. La. 1994) (deposition transcript deemed "other paper"); Johnson v. Dillard Dep't Stores, Inc., 836 F. Supp. 390 (N.D. Tex. 1993) (plaintiff's answers to requests for admission deemed "other paper").

147. *See, e.g.*, Lee v. Volkswagen of America, 429 F. Supp. 5 (W.D. Okla. 1976); Jong v. General Motors Corp., 359 F. Supp. 223 (N.D. Ca. 1973).

148. *See In re* Bristol Myers-Squibb Co., No. 96-10743, 1996 U.S. App. LEXIS 24760 (5th Cir. June 28, 1996).

149. *See, e.g.*, Akin v. Big Three Indus., Inc., 851 F. Supp. 819, 825 (E.D. Tex. 1994); Brooks v. Solomon Co., 542 F. Supp. 1229, 1230 (N.D. Ala. 1982) (federal question became apparent upon taking of plaintiff's deposition).

is filed. Thus, post-removal amendments to create or destroy removal jurisdiction generally will have no effect on removability.[150]

2. Cases that Become Removable After Filing

Nevertheless, § 1446(b) does provide one way in which later actions taken by the plaintiff may affect removability. Even if the initial petition was unremovable, it may become removable upon the filing of "an amended pleading, motion, order, or other paper."[151] As noted by the Fifth Circuit in *S.W.S. Erectors, Inc. v. Infax, Inc.*, this new removability must result from a voluntary act of the plaintiff.[152] This rule, in turn, reflects the general rule that the plaintiff is the master of his complaint. Thus, for example, if a plaintiff chooses voluntarily to dismiss a nondiverse defendant or to settle with such a defendant, then removal jurisdiction would exist and the thirty-day delay for removing would begin.[153] Similarly, amendment to a petition alleging only state law claims to add claims based on federal law would trigger the thirty-day delay for removal jurisdiction.[154]

This rule allowing new-found removability is subject to one important exception: "a case may not be removed on the basis of [diversity] jurisdiction . . . more than one year after commencement of the action."[155] Although, as discussed by commentators,[156] this rule is subject to manipulation and abuse, some courts have held that it is, nonetheless, mandatory in nature. Therefore, though tempted to do so, these courts have refused to carve out equitable exceptions to the one-year bar on removability in diversity cases, deeming the policy concerns[157] undergirding that rule to be weightier than the unfairness attendant to particular defendants in particular cases.[158] Other courts will recognize equitable

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150. Allen v. R & H Oil & Gas Co., 63 F.3d 1326, 1336 (5th Cir. 1995) ("Once district court found that it had jurisdiction, the jurisdiction is deemed to have vested in the court at the time of removal."). Thus, a court has discretion to retain jurisdiction over state court claims pursuant to supplemental jurisdiction, even if the claims over which it had subject matter jurisdiction have dropped out. Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 108 S. Ct. 614 (1988). Similarly, a post-removal reduction of the amount in controversy in a diversity case will not affect federal court jurisdiction. St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283 (1938). An exception to the rule of continuing jurisdiction exists, however, when the court is forced to add a nondiverse indispensable party to the case. There, diversity jurisdiction is destroyed and the court must remand the action back to state court. Bankston v. Burch, 27 F.3d 164, 167-68 (5th Cir. 1994). *Cf.* 28 U.S.C. § 1447(e) (1994) (request for leave to join nondiverse but dispensable party subject to court's discretion; if granted, however, case must be remanded).

151. 28 U.S.C. § 1446(b) (1994).

152. *S.W.S. Erectors*, 72 F.3d at 494. *See also* Self v. General Motors Corp., 588 F.2d 655 (9th Cir. 1978).

153. Higgins v. E.I. DuPont de Nemours & Co., 863 F.2d 1162 (4th Cir. 1988). *Cf.* Canova v. C.R.C., Inc., 602 F. Supp. 817 (M.D. La. 1985) (unremovable case did not become removable based on court's dismissal of nondiverse defendant).

154. *See, e.g.*, Burks v. Amerada Hess Corp., 8 F.3d 301 (5th Cir. 1993) (amendment to add ERISA claim).

155. 28 U.S.C. § 1446(b) (1994).

156. *See, e.g.*, Gordon D. Polozola, *supra* note 32, at 1421-22. ("By delaying service . . . for over a year, plaintiffs [can] ensure[] that [their] action [can] not be timely removed . . . to a federal forum.").

157. Congress inserted the one-year limitation to prevent removal of cases after they have progressed substantially in state court. H.R. REP. NO. 889, 100th Cong., 2d Sess. 71-73 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5982, 6031-33.

158. *See, e.g.*, Martine v. National Tea Co., 841 F. Supp. 1421, 1422 (M.D. La. 1993) (although the court noted that the case in *Martine* had not progressed substantially in state court, it nonetheless found that "[i]t is for Congress and not this Court to rewrite the provisions of § 1446(b) to curb such abuses."). *See also* Hedges v. Hedges Gauging Serv., Inc., 837 F. Supp. 753 (M.D. La. 1993) (same).

exceptions, however, at least where they perceive purposeful manipulation and abuse by the plaintiff.[159] Moreover, because the one-year time limitation, like the thirty-day delay, is merely procedural in nature, failure to timely challenge a delinquent removal will result in waiver of that rule.[160] Thus, although this will not curb purposeful manipulation of the rule by the plaintiff, it will grant the defendant some much-needed reprieve whenever the plaintiff fails timely to move to remand the untimely removal petition.

E. "How" Does a Party Go About Removing a Case from State to Federal Court?

We now come to the mechanics of removing a case from state to federal court. In a nutshell, the defendant must file a "notice of removal" with the appropriate federal court within thirty days of receipt (or service) of the complaint containing the removable claim. If the case involves multiple defendants, all defendants served in the state action must join in the notice of removal.[161] If the ground for removal is diversity, the defendants must file the notice of removal within one year of commencement of the action. The notice of removal, which must be signed in accordance with Rule 11,[162] should contain a short and plain statement of the grounds justifying the removal and should append a copy of all processes, pleadings, and orders served upon the removing defendants.[163]

The defendants also must file a copy of the removal papers with the state court and must give prompt notice of the removal to all adverse parties. Upon the filing of the copies with the state court, the case is officially removed, and the state court may no longer proceed.[164] This is true even if removal is improper as, until the case is remanded to state court, the state court is ousted of jurisdiction.[165] If the state court persists in hearing the case, it can be enjoined from doing so by the federal court.[166]

The content of the removal notice depends upon the grounds for removal as well as local rules. Many courts require by local rule that the removing party include such things as a civil cover sheet, a notice of related cases, and specific jurisdictional allegations.[167] In federal question cases, the notice of removal need only allege that removal is based on a claim "arising under" federal law and state the federal statutory basis for that claim. If the federal claim is not obvious from the face of the plaintiff's complaint, the allegation also should explain why federal law applies. The notice of removal in diversity cases should include a state-

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159. *See, e.g.*, Saunders v. Wire Rope Corp., 777 F. Supp. 1281 (E.D. Va. 1991); Greer v. Skilcraft, 704 F. Supp. 1570 (N.D. Ala. 1989).

160. Barnes v. Westinghouse Elec. Corp., 962 F.2d 513, 516 (5th Cir. 1982), *cert. denied*, 506 U.S. 999 (1992).

161. *See supra* notes 10-24 and accompanying text.

162. FED. R. CIV. P. 11. The removing parties thus certify that to the best of their knowledge and belief, removal of the case is warranted. If the federal court determines that the removing party did not accurately investigate the basis of federal jurisdiction, it may impose sanctions pursuant to § 1447(c).

163. 28 U.S.C. §§ 1446(a) and (b) (1994).

164. 28 U.S.C. § 1446(d) (1994).

165. Murray v. Ford Motor Co., 770 F.2d 461 (5th Cir. 1985). *See also* E.D. Sys. Corp. v. Southwestern Bell Tel., 674 F.2d 453, 457-58 n.2 (5th Cir. 1982) (the propriety of the removal is for the federal court to decide).

166. Frith v. Blazon-Flexible Flyer, Inc., 512 F.2d 899, 901 (5th Cir. 1975).

167. *See* HITTNER, *supra* note 5, at 2:963.

ment of each party's citizenship, both at the time of the action's filing and the time of the removal, and should state that the amount in controversy exceeds $75,000, exclusive of interest and costs.[168] It should then declare that federal jurisdiction rests on diversity of citizenship and that all plaintiffs and defendants are diverse. Finally, in cases where federal jurisdiction is conferred by special statute, the removing party should allege this and should cite to the appropriate federal statute. In all instances of removal, moreover, despite the jurisdictional basis, the notice of removal should state that all defendants join in the notice of removal or explain why certain defendants do not.[169] Although the notice of removal need only be signed by one defendant, the defendants who do not sign should submit a written notice of joinder.[170]

The notices to adverse parties and to state court are relatively simple. First, both notices must be in writing.[171] Second, the notice to adverse parties should inform them that the case has been removed and should explain why. Technically, it is not sufficient simply to serve the adverse parties with a copy of the federal notice of removal. A copy of the federal court notice and the state court notices, should be appended, however. Finally, the state court notice should inform the state court of the removal and should include, in addition to a copy of the federal removal papers, a copy of the notice served on the adverse parties.[172] Once these steps are taken, removal to federal court is complete.

Sections 1447 and 1448 of Title 28 of the United States Code govern federal court procedure once a case has been removed to federal court. Initially, the federal court takes the case as it finds it, recognizing all state court orders, discovery rulings, motions for extensions, and the like.[173] Upon removal, however, federal procedural rules begin to govern.[174] Thus, if a defendant has not yet answered,[175] its answer must be filed "within 20 days after . . . service of summons (the complaint) . . . or within 5 days after filing of the notice of removal, whichever period is longest."[176] Its answer must, moreover, conform to the strictures of the Federal Rules of Civil Procedure. Furthermore, the mere fact that a defendant has removed a case does not preclude it from making jurisdictional challenges. The defendant may still invoke Rule 12 of the Federal Rules of Civil Procedure

168. Gaitor v. Peninsular & Occidental Steamship Co., 287 F.2d 252 (5th Cir. 1961). If a party has more than one state of citizenship, as may be the case with a corporation, then each state of citizenship should be listed.

169. *See, e.g.*, Home Owners Funding Corp. v. Allison, 756 F. Supp. 290, 291 (N.D. Tex. 1991).

170. *See, e.g.*, Roe v. O'Donohue, 38 F.3d 298, 301 (7th Cir. 1994) (insufficient to merely allege that all defendants join). And, remember, copies of the pleadings from the state proceeding must accompany the notice of removal. A copy of the notices sent to the state court and to the adverse parties should also be included. *See* FED. R. CIV. P. 5(d).

171. 28 U.S.C. § 1446(d) (1994).

172. *Id.*

173. Salveson v. Western States Bankcard Ass'n, 525 F. Supp. 566 (N.D. Ca. 1981).

174. *See* FED. R. CIV. P. 81(c) ("These rules apply to civil actions removed . . . and govern procedures after removal."); Willy v. Coastal Corp., 503 U.S. 131 (1992).

175. Defendants who answered in state court need not file a new answer unless instructed to do so by the federal court. FED. R. CIV. P. 81(c).

176. *Id.*

to challenge service of process[177] or personal jurisdiction, provided it did not waive these challenges in state court prior to removal.[178] Finally, the issue of jury demand can be tricky once removal has occurred. If a jury was demanded in state court prior to removal, the demand need not be renewed.[179] But, if a jury was not demanded, a formal jury demand must be filed in accordance with Rule 38 of the Federal Rules of Civil Procedure. The timing of the demand depends upon the status of the case at the time the case was removed:

> (1) If no answer was filed in state court prior to removal, either party may make formal demand for a jury no later than 10 days after service of the last pleading directed to a jury-triable issue.[180]
>
> (2) If an answer was filed prior to removal
>
> (a) the defendant must file his jury demand within 10 days after filing its notice of the removal, and
>
> (b) the plaintiff must file his jury demand within 10 days after service of the notice of removal.[181]

Failure to file a timely jury demand constitutes a waiver of the right to trial by jury.[182]

IV. THE WAY OF REMAND BACK TO STATE COURT

The plaintiff[183] may, of course, determine that removal was improper and move to remand back to state court. Section 1447 of Title 28 of the United States Code governs remand to state court:

> (c) 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 or 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. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of

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177. Because service probably will have occurred while the parties were still in state court, the validity of that service will be judged according to the state's standards. Allen v. Ferguson, 791 F.2d 611 (7th Cir. 1986). Service after removal is governed by federal standards, however. 28 U.S.C. § 1448 (1994) (if defendant is not served or is improperly served before removal, new service or proper service should follow federal mandates).

178. A defendant may have waived these challenges in state court by, for example, making a general appearance or answering prior to removal. *See, e.g.*, Nationwide Eng'g & Control Sys. v. Thomas, 837 F.2d 345 (8th Cir. 1988).

179. FED. R. CIV. P. 81(c).

180. FED. R. CIV. P. 38(b).

181. FED. R. CIV. P. 81(c).

182. *Id. But see* Farias v. Bexar County Bd. of Trustees, 925 F.2d 886 (5th Cir. 1991) (court has discretion to grant relief from waiver).

183. Normally, the plaintiff will be the party seeking remand. However, any party, even the removing defendant, may request remand if subject matter jurisdiction is lacking. *See* American Fire & Casualty Co. v. Finn, 341 U.S. 6 (1951). Moreover, a defendant who did not join in the notice of removal may move for remand on any ground, procedural or jurisdictional. *See* Getty Oil Corp. v. Ins. Co. of N. America, 841 F.2d 1254 (5th Cir. 1988).

> 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.[184]

This provision raises an important sub-issue: What constitutes a defect in removal procedure as opposed to a defect affecting subject matter jurisdiction? The answer to this question is an important one, as the nature of the defect dictates the power of the court to remand the case to state court.

A. Procedural Versus Jurisdictional Defects

If the removal defect is based on procedural error, the plaintiff has only thirty days from the filing of the removal notice to file a motion to remand; otherwise, the defect is waived.[185] If the removal defect is based on lack of subject matter jurisdiction, any party may move at any time to have the case remanded, and the federal court may even act *sua sponte* to remand the case.[186] Jurisdictional defects include lack of diverse citizenship[187] and lack of a federal question.[188] By contrast, procedural defects include such things as tardy filing of the removal notice,[189] defects in the form or content of the removal notice,[190] failure to give notice to the adverse parties or the state court,[191] violation of the "no-local-defendants" rule,[192] and failure to join all necessary defendants.[193] Some courts broaden this category, and also include *any* nonjurisdictional defect; thus, such things as removal of cases that are statutorily unremovable[194] and failure to file a notice of removal within one year of commencement of the action in diversity cases would constitute mere procedural defects.[195]

Assuming the defect is procedural, the plaintiff has only thirty days from *the filing of the notice of removal* to file its motion to remand. The Fifth Circuit has held that this period may not be extended — not even by Federal Rule 6(e),

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184. 28 U.S.C. § 1447(c) (1994).

185. Maniar v. FDIC, 979 F.2d 782 (9th Cir. 1992); FDIC v. Loyd, 955 F.2d 316 (5th Cir. 1992). The courts are split over whether the court may remand *sua sponte* on the basis of a procedural defect. *Compare* Page v. City of Southfield, 45 F.3d 128 (6th Cir. 1995) *and In re* Continental Casualty Co., 29 F.3d 292 (7th Cir. 1994) and *In re* Allstate Ins. Co., 8 F.3d 219 (5th Cir. 1993) (failure of plaintiff to raise procedural defect deemed waiver of right to remand on that ground) *with* Maniar 979 F.2d at 784; Air-Shields, Inc., 891 F.2d 63 (3d Cir. 1989) (court may remand for procedural defect *sua sponte* if such remand occurs within thirty days of the notice of removal) *and* Averdick v. Republic Fin. Servs., 803 F. Supp. 37 (E.D. Ky. 1992) (allowing court to remand for procedural defects at any time).

186. 28 U.S.C. § 1447 (1994). Subject matter jurisdiction cannot be agreed upon or waived by the parties. *See* Coury v. Prot, 85 F.3d 244 (5th Cir. 1996); IMFC Professional Servs. of Fla. v. Latin Am. Home Health, Inc., 676 F.2d 152 (5th Cir. 1982).

187. *See Coury*, 85 F.3d at 252; Horton v. Scripto-Tokai Corp., 878 F. Supp. 902 (S.D. Miss. 1995); Metroplex Infusion Care, Inc. v. Lone Star Container Corp., 855 F. Supp. 897 (N.D. Tex. 1994).

188. *See* Bogle v. Phillips Petroleum Co., 24 F.3d 758, 762 (5th Cir. 1994).

189. *See, e.g.*, Wilson v. General Motors Corp., 888 F.2d 779 (11th Cir. 1989).

190. *See, e.g., In re* Allstate, 8 F.3d 219 (5th Cir. 1993); Harper v. National Flood Insurers Ass'n, 494 F. Supp. 234 (M.D. Pa. 1980).

191. *See, e.g.*, Dukes v. South Carolina Ins. Co., 770 F.2d 545 (5th Cir. 1985).

192. *See, e.g.*, Coury v. Prot, 85 F.3d 244, 252 (5th Cir. 1996); *In re* Shell Oil Co., 932 F.2d 1518 (5th Cir. 1991).

193. *See, e.g.*, Roe v. O'Donohue, 38 F.3d 298 (7th Cir. 1994); Fontenot v. Global Marine, Inc., 703 F.2d 867 (5th Cir. 1983).

194. *See* Patin v. Allied Signal, Inc., 77 F.3d 782, 786 (5th Cir. 1996); Baris v. Sulpicio Lines, Inc., 932 F.2d 1540 (5th Cir. 1991).

195. *See* Barnes v. Westinghouse Elec. Corp., 962 F.2d 513 (5th Cir.), *cert. denied*, 506 U.S. 999 (1992).

which provides an additional three days in which to act following service of a pleading by mail.[196] This makes sense, as the thirty-day delay does not run from service, but from filing.[197] This rule is consistent with the rule requiring defendants to file their notice of removal within thirty days, moreover, as that rule cannot be extended by Rule 6(e), either.[198]

B. Court Ruling on the Motion to Remand

Pursuant to § 1444(c), the court is authorized to remand the case based on procedural defects or lack of subject matter jurisdiction. The Supreme Court has held that federal district courts do not have discretion to create other grounds. Thus, in *Thermtron Products, Inc. v. Hermansdorfer*,[199] the Court held that a federal court may not remand a properly removed case simply because it thinks its docket is too crowded to afford timely review.[200] Correlatively, if a procedural or jurisdictional defect renders removal improper, the courts have no discretion but to remand. Section 1447(c) states that the courts "shall remand" cases that are improperly removed from state to federal court.[201] Some courts have created a practical exception to this rule, allowing the removing party to correct a procedural defect, provided it does so within the thirty days allotted for removal.[202]

Federal courts do have discretion to remand cases in certain discrete instances, however. If removal was based on federal question jurisdiction and the federal question subsequently drops out, the court may choose to retain the supplemental state law claims, dismiss them, or remand them to state court.[203] Similarly, if the case contains "separate and independent" claims, some of which are based on federal question jurisdiction and others of which are unremovable, the court has the discretion to retain the entire case or to remand the "separate and independent" claims if they are governed predominantly by state law.[204] Finally, in the diversity context, the federal district court has the discretion to allow joinder of a nondiverse, dispensable party and to remand the case to state court or to deny the request for the joinder and to retain the case in federal court.[205]

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196. Pavone v. Miss. Riverboat Amusement Corp., 52 F.3d 560 (5th Cir. 1995).
197. *Id.* at 566.
198. *See supra* notes 127-40 and accompanying text.
199. 423 U.S. 336 (1976).
200. *Id. See also* Levy v. Weissman, 671 F.2d 766 (3rd Cir. 1982) (no discretion to remand as a sanction); Ryan v. State Board of Elections, 661 F.2d 1130 (7th Cir. 1981) (no discretion to remand as a form of abstention); *In re* Shell Oil Co., 631 F.2d 1156 (5th Cir. 1980) (no discretion to remand for failure to oppose motion to remand).
201. 28 U.S.C. § 1447(c) (1994).
202. *See* O'Halloran v. University of Washington, 856 F.2d 1375 (9th Cir. 1988); Loftin v. Rush, 767 F.2d 800 (11th Cir. 1985); Fristoe v. Reynolds Metals Co., 615 F.2d 1209 (9th Cir. 1980); Computer People, Inc. v. Computer Dimensions Int'l, 638 F. Supp. 1293 (M.D. La. 1986).
203. Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343 (1988); Bogle v. Phillips Petroleum Co., 24 F.3d 758 (5th Cir. 1994).
204. 28 U.S.C. § 1441(c) (1994). *See also supra* notes 111-118 and accompanying text.
205. 28 U.S.C. § 1447(e) (1994).

Once the federal court remands the case to state court, it is divested of jurisdiction. A remand order is final once a certified copy of the order is forwarded to the clerk of the state court.[206] This creates a curious anamoly in that the parties may believe that federal jurisdiction has been divested, while the federal court, in reality, still has jurisdiction. Thus, the astute practitioner desiring reconsideration of the remand order will check to see whether the certified copy has been sent and, if not, file a motion for reconsideration promptly. If the certified copy has been sent, however, reconsideration of the remand order may not be granted.[207]

V. APPELLATE OVERVIEW OF EXCURSIONS BETWEEN THE COURTS

The ability to file for reconsideration is important because appellate review of orders denying or granting remand is severely limited. Orders denying remand are interlocutory in nature and, thus, are not reviewable except as part of an appeal from final judgment.[208] Immediate appellate review may be sought only as part of an appeal from another appealable order or by writ of mandamus. The former might occur, for instance, in conjunction with immediate review of the grant or denial of an injunction.[209] The latter, however, will rarely occur. Writs of mandamus are reserved for "extreme situations" and are rarely granted by the courts.[210] Of course, a party desiring review of a remand denial may request certification of the ruling for interlocutory review, but, even then, review rests in the discretion of the appellate court.[211]

Section 1447(d) expressly provided that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise."[212] This ban is limited to remands based on the two grounds enumerated in § 1447(c),[213] that is, if the remand is based on a timely-raised procedural

206. 28 U.S.C. § 1447(c) (1994). *See* Trans Penn Wax Corp. v. McCandless, 50 F.3d 217, 225 (3d Cir. 1995); Seedman v. United States Dist. Court, 837 F.2d 43 (9th Cir. 1988); Browning v. Navarro, 743 F.2d 1069, 1078 (5th Cir. 1984). *See also* State v. Sprint Communications Co., 899 F. Supp. 282, 284 (M.D. La. 1995) (when mailing of certified copy "slips through the cracks," court retains jurisdiction to reconsider remand ruling).

207. *See* New Orleans Pub. Serv., Inc. v. Majorie, 802 F.2d 166, 167 (5th Cir. 1986). *Contra In re* Carter, 618 F.2d 1093, 1098 (5th Cir. 1980) (allowing review of remand order after final judgment).

208. *See* Cervantez v. Bexar County Civil Serv. Comm'n, 99 F.3d 730, 732 (5th Cir. 1996) (reviewing denial of remand as part of review of final judgment).

209. *See, e.g.*, Spring Garden Assoc. v. RTC, 26 F.3d 412 (3d Cir. 1994); Jones v. Newton, 775 F.2d 1316 (5th Cir. 1985).

210. *See* Rohrer Hibler & Replogle, Inc. v. Perkins, 728 F.2d 860 (7th Cir. 1984). *But see In re* Allstate Ins. Co., 8 F.3d 219, 221 (5th Cir. 1993) (noting mandamus should be granted if remand was granted on grounds not permitted under § 1446(c)).

211. 28 U.S.C. § 1292(b) (1994). In fact, the party would be wise to request certification to preserve the issue for appeal of final judgment. Courts have upheld final judgments, despite erroneous denials of motions to remand, provided subject matter jurisdiction existed over the case at the time of trial. *See, e.g.*, Grubbs v. General Elec. Credit Corp., 405 U.S. 699 (1971); Harris v. Provident Life & Accident Ins. Co., 26 F.3d 930 (9th Cir. 1994); O'Halloran v. University of Washington, 856 F.2d 1375 (9th Cir. 1988); Gould v. Mutual Life Ins. Co., 790 F.2d 769 (9th Cir. 1986); Hartford Accident & Indem. v. Costa Lines Cargo Serv., 903 F.2d 352 (5th Cir. 1990). The request for certification presumably would preserve defects in removal procedure for appellate review. *See, e.g.*, Nishimoto v. Federman-Bachrach Assoc., 903 F.2d 709 (9th Cir. 1990). *Cf.* Kruse v. State, 68 F.3d 331 (9th Cir. 1995) (The *Grubbs* rule is limited to decisions on the merits. If a court otherwise disposes of the case, procedural defects may be reviewed.).

212. 28 U.S.C. § 1447(d) (1994).

213. *See* Things Remembered, Inc. v. Petrarca, 116 S. Ct. 494, 497 (1995) ("section 1447(d) must be read *in pari materia* with section 1447(c)"). *See also In re* Abbott Labs., 51 F.3d 524, 525 (5th Cir. 1995).

error[214] or any jurisdictional error,[215] the appellate court lacks jurisdiction to hear the case.[216] If, however, the remand is based on a ground not enumerated in § 1447(c), the appellate court may review the propriety of the remand.[217] Morever, in the case of a district court's discretionary remand of supplemental state law claims, the appellate court may exercise its jurisdiction. In such a case, remand is based on the court's discretionary power, not the procedural or jurisdictional defects of § 1447(c).[218] Finally, orders granting remand may be reviewed in conjunction with other final and appealable orders. Thus, where the district court dismisses certain claims and remands the remaining nonfederal ones, the remand may be reviewed by the appellate court.[219]

VI. CONCLUSION

In sum, many considerations enter into the removal and remand of cases between state and federal courts. Parties on the road to federal court must ensure that they abide by the minuscule rules governing the type of removal sought or

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214. *See In re* Shell Oil Co., 932 F.2d 1518 (5th Cir. 1991) (holding that an order granting a motion to remand based on alleged procedural defect, which motion was filed after the thirty day period for filing a remand motion, was not within the scope of § 1447(c), and thus was reviewable).

215. *See, e.g.*, Things Remembered, Inc., 116 S. Ct. at 497 (untimely removal notice unreviewable); Bogle v. Phillips Petroleum Co., 24 F.3d 758 (5th Cir. 1994) (erroneous finding of no preemption unreviewable); Westinghouse Credit Corp. v. Thompson, 987 F.2d 682 (10th Cir. 1993) (removal of statutorily unremovable claim not reviewable); Whitman v. Raley's, Inc., 886 F.2d 1177 (9th Cir. 1989) (erroneous finding of complete preemption unreviewable).

216. One Fifth Circuit decision, *In re* Digicon Marine, Inc., 966 F.2d 158 (5th Cir. 1992), has suggested that remand orders are only unreviewable pursuant to § 1447(d) if based on a finding of lack of subject matter jurisdiction. Because the Fifth Circuit follows the broader definition of procedural error, *see* Baris v. Sulpicio Lines Inc. 932 F.2d 1540 (5th Cir. 1991), more remand orders would be reviewable under this precedent than in most circuits. For instance, the Fifth Circuit treats lack of removal jurisdiction as a procedural error, thus allowing appellate review of that error. *Id.* However, later Fifth Circuit cases have followed the general rule that remand orders based on both procedural and jurisdictional errors are unreviewable pursuant to § 1447(d). *See* Eustus v. Blue Bell Creameries, L.P., 97 F.3d 100 (5th Cir. 1996); *In re* Medscope Marine, Ltd., 972 F.2d 107 (5th Cir. 1992). Given the adherence of all other circuits to this rule, it would appear to be the better one. *See generally* Charles Everingham, IV, *Removal, Waiver, and the Myth of Unreviewable Remand in the Fifth Circuit*, 45 BAYLOR L. REV. 723 (1993) (explaining the correctness of the *Medscope* decision and recounting generally Fifth Circuit rules regarding appellate review of remand orders).

217. *See* Thermtron Prods., Inc. v. Hermansdorfer, 423 U.S. 336 (1976), holding that § 1447(d) only prohibits appellate review of remand orders issued pursuant to § 1447(c). Thus, if the court remanded because its docket was too crowded, for instance, the remand would be reviewable by the appellate court. *Id. See also* note 200 and accompanying text (citing other examples of remands not based on the statutory grounds of § 1447(c)). *See also* Minot v. Eckhardt-Minot, 13 F.3d 590 (2d Cir. 1994) (remand based on abstention); *In re* International Paper Co., 961 F.2d 558 (5th Cir. 1992) (remand in the "spirit of federalism"); Clorox v. United States Dist. Ct., 779 F.2d 517 (9th Cir. 1985) (remand based on waiver of removal right); Pelleport Investors, Inc. v. Budco Quality Theatres, Inc., 741 F.2d 273 (9th Cir. 1984) (remand based on forum selection clause). For an excellent account of the various circuits' treatment of the *Thermtron* exception, *see* Rhonda Wasserman, *Rethinking Review of Remands: Proposed Amendments to the Federal Removal Statute*, 43 EMORY L.J. 83 (1994).

218. *See, e.g.*, Smith v. Texas Children's Hosp., 84 F.3d 152 (5th Cir. 1996) (discretionary remand pursuant to § 1367); Executive Software of N. Am., Inc. v. United States Dist. Ct., 24 F.3d 1545 (9th Cir. 1994) (same); *Bogle*, 24 F.3d at 758 (same); *Eustus*, 97 F.3d at 103-04 (discretionary remand pursuant to § 1441(c)); *In re* Surinam Airways Holding Co., 974 F.2d 1255 (11th Cir. 1992) (same).

219. *See* Quackenbush v. Allstate Ins. Co., 116 S. Ct. 1712 (1996). *See, e.g.*, *Eustus*, 97 F.3d at 103-04 (order finding FMLA claim removable, but remanding state law claims); Loftin v. Rush, 767 F.2d 800 (11th Cir. 1985) (order vacating state court judgment and remanding claims to state court); *In re* Bobroff, 766 F.2d 797 (3d Cir. 1985) (order denying summary judgment to defendant in bankruptcy debtor's tort action and remanding to state court); Pelleport Investors, Inc v. Budco Quality Theatres, Inc., 741 F.2d 273 (9th Cir. 1984) (remand order based on forum selection agreement). *See also* Bennett v. Liberty Nat'l Fire Ins. Co., 968 F.2d 969 (9th Cir. 1992) (order upholding arbitration agreement but remanding action to state court); Wasserman, *supra* note 217.

risk remand of their case back to the state court. By contrast, parties seeking remand to state court must pay particular attention to the nature of the removal error and the timing of their remand application. Even if a district court's decision to remand or not to remand a case is in error, the appellate court may lack jurisdiction to take corrective action. In this regard, a party's failure to follow the appropriate removal or remand procedures may have lasting effects. The effect may even be a permanent one, as when subject matter jurisdiction existed at the time of trial, the federal appellate court may treat any procedural defect as a sort of harmless error and affirm the federal district court's decision, anyway. Thus, because the rules of removal and remand dictate the very court that will hear a party's case, the party seeking removal or remand would be wise to check, double-check, and triple-check its actions when moving to remove or remand its case between the courts.