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RECENT TRENDS IN THE ELEVENTH CIRCUIT: REMOVAL JURISDICTION AND PROCEDURES IN EMPLOYMENT LAW LITIGATION

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I. REMOVAL JURISDICTION IN GENERAL

Subject to certain exceptions, a defendant may remove "any civil action brought in a State court of which the district courts of the United States have original jurisdiction . . . ."[1] The rationale for removal jurisdiction is the belief that defendants, as well as plaintiffs, should have the opportunity to benefit from the availability of a federal forum.[2] For example, traditionally, removal in diversity cases was intended to ensure a neutral forum for alien defendants when a plaintiff sued in his or her home state.[3] In federal question cases, removal has customarily ensured that questions of federal law were decided by judges more familiar with those issues.[4]

Today, employers generally seek to remove employment cases to federal court, not only to benefit from federal judges' neutrality or familiarity with the federal statutes, but also to take advantage of practical and strategic advantages not available in state court.[5] In recent years, removal by employers has increased, possibly in part due to defendants' penchant for seeking a federal forum, but more likely because plaintiffs have many more opportunities to file their employment-related claims in state courts. This is largely because states such as Florida have in recent years enacted legislation similar to federal anti-discrimination laws, and often providing for greater coverage or relief.[6]

With the proliferation of removal efforts comes the need for courts to focus on the broad jurisdictional issues as well as the intricacies of removal

1. 28 U.S.C. § 1441(a) (2000). *See also* Judiciary Act of 1789, ch. 20 §12, 1 Stat. 79–80 (original removal statute).

2. *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION §5.5, at 340 (3d ed. 1999).

3. *See* CHEMERINSKY, *supra* note 2.

4. *See* Hunter v. United Van Lines, 746 F.2d 635, 639 (9th Cir. 1984) (citing Paul J. Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157, 170–76 (1953)).

5. *See* Yellow Freight Sys., Inc. v. Donnelly, 494 U.S. 820, 826 (1990) ("It may be assumed that federal judges will have more experience in Title VII litigation than state judges. That, however, is merely a factor . . . that may motivate a defendant to remove a case to federal court.").

6. For example, the Florida Civil Rights Act of 1992, unlike Title VII of the Civil Rights Act of 1964, extends protection to "marital status" discrimination and does not limit the amount of available compensatory damages. *See* FLA. STAT. § 760.01–.11 (2002).

procedures.[7] Accordingly, case law addressing the minutiae of removal jurisdiction and procedures has exploded in recent years. The purpose of this article is to review and analyze developments and trends in the recent decisions relating to removal procedures and jurisdictional prerequisites, particularly those impacting employment litigation in the Eleventh Circuit.

A. *Federal Question Jurisdiction*

The general removal statute does not separately provide jurisdiction;[8] rather, a defendant may only remove an action if the federal court would possess original jurisdiction over the subject matter.[9] In general, the complaint must be either be a federal question or a diversity of citizenship must exist for a case to be removed pursuant to section 1441(a).[10] Because removal jurisdiction raises significant federalism concerns, "removal statutes should be construed narrowly, with doubts resolved against removal."[11] Thus, the party seeking removal to federal court has the burden of establishing federal jurisdiction.[12]

Federal courts have "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."[13] If federal question jurisdiction exists, an action "shall be removable without regard to the citizenship or residence of the parties."[14]

B. *Well-Pleaded Complaint Rule*

The presence of federal question jurisdiction has traditionally been governed by the "well-pleaded complaint" rule.[15] Pursuant to this rule, a case "arises under" federal law, and is therefore removable, only if a federal claim

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7. *See* Matthew C. Lucas, *Trial Lawyers Forum: Diversity Jurisdiction Removal In Florida*, 77 FLA. BAR J. 54, (2003) (stating "[A] maelstrom of potential issues - - from the mundane to the occasionally esoteric - - await the practitioner who seeks to remove a lawsuit from a Florida court to a federal court . . . .").

8. *See* Allen v. Christenberry, 327 F.3d 1290, 1296 n.3 (11th Cir. 2003).

9. *See* Caterpillar Inc. v. Williams, 482 U.S. 386, 392 (1987); Field v. Nat'l Life Ins. Co., No. 8:00-CV-989-T-24TBM, 2001 U.S. Dist. LEXIS 5451, at *3 (M.D. Fla. Jan. 22, 2001).

10. *See* CHEMERINSKY, supra note 2, §5.5, at 340 (3d ed. 1999).

11. *Allen*, 327 F.3d at 1293 (citing Diaz v. Sheppard, 85 F.3d 1502, 1505 (11th Cir. 1996); *see* Univ. of S. Ala. v. Am. Tobacco Co., 168 F.3d 405, 411 (11th Cir. 1999).

12. *See Diaz*, 85 F.3d at 1505.

13. 28 U.S.C. § 1331 (2000).

14. 28 U.S.C. § 1441(b) (2000).

15. Rivet v. Regions Bank of La., 522 U.S. 470, 475 (1998) (quoting *Williams*, 482 U.S. at 392; Merrell Dow Pharm., Inc. v. Thompson, 478 U.S. 804, 808 (1986).

exists on the face of the plaintiff's complaint.[16] In 2003, the Eleventh Circuit reaffirmed that the federal question must "'necessarily appear [ ] in the plaintiff's statement of his own claim in the bill or declaration, unaided by anything alleged in anticipation of avoidance of defenses which it is thought the defendant may interpose.'"[17]

The United States Supreme Court has established that "[a] defense is not part of a plaintiff's properly pleaded statement of his or her claim."[18] Thus, "a case may not be removed to federal court on the basis of a federal defense . . . even if the defense is anticipated in the plaintiff's complaint, and even if both parties admit that the defense is the only question truly at issue in the case."[19]

C. *Complete Preemption - Exception to the Well-Pleaded Complaint Rule*

Generally, the defense of ordinary preemption—that the plaintiff's state law claims have been substantively displaced by federal law—has been held to be insufficient to confer federal jurisdiction.[20] In 2003, the Supreme Court, in *Beneficial National Bank v. Anderson*,[21] decided that "a state claim may be removed to federal court [under federal question jurisdiction based on preemption] in only two circumstances—when Congress expressly so provides, such as in the Price–Anderson Act . . . when a federal statute wholly displaces the state-law cause of action through complete pre-

16. *Rivet*, 522 U.S. at 475–76 (quoting *Williams*, 482 U.S. at 392; *See also* Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 63 (1987) (stating "[i]t is long settled law that a cause of action arises under federal law only when the plaintiff's well-pleaded complaint raises issues of federal law."); Whitt v. Sherman Int'l Corp., 147 F.3d 1325, 1329 (11th Cir. 1998) (stating "[a] case does not arise under federal law unless a federal question is presented on the face of the plaintiff's complaint.").

17. Stern v. IBM, 326 F.3d 1367, 1370 (11th Cir. 2003) (quoting Oklahoma Tax Comm'n v. Graham, 489 U.S. 838, 841 (1989))(quoting Taylor v. Anderson, 234 U.S. 74, 75–76 (1914); (citing Louisville & Nashville R.R. Co. v. Motley, 211 U.S. 149, 152 (1908))).

18. *Rivet*, 522 U.S. at 475. "[P]reclusion thus remains a defensive plea involving no recasting of the plaintiff's complaint, and is therefore not a proper basis for removal." *Id.* at 477.

19. Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust for S. Cal., 463 U.S. 1, 14 (1983).

20. *See* Caterpillar Inc., v. Williams, 482 U.S. 386, 392–93 (1987) "The fact that a defendant might ultimately prove that a plaintiff's claims are pre-empted . . . does not establish that they are removable to federal court." *Id.* at 398. Ordinary preemption is a defense that may be raised in state court as well as in federal court. *See* BLAB T.V. of Mobile, Inc. v. Comcast Cable Communications, Inc., 182 F.3d 851, 855 (11th Cir. 1999).

21. 123 S. Ct. 2058 (2003).

emption."[22] Unlike the defense of ordinary preemption, the doctrine of "complete preemption" gives a defendant the ability to remove the case to federal court.[23] The rationale undergirding this exception is that, where federal preemption is so complete that conflicting state law not only must yield, but is effectively extinguished; the only theory of recovery remaining is the federal claim, which takes the place of the state law claim recited in the complaint.[24]

Accordingly, complete preemption is an "extremely narrow exception,"[25] which only exists where Congress has clearly manifested an intent to make causes of action under a federal statute removable to federal court.[26] In fact, until the *Anderson* decision in June 2003, the Supreme Court has invoked the complete preemption doctrine under only two statutes, the Labor management Relations Act ("LMRA") and Employee Retirement Income Security Act ("ERISA").[27] Likewise, the Eleventh Circuit has refused to extend the complete preemption doctrine beyond the LMRA or ERISA.[28] For example, in *Geddes v. American Airlines Inc.*,[29] the Eleventh Circuit in 2003 refused to extend the doctrine of complete preemption to state actions implicating the Railway Labor Act ("RLA").[30] The court reasoned that the Supreme Court has been extremely reluctant "to find complete preemption absent any indication of Congress' clear intent to establish federal question

22. *Id.* at 2063. *See generally Taylor*, 481 U.S. at 63–65. "On occasion, the Court has concluded that the pre-emptive force of a statute is so 'extraordinary' that it 'converts an ordinary common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule.'" *Williams*, 482 U.S. at 393 (citing *Taylor*, 481 U.S. at 65).

23. *See BLAB T.V.*, 182 F.3d at 854.

24. *See Anderson*, 123 S. Ct. at 2063 (stating"[w]hen the federal statute completely preempts the state-law cause of action, a claim which comes within the scope of that cause of action, even if pleaded in terms of state law, is in reality based on federal law.").

25. *Stern*, 326 F.3d at 1371 .

26. *See Taylor*, 481 U.S. at 67.

27. *See* Avco Corp. v. Aero Lodge 735 Int'l Assoc. of Machinists & Aerospace Workers, 390 U.S. 557, 559 (1967) (providing an example of complete pre-emption under the LMRA), and *Taylor*, 481 U.S. at 67 (stating "[t]his [ERISA] suit, though it purports to raise only state law claims, is necessarily federal in character by virtue of the clearly manifested intent of Congress.").

28. *See* Anderson v. H & R Block, Inc., 287 F.3d 1038, 1046–48 (11th Cir. 2002) (holding that the National Bank Act did not accomplish complete preemption), *rev'd, sub nom.*, *Anderson*, 123 S. Ct. at 2063; Smith v. GTE Corp., 236 F.3d 1292, 1310–13 (11th Cir. 2001) (holding that the Federal Communications Act did not accomplish complete preemption); *BLAB T.V.*, 182 F.3d at 857–59 (holding that the Cable Communications Policy Act did not accomplish complete preemption).

29. 321 F.3d 1349 (11th Cir. 2003).

30. *Id.* at 1356–57.

jurisdiction . . . ."[31] The court concluded that although the RLA was designed to provide a comprehensive framework for resolving labor disputes, it lacked express language creating a federal cause of action (unlike ERISA or the LMRA).[32]

However, subsequent to *Geddes*, the Supreme Court in *Anderson* extended the complete preemption doctrine to hold that two sections of the National Bank Act completely preempted certain state law claims.[33] *Anderson* potentially expands the scope of the complete preemption doctrine and will be discussed in greater depth in Section IV, *infra*. Additionally, the Eleventh Circuit recently refined the application of the complete preemption doctrine under ERISA.[34] These developments will also be discussed at greater length in Section IV.

D. *Diversity Jurisdiction*

The diversity statute confers jurisdiction on the federal courts in civil actions between citizens of different states, in which the jurisdictional amount of greater than $75,000 is met, exclusive of interest and costs.[35] As the Eleventh Circuit held in 2002, according to the rule of "complete diversity," no plaintiff may share the same state citizenship with any defendant.[36]

In 2002, the Eleventh Circuit, in *Leonard v. Enterprise Rent a Car*,[37] held that for purposes of challenging the subject matter jurisdiction of the district court, the critical time is the date of removal.[38] The court held that "[i]f jurisdiction was proper at that date, subsequent events, even the loss of the required amount in controversy, will not operate to divest the court of jurisdiction."[39]

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31. *Id.* at 1357.

32. *Id. See also* Selim v. Pan American Airways Corp., 254 F. Supp. 2d 1316, 1320 (S.D. Fla. 2003) (holding Airline Deregulation Act does not completely preempt state law claims sufficient to support removal jurisdiction). *But see* Solimo v. Metro-North Commuter R.R., 253 F. Supp. 2d 733, 735 (S.D.N.Y. 2003) (finding state law claims that could not be settled without reference to CBA were preempted by the RLA).

33. *Anderson*, 123 S. Ct.. at 2060–63.

34. *See* Ervast v. Flexible Prods. Co., No. 02-15769, 02-15941, 2003 WL 22203472, at *4 (11th Cir. Sept. 24, 2003).

35. *See* 28 U.S.C. § 1332(a)(1) (2000).

36. *See* Riley v. Merrill Lynch, 292 F.3d 1334, 1337 (11th Cir. 2002).

37. 279 F.3d 967 (11th Cir. 2002).

38. *Id.* at 972 (citing Poore v. American-Amicable Life Ins. Co. of Texas, 218 F.3d 1287, 1289–91 (11th Cir. 2000)).

39. *Id. See also* Jones v. Law Firm of Hill & Ponton, 141 F. Supp. 2d 1349, 1355 (M.D. Fla. 2001) (stating "if there is no diversity of citizenship as of the date of commencement of

1. Complete Diversity

The Supreme Court has established that a case falls within the federal district court's "original" diversity jurisdiction only if diversity of citizenship among the parties is "complete" (e.g., only if there is no plaintiff and no defendant who are citizens of the same state).[40] Consequently, a defendant cannot remove a case that contains some claims against diverse defendants as long as there is one claim brought against a nondiverse defendant.[41] In other words, as the Northern District of Florida recently explained, "actions cannot be removed based on diversity if any defendant is a citizen of the forum state."[42]

The courts are still divided over the issue of whether 28 U.S.C. § 1441(b) allows removal of a diversity action before a non-diverse defendant is served. 28 U.S.C. § 1441(b), as amended, provides: "[S]uch action[s] 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."[43] The Northern District of Florida has stated that "a plaintiff cannot defeat removal merely by naming a non-diverse defendant; that defendant also has to be 'properly joined and served' for removal to be barred."[44]

Despite the language of section 1441(b), some courts have continued to follow the pre-amendment Supreme Court decision in *Pullman Co. v. Jenkins*,[45] which established that the presence of a single non-diverse defendant, whether served or not, defeats removal jurisdiction.[46] The Eleventh Circuit

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action, it cannot be created by a subsequent change of domicile by one of the parties.") (citing Slaughter v. Toye Bros. Yellow Cab Co., 359 F.2d 954 (5th cir. 1966)).

40. See Carden v. Arkoma Assocs., 494 U.S. 185, 187 (1990). *But cf.* FED. R. CIV. P. 21; Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 832–38 (1989) (Rule 21 authorizes courts to dismiss nondiverse defendants in order to cure jurisdictional defects, instead of the entire case).

41. *See* Caterpillar Inc. v. Lewis, 519 U.S. 61, 68 (1996).

42. Bouie v. Am. Gen. Life & Accident Ins. Co., 199 F. Supp. 2d 1259, 1262 n.4 (N.D. Fla. 2002).

43. 28 U.S.C. § 1441(b) (2000).

44. Samples v. Conoco, Inc., 165 F. Supp. 2d 1303, 1308 (N.D. Fla. 2001) (quoting Gilberg v. Stepan Co., 24 F. Supp. 2d 325, 330 (D.N.J. 1998)). *See also* Mask v. Chrysler Corp., 825 F. Supp. 285, 289 (N.D. Ala. 1993) (stating "the case was properly removed because the [non-diverse] dealer has not been served"), *aff'd* 29 F.3d 641 (11th Cir. 1994).

45. 305 U.S. 534, 539–41 (1939).

46. *See* Everett v. MTD Prods., 947 F. Supp. 441, 444 (N.D. Ala. 1996) (stating "*Pullman* continues to be good law to this day."); Stan Winston Creatures, Inc. v. Toys "R" Us, Inc., No. 02-CIV-0808(GEL), 2003 U.S. Dist. LEXIS 6502, at *5 (S.D.N.Y. Apr. 14, 2003) (stating "It is well established that an action based on state law cannot be removed to federal court if any non-diverse defendant is joined in the complaint, regardless of whether that defendant has been served.").

has not resolved this issue, although, in dicta it did express that "[u]nserved resident fictitious defendants may not be ignored on removal if the complaint's allegations are directed at all defendants jointly. . . ."[47]

2. Individuals

For diversity jurisdiction purposes, an individual can be a citizen of only one state at a time.[48] State citizenship, or "domicile," is determined by two factors: residence and intent to remain.[49] Generally, individuals are citizens of the state in which they maintain a principal residence, however, courts will look to the "totality of evidence."[50] Accordingly, one court has recently denied removal where the defendant alleged only "residence," as opposed to "citizenship."[51]

Various issues continue to arise as to where an individual is domiciled for purposes of diversity. For example, the Eleventh Circuit has recently held that aliens who have not yet established legal permanent residence are not citizens of the United States or Florida for purposes of diversity.[52] Furthermore, a member of the military service is presumed to retain his domicile at the time of enlistment.[53] Likewise, "'out-of-state college students are temporary residents and not domiciliaries of the states in which they attend college.'"[54] "Generally, a minor's domicile is determined by reference to that of some other person. In most cases, the minor's father's domicile."[55] Finally, diversity of citizenship in a putative class action is determined by the citizenship of the class members rather than the citizenship of the class representatives.[56]

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47. Coker v. Amoco Oil Co., 709 F.2d 1433, 1440 (11th Cir. 1983); *overruled by* Wilson v. Gen. Motors Corp., 888 F.2d 779, 782 (11th. Cir. 1989).

48. *Jones*, 141 F. Supp. 2d at 1353–54.

49. *Id.* at 1355.

50. *Id.*

51. Johnson v. Progressive Ins. Co., No. 03 CIV 4891 (LAK), 2003 U.S. Dist. LEXIS 12491, at *1 (S.D.N.Y. July 22, 2003).

52. *See* Foy v. Schantz, Schatzman & Aaronson, P.A., 108 F.3d 1347, 1349 (11th Cir. 1997).

53. Deckers v. Kenneth W. Rose, Inc., 592 F. Supp. 25, 27 (M.D. Fla. 1984).

54. Las Vistas Villas, S.A. v. Petersen, 778 F. Supp. 1202, 1205 (M.D. Fla. 1991), *aff'd*, 13 F.3d 409 (11th Cir. 1994), (quoting Hakkila v. Consol. Edison Co. of N. Y., Inc. 745 F. Supp. 988, 990 (S.D.N.Y. 1990).

55. Safeco Ins. Co. of America v. Mirczak, 662 F. Supp. 1155, 1157 (D. Nev. 1987); Wilson v. Kimble, 573 F. Supp. 501, 502 (D. Colo. 1983); Fahrner v. Gentzsch, 355 F. Supp. 349, 353 (E.D. Pa. 1972); Pauley v. Pauley, 58 F.R.D. 386, 387 (D. Md. 1972).

56. *See* Snyder v. Harris, 394 U.S. 332, 340 (1969).

3. Corporations

Diversity citizenship is frequently debated in employment related cases because many employers are corporations with headquarters or operations outside the place of employment. The Eleventh Circuit has recognized that, for purposes of diversity jurisdiction, a corporation is a citizen of: 1) the state in which it is incorporated; and 2) the state where it has its principal place of business.[57]

4. State of Incorporation

> [T]he requirement that "a corporation shall be deemed a citizen of any State by which it has been incorporated" refers to the state in which the appropriate regulatory agency has issued a certificate of incorporation or other legal document signifying that the corporation has been properly established pursuant to that state's law, and that no further inquiry is appropriate.[58]

Failure to maintain good standing in a state of its incorporation is irrelevant.[59]

Where a corporation is incorporated in more than one state, most courts have concluded that the multi-state corporation is deemed a citizen of every state in which it has been incorporated.[60] However, some courts, applying the so-called "forum doctrine," hold that a defendant multi-state corporation, when sued in one of the states of its incorporation, is regarded for diversity purposes as a citizen only of the forum state.[61]

Furthermore, pursuant to the alter ego and consolidation doctrines, a corporation may gain additional places of citizenship for purposes of diversity jurisdiction if it is consolidated with another corporation, or if it is found to be the "alter ego" of another corporation.[62] "For example, when a subsidiary is the alter ego of a parent, the parent is deemed to be a citizen of (1) the place where it is incorporated, (2) the place where its subsidiary is incorpo-

57. Bel-Bel Int'l Corp. v. Cmty. Bank of Homestead, 162 F.3d 1101, 1106 (11th Cir. 1998); (citing 28 U.S.C. § 1332(c)(1) (1994)); Fritz v. Am. Home Shield Corp., 751 F.2d 1152, 1153 (11th Cir. 1985) (stating "Thus, the statute [28 U.S.C. § 1332(c)] furnishes a dual base for citizenship: place of incorporation, and principal place of business.").

58. *Fritz,* 751 F.2d at 1154.

59. *See* Smith v. Arundel Coop., Inc., 660 F. Supp. 912, 913 (D.D.C. 1987).

60. *See e.g.,* Yancoskie v. Del. River Port Auth., 528 F.2d 722, 727 n.17 (3d Cir. 1975).

61. *See* Hudak v. Port Auth. Trans-Hudson Corp., 238 F. Supp. 790, 791–92 (S.D.N.Y. 1965).

62. Panalpina Welttransport GmBh v. Geosource, Inc., 764 F.2d 352, 354 (5th Cir. 1985) (citing Freeman v. Northwest Acceptance Corp., 754 F.2d 553 (5th Cir. 1985)).

rated, and (3) the place where it has its principal place of business."[63] However, the Eleventh Circuit has held that the alter ego doctrine cannot be used to preserve diversity jurisdiction by ignoring the place of incorporation of the subsidiary and treating the subsidiary as if it were only a citizen of the state of incorporation of the dominant corporation.[64]

5. Principal Place of Business

A more frequently litigated issue is the location of a corporation's "principal place of business." It is clear "that a corporation can have only one principal place of business."[65] The Eleventh Circuit has held that, "[i]n determining a corporation's principal place of business, a district court must, consider all of the corporation's operations . . . ."[66]

> One looks to the "total activity" of the corporation in order to determine its principal place of business. This analysis incorporates both the "place of activities" test (focus on production or sales activities), and the "nerve center" test (emphasis on the locus of the managerial and policymaking functions of the corporation).[67]

"[A] foreign corporation is a citizen of the U.S. state where it has its principal place of business."[68]

6. Unincorporated Associations

An unincorporated association is a citizen of every state where one of its members is a citizen.[69] Accordingly, a limited partnership is a citizen of each state in which at least one of its general or limited partners is a citizen.[70]

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63. *Id.*

64. *See Fritz*, 751 F.2d at 1153.

65. Brandt v. Weather Channel, Inc., 42 F. Supp. 2d 1344, 1345 (S.D. Fla. 1999); (citing citing Vareka Invs., N.V. v. Am. Inv. Prop., Inc., 724 F.2d 907 (11th Cir. 1984)).

66. Cabalceta v. Standard Fruit Co., 883 F.2d 1553, 1561 (11th Cir. 1989).

67. *Vareka Invs., N.V.* 724 F.2d at 910, *cert. denied*, 469 U.S. 826 (1984). *See also* Bivens v. Equitable Life Assur. Soc'y of the United States, 12 Fla. L. Weekly Fed. D244 (M.D. Fla. Mar. 17, 2000).

68. Las Vistas Villas, S.A. v. Petersen, 778 F. Supp. 1202, 1204 (M.D. Fla. 1991) (citing Jerguson v. Blue Dot Inv., Inc., 659 F.2d 31 (5th Cir., 1981), *cert. denied*, 456 U.S. 946 (1982)), *aff'd*, 13 F.3d 409 (1992).

69. United Steelworkers of Am. v. R. H. Bouligny, Inc., 382 U.S. 145, 146 (1965).

70. Carden v. Arkoma Assocs., 494 U.S. 185, 191–95 (1990). *Cf.* Riley v. Merrill Lynch, 292 F.3d 1334, 1339 (11th Cir.) (holding a business trust is a citizen of each state in which one of its shareholders is a citizen), *cert. denied*, 537 U.S. 950 (2002).

Likewise, a labor union is a citizen of every state where one of its members is a citizen.[71]

7. National Banks

National banks are subject to different diversity jurisdiction requirements.[72] Under 28 U.S.C. § 1348, national banks not chartered by any state are deemed citizens of the states in which they are located.[73] Accordingly, some courts have held that a national bank is "located" in every state in which it has a branch, therefore diversity jurisdiction will rarely be available.[74] However, the Seventh Circuit has recently held that national banks are subject to citizenship determinations similar to that of traditional corporations,[75] therefore, for purposes of diversity jurisdiction, a national bank is deemed to be a citizen of two states, the state of its principal place of business and the state listed in its organization certificate.[76] Although the Eleventh Circuit has not resolved the issue, one district court within the Circuit has followed the Seventh Circuit reasoning.[77]

8. Amount in Controversy - What Is and Is Not Included

It is clear that in determining whether the $75,000 jurisdictional threshold is met, the court must look solely to the amount in controversy at the time of removal.[78] Any subsequent events that may reduce the amount in controversy will not divest the court of jurisdiction.[79]

> [D]etermination of the value of the matter in controversy for purposes of federal jurisdiction is a federal question to be decided under federal standards, although the federal courts must, of course,

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71. *See United Steelworkers*, 382 U.S. at 152–53.
72. 28 U.S.C. § 1348.
73. *See* Fulton Nat'l Bank of Atlanta v. Hozier, 267 U.S. 276 (1925).
74. *See* Conn. Nat'l Bank v. Iacono, 785 F. Supp. 30, 33 (D.R.I. 1992).
75. Firstar Bank, N.A. v. Faul, 253 F.3d 982 (7th Cir. 2001).
76. *See id.*
77. Evergreen Forest Prods. of Ga. v. Bank of Am., N.A., 262 F. Supp. 2d 1297, 1303 (M.D. Ala. 2003) (adopting *Faul*, "[h]owever, rather than using a national bank's original organizational certificate as the second component in the citizenship determination, this court believes that a bank's most recent articles of association provide a more accurate standard for determining a bank's current citizenship."). *Id.*
78. *See* Keene Corp. v. United States, 508 U.S. 200 (1993).
79. St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 289 (1938).

look to state law to determine the nature and extent of the right to be enforced in a diversity case.[80]

9. Actual Damages

In evaluating whether the amount in controversy requirement is satisfied, courts will look to a plaintiff's claim for actual damages.[81] In employment cases, lost wages, bonuses, and benefits may be used in establishing the amount in controversy.[82]

For example, in *George v. Marriott Senior Living Services, Inc.*,[83] plaintiff asserted a claim for age discrimination under the FCRA.[84] "In her complaint, plaintiff alleged that her damages 'exceed Fifteen Thousand Dollars' but did not otherwise provide any specific numerical calculation of damages sought in the action."[85] In response to interrogatories, plaintiff did not provide a dollar amount of damages but did state that she was "seeking damages in the form of lost wages, lost bonuses, attorney's fees, loss of benefits, and unspecified compensatory damages for pain and suffering."[86] In its notice of removal, defendant, based upon these interrogatory answers, calculated the probable measure of damages, including back wages, as exceeding $75,000.[87] The southern district held that, based upon these calculations, defendant proved by a preponderance of the evidence that as of the date of removal, plaintiff's complaint and other documentation indicated that the amount in controversy exceeded $75,000.[88]

Both "potential as well as past damages are appropriate for consideration."[89] However, in *Golden v. Dodge-Markham Co*,.[90] a case involving a claim for retaliatory discharge pursuant to Florida's Whistleblower Act, the court remanded in part on the basis that "[a]t the time of removal, Plaintiff's

80. Horton v. Liberty Mut. Ins. Co., 367 U.S. 348, 352–53 (1961).
81. *See* Pease v. Medtronic, Inc., 6 F. Supp. 2d 1354, 1357 (S.D. Fla. 1998).
82. *See* Viens v. Wal-Mart Stores, Inc., Civ. No. 3:96cv02602 (AHN), 1997 U.S. Dist. LEXIS 24029, at *8 (D. Conn. Mar. 4, 1997) (including reasonably probable lost wages and medical expenses).
83. 2001 U.S. Dist. LEXIS 22822 (S.D. Fla. 2001).
84. *Id.* at *2.
85. *Id.*
86. *Id.* at *3.
87. *George*, 2001 U.S. Dist. LEXIS 22822 at *3.
88. *Id.* at *5.
89. Viacom, Inc. v. Zebe, 882 F. Supp. 1063, 1064–65 (S.D. Fla. 1995).
90. 1 F. Supp. 2d 1360 (M.D. Fla. 1998).

accrued lost wages, benefits, and other remunerations totaled $40,277.57."[91] The court observed that defendant did "not offer any evidence that Plaintiff would be entitled to any other payments, reimbursements, rewards, recompense, or compensation."[92] Therefore, it is important for a defendant, in its notice of removal, to provide calculations for potential, and past and front pay under the applicable claim.

10. Compensatory Damages

In evaluating whether the amount in controversy requirement is satisfied, courts may look to a plaintiff's claim for compensatory damages.[93] For example, in *Pease v. Medtronic, Inc.*,[94] the southern district decided that defendant had presented sufficient evidence that compensatory damages "in cases like this one routinely approach or exceed $75,000."[95] However, the Middle District of Florida has expressed that "[m]aking a general blanket statement that, if Plaintiff prevails, compensatory damages could certainly entitle him to thousands of dollars, does not rise to the levels of proving, by a preponderance of the evidence, that the amount in controversy exceeds $75.000.00."[96]

11. Declaratory or Injunctive Relief

Where the plaintiff seeks only declaratory and injunctive relief, the United States Supreme Court has held that "the amount in controversy is measured by the value of the object of the litigation."[97] "In other words, the value of the requested injunctive relief is the monetary value of the benefit that would flow to the plaintiff if the injunction were granted."[98] For example, where a plaintiff asked the court to void a $9.5 million dollar arbitration

91. *Id.* at 1366. The court determined this figure by dividing plaintiff's annual salary into a monthly salary or daily salary, calculating the time between the date of termination and time of removal, and multiplying the salary by the time. *Id.*

92. *Id.* at 1366. *See also* Viens v. Wal-Mart Stores, Inc., CIV. No. 3:96cv02602(AHN), 1997 U.S. Dist. LEXIS 24029, at *8 n.3 (D. Conn. Mar. 3, 1997) (holding that a negligence action, for purposes of determining amount in controversy, estimated back pay figure from plaintiff's interrogatory responses are hourly rate X hours/week X number of weeks plaintiff would have worked between the date of accident and the date of the discovery response).

93. *See e.g.* Pease v. Medtronic, Inc., 6 F. Supp. 2d 1354, 1357 (S.D. Fla. 1998).

94. *Id.* at 1354.

95. *Id.*

96. *Golden*, 1 F. Supp. 2d at 1366.

97. Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 347 (1977).

98. Cohen v. Office Depot, Inc., 204 F.3d 1069, 1077 (11th Cir. 2000), *cert. denied*, 531 U.S. 957 (2000).

award and enjoin defendant from placing liens against plaintiff's property, one district court held that the amount in controversy requirement was met.[99]

However, where a plaintiff asks the court to enjoin a defendant from engaging in certain practices, such as ongoing harassment or discrimination in the workplace, but where such injunction would be of no monetary benefit to the plaintiff, the requested injunctive relief will not satisfy the amount in controversy requirement.[100] The Eleventh Circuit has recently declared that for determining the amount in controversy, "the costs borne by [a] defendant in complying with [an] injunction are irrelevant."[101] Moreover, "[t]he remote possibility—if there be any—that monetary value might somehow flow to the class plaintiffs from the requested injunctive relief is 'too speculative and immeasurable to satisfy the amount in controversy requirement.'"[102]

12. Attorneys' Fees

The United States Supreme Court has established that attorneys' fees may be included in meeting the amount in controversy requirement where the governing law allows.[103] However, in 2003, the Eleventh Circuit clarified that "[t]he general rule is that attorneys' fees do not count towards the amount in controversy unless they are allowed for by statute or contract."[104] Accordingly, a claim for attorneys' fees arising from a common law cause of

99. Evergreen Forest Prods. of Ga., L.L.C. v. Bank of Am., N.A., 262 F. Supp. 2d 1297, 1308 (M.D. Ala. 2003).

100. *Cohen*, 204 F.3d at 1078–79.

101. Morrison v. Allstate Indem. Co., 228 F.3d 1255, 1268 n.9 (11th Cir. 2000). *See* Cohen, 204 F.3d at 1079 n.8.

102. *Cohen*, 204 F.3d at 1078 (quoting Ericsson GE Mobile Communications, Inc. v. Motorola Communications & Elecs., Inc., 120 F.3d 216, 221–22 (11th Cir.1997)).

103. Mo. State Life Ins. Co. v. Jones, 290 U.S. 199 (1933); *Cohen*, 204 F.3d at 1079 ("when a statutory cause of action entitles a party to recover reasonable attorney fees, the amount in controversy includes consideration of the amount of those fees."); *Morrison*, 228 F.3d at 1265 ("When a statute authorizes the recovery of attorney's fees, a reasonable amount of those fees is included in the amount in controversy."); 14B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3712 (3d ed. 1998) ("The law is now quite settled, . . . [that] attorney's fees are a part of the matter in controversy . . . when they are provided for by contract or by state statute."). *Id.*

104. Federated Mut. Ins. Co. v. McKinnon Motors, LLC, 329 F.3d 805, 808 n.4 (11th Cir. 2003). *See also* Golden v. Dodge-Markham Co., 1 F. Supp. 2d 1360, 1366 (M.D. Fla. 1998) (holding that although reasonable attorneys' fees, court costs, and expenses were available to prevailing party under section 448.104 of the *Florida Statutes*, the court determined that, "by including attorney's fees with court costs and expenses, it logically follows that they are considered just that—costs and expenses, which are excluded under 28 U.S.C. § 1332(a).").

action may not be included in meeting the amount in controversy requirement.[105]

Moreover, "when the amount in controversy substantially depends on a claim for attorney fees, that claim should receive heightened scrutiny," and defendant may be required to provide documentation to support its claim that attorneys' fees will exceed the jurisdictional amount.[106] In addition, the court should also take into account the reasonableness of the purported fee award in relation to other potential damages in determining whether it satisfies the jurisdictional minimum.[107] Accordingly, a "disproportionately large amount of attorney's fees cannot be employed to claim that the amount in controversy requirement was attained."[108]

13. Punitive Damages

In evaluating whether the amount in controversy requirement is satisfied, the Eleventh Circuit has held that courts may look to a plaintiff's demand for punitive damages.[109] Likewise, the United States Supreme Court has held that punitive damages must be included in determining the amount in controversy requirement if, under the governing law of the suit, they are recoverable.[110]

However, a defendant cannot remove a case merely upon the suspicion that plaintiff intends to amend its complaint to seek punitive damages.[111] Rather, "[i]f and when that happens, the case would then become removable——but not until then."[112] Likewise, in *Federated Mutual Insurance Co. v. McKinnon Motors*,[113] the Eleventh Circuit recently declared that a mere speculative assertion that punitive damages may exceed $75,000 (e.g. "mere citation" to what other plaintiffs have received in the past as punitive damages awards in similar cases) may not satisfy defendant's burden.[114]

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105. *See Federated Mut. Ins. Co.*, 329 F.3d at 808 n.4.

106. Cohen v. Office Depot, Inc., 204 F.3d 1069, 1080 n.10 (11th Cir. 2000).

107. *Cohen*, 204 F.3d. at 1080. *See also* Field v. Nat'l Life Ins. Co., No. 8:00-CV-989-T-24TBM, 2001 U.S. Dist. LEXIS 5451, at *17 (M.D. Fla. Jan. 22, 2001) ("claimed attorney's fees must obviously be a reasonable and proportional amount.").

108. *Field*, 2001 U.S. Dist. LEXIS 5451, at *18.

109. Holley Equip. Co. v. Credit Alliance Corp., 821 F.2d 1531, 1535 (11th Cir. 1987) ("[P]unitive damages must be considered, [citations omitted] unless it is apparent . . . that such cannot be recovered."); *see* Pease v. Medtronic, Inc., 6 F. Supp. 2d 1354, 1357 (S.D. Fla. 1998).

110. Bell v. Preferred Life Assurance Soc., 320 U.S. 238, 240 (1943).

111. Howard v. Globe Life Ins. Co., 973 F. Supp. 1412, 1418 (N.D. Fla. 1996).

112. *Id.*

113. 329 F.3d 805 (11th Cir. 2003).

114. *Id.* at 809.

Moreover, consideration of the amount of punitive damages should take into account applicable limits on punitive damages awards. For example, in *Barnes v. Ford Motor Co.*,[115] the defendant removed a fraud action to federal court based on diversity and federal question jurisdiction.[116] The court remanded due to lack of jurisdiction.[117] As to diversity jurisdiction, the court found that the minimum amount in controversy was not met because, although plaintiff sought both compensatory and punitive damages, the plaintiff requested less than $1,000 in compensatory damages.[118] As to punitive damages, the court reasoned that to meet the minimum amount in controversy, punitive damages would need to exceed $74,000, a figure that was far in excess of the constitutional limit as set forth in *State Farm Mutual Automobile Insurance Co. v. Campbell*.[119] Similarly, one who is removing employers with less than 101 employees must be aware that Title VII limits punitive damages in such cases to $50,000.[120]

14. Liquidated Damages

Liquidated damages and statutory penalties may be included for calculating whether the amount in controversy has been met.[121]

15. Costs and Prejudgment and Postjudgment Interest Not Included

The text of 28 U.S.C. § 1332 precludes consideration of a party's claim for costs and/or interest in determining whether the amount in controversy requirement has been satisfied.[122]

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115. No. 4:03-cv-0018-DFH, 2003 U.S. Dist. LEXIS 9268, at *1 (S.D. Ind. May 30, 2003).

116. *Id.* at *2.

117. *Id.*

118. *Id.* at *6–7.

119. *Id.* at *9.

120. *See* 42 U.S.C. § 1981a(b)(3)(A) (2000).

121. *See* Jackson v. Purdue Pharma Co., No. 6:02-1428, 2003 U.S. Dist. LEXIS 6998, at *3–6 (M.D. Fla. Apr. 10, 2003). In FDUPTA case, "amount in controversy include Plaintiff's requests for the reimbursed purchase price of the OxyContin, treble damages and/or the statutory penalty amount under the FDUTPA, attorney's fees, and the value to the Plaintiff of the medical monitoring fund." *Id.* at *6.

122. *See Federated Mut. Ins. Co.*, 329 F.3d at 808 n.4.

16. Multiple Claims

"[M]ultiple claims for relief can and should be considered together in determining the amount in controversy, since there may be multiple recoveries if plaintiffs succeed on each claim."[123] Furthermore, the Middle District of Florida recently held that defendants may rely upon the damages claimed by an unnamed plaintiff in attempting to establish the jurisdictional threshold.[124]

E. *Supplemental Jurisdiction*

The *Federal Rules of Civil Procedure* provide that a district court may exercise supplemental jurisdiction over all claims that are "so related to claims in the action within [the court's] such original jurisdiction that they form part of the same case or controversy. . . ."[125] In addition, 28 U.S.C. § 1441 (c) provides:

> Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates. [126]

28 U.S.C.§ 1441(c) serves the same values as supplemental jurisdiction in that it allows an entire case to be tried in one forum.[127]

1. Applies in Federal Question Removal Where There Is No Independent Basis for Federal Jurisdiction of Pendent State Claims

A district court may properly retain jurisdiction over non-removable claims joined with separate and independent removable claims.[128] For example, in *Newton v. Coca-Cola Bottling Co. Consolidated*,[129] the court held that

123. *Howard*, 973 F. Supp. at 1418.
124. *See* Forest v. Penn Treaty Am. Corp., No. 5:03-45-O-10GRJ, 2003 U.S. Dist. LEXIS 11869, at *24 (M.D. Fla. June 4, 2003).
125. § 1367(a) (2003).
126. 28 U.S.C. § 1441(c).
127. *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 5.5 (3d ed. 1999).
128. *See* Butero v. Royal Maccabees Life Ins. Co., 174 F.3d 1207, 1215 (11th Cir. 1999); Hayduk v. United Postal Serv., Inc., 930 F. Supp. 584, 600 (S.D. Fla. 1996).
129. 958 F. Supp. 248 (W.D.N.C. 1997).

plaintiff's claims under the Violence Against Women Act ("VAWA") (which are expressly non-removable under 28 U.S.C. § 1445(d)), were removable under 28 U.S.C. § 1441(c) where they were joined with removable sexual harassment claims under Title VII.[130] The court held that the Title VII claim and the VAWA claim did not arise from the same facts or series of interlocked transactions and that removal pursuant to 28 U.S.C. § 1441(c) was proper.[131] Yet, in *Reed v. Heil Co.*,[132] the Eleventh Circuit refused to exercise supplemental jurisdiction over a state workers' compensation retaliation claim where the court had federal question jurisdiction of an ADA claim, because the workers' compensation retaliation claim was expressly non-removable under 28 U.S.C. § 1445.[133]

Although 28 § 1441(c) gives the district court the discretion to remand "all matters in which State law predominates,"[134] 28 U.S.C. § 1441(c) only permits remand of claims which are "separate and independent" of the removable claims.[135] 28 U.S.C. § 1441(c) does not allow the remand of claims that are not separate and independent.[136] For example, in *Eastus v. Blue Bell Creameries, L.P.*,[137] an employee, who was terminated after requesting time off because he expected his wife to give birth, filed a state court action against his employer for violation of the FMLA, tortious interference, and intentional infliction of emotional distress.[138] The employer removed the case.[139] The Fifth Circuit held that the FMLA claim and the intentional infliction of emotional distress claim were not "separate and independent" causes of action and could not be remanded under 28 U.S.C. § 1441(c), because both claims were based on the employee's termination and were sim-

130. *Id.* at 251.

131. *Id. See also* H & R Block, Ltd. v. Housden, 24 F. Supp. 2d 703 (E.D. Tex. 1998). In *H & R Block*, the employer filed an action against former employees alleging employees' breach of their noncompete agreements. *Id.* at 704. The employees filed a counterclaim alleging violations of the FLSA. *Id.* The counterclaim defendants filed removed the action. *Id.* The court held that the removal was proper because the counterclaim was separate and independent from the original claim as required by 28 U.S.C. § 1441(c), in that the defendants' counterclaim involved activities that took place during their employment, unlike the plaintiff's claim which was rooted in activities that took place following the termination of their employment. *Id.* at 706.

132. 206 F.3d 1055 (11th Cir. 2000).

133. *Id.* at 1057.

134. 28 u.S.C. § 1441(c) (2003).

135. *Id.*

136. *See* Eastus v. Blue Bell Creameries, L.P., 97 F.3d 100, 106 (5th Cir. 1996) (citing 28 U.S.C. § 1441(c)).

137. 97 F.3d 100 (5th Cir. 1996).

138. *Id.* at 102–103.

139. *Id.* at 103.

ply different theories of recovery.[140] However, the court affirmed the remand of the tortious interference claim because the FMLA and tortious interference claims were separate and independent under 28 U.S.C. § 1441(c).[141]

Under 28 U.S.C. § 1367, the state claim must be a judicially cognizable cause of action and the state and federal claims must "derive from a common nucleus of operative fact."[142] District courts may decline to exercise jurisdiction over pendent claims for a number of valid reasons.[143] 28 U.S.C. § 1367(c) provides that:

> district courts may decline to exercise supplemental jurisdiction over a claim . . . if—
>
> (1) the claim raises a novel or complex issue of State law,
>
> (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
>
> (3) the district court has dismissed all claims over which it has original jurisdiction, or
>
> (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.[144]

In addition to its discretion under § 1367(c), district courts "may decline to exercise their jurisdiction, in otherwise 'exceptional circumstances,' where denying a federal forum would clearly serve an important countervailing interest, for example, where abstention is warranted by considerations of 'proper constitutional adjudication,' 'regard for federal-state relations,' or 'wise judicial administration.'"[145]

A "district court may, at its discretion, exercise supplemental jurisdiction over state law claims even where it has dismissed all claims over which it had original jurisdiction, [even though] it cannot exercise supplemental jurisdiction unless there is first a proper basis for original federal jurisdic-

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140. *Id.* at 105.

141. *Id.* at 105–6; *see also In re* City of Mobile, 75 F.3d 605, 608 (11th Cir. 1996) (citing Am. Fire & Cas. Co. v. Finn, 341 U.S. 6, 14 (1951)) (where "a single accident occurred, and state and federal claims were filed based on that accident . . . section 1441(c) is not applicable because no separate and independent claim exists").

142. City of Chicago v. Int'l Coll. of Surgeons, 522 U.S. 156, 165 (1997) (quoting Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966).

143. *See* Carnegie Mellon Univ. v. Cohill, 484 U.S. 343, 350 (1988) (citing *Gibbs*, 383 U.S. 715, 726 (1966)).

144. § 1367(c).

145. Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 716 (1996) (quoting Colo. River Water Conservation Dist. v. U.S. 800, 813 (1976) (quoting County of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 189 (1959))) (internal citations omitted).

tion."[146] However, "when all federal claims are eliminated in the early stages of litigation, the balance of factors generally favors declining to exercise pendent jurisdiction over remaining state law claims and dismissing them *without* prejudice."[147]

2. Not Necessary in Diversity Cases

Under the Judicial Improvements Act of 1990,[148] 28 U.S.C. § 1441(c) no longer applies to diversity cases. Rather, the ability to remove under 28 U.S.C. § 1332 requires that amount in controversy requirements are met and that complete diversity of citizenship exists as to every claim alleged in the complaint.[149]

II. REMOVAL PROCEDURE

A case "may be removed [only] by the defendant or the defendants."[150] Plaintiffs may not remove a case, even to defend against a counterclaim.[151] Likewise, third-party defendant typically may not remove an action to federal court.[152]

A. *Time Requirements*

1. Thirty Days from Service of Complaint Demonstrating a Basis for Removal

28 U.S.C. § 1446(b) provides:

> 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*

146. Nowak v. Ironworkers Local 6 Pension Fund, 81 F.3d 1182, 1187 (2d Cir. 1996)(citing Cushing v. Moore, 970 F.2d 1103, 1106 (2d Cir. 1992)).

147. Tops Mkts., Inc. v. Quality Mkts., Inc., 142 F.3d 90, 103 (2d Cir. 1998).

148. Pub. L. No. 101-650, § 310(a), 104 Stat. 5113 (codified as amended at 28 U.S.C. § 1367 (2000)).

149. Blasberg v. Oxbow Power Corp., 934 F. Supp. 21, 23 (D. Mass. 1996).

150. 28 U.S.C. §1441(a) (2000).

151. *See* 14C CHARLES A. WRIGHT et al., FEDERAL PRACTICE AND PROCEDURE: § 3731 (3d ed. 1998).

152. Manorcare Potomac v. Understein, 15 Fla. L. Weekly Fed. D594, 595 n.1 (Fla. Oct. 16, 2002) (noting that there is an exception for third-party defendants proceeding under 28 U.S.C. § 1442(a)(1) (2000)).

> 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*.[153]

"The thirty day period is not jurisdictional, but is rather a strictly applied rule of procedure that may not be extended by the court."[154] "Thus, section 1446(b)'s mandatory removal period cannot be enlarged by court order, stipulation of the parties, or otherwise."[155] However, the court of the Middle District of Florida has stated that "it may be waived by the parties by 'affirmative conduct or unequivocal assent of a sort which would render it offensive to fundamental principles of fairness to remand.'"[156] It is important to note that a defendant's reliance upon an agreement with a plaintiff to enlarge the time for removal for waiver purposes is considered per se unreasonable—agreements to extend the statutory removal period are void *ab initio*.[157]

2. When Does the Clock Begin to Run?

Despite the language of 28 U.S.C. § 1446(b), a defendant's time to remove is not triggered until actual service of process (e.g. not by mere receipt of a complaint (e.g. by facsimile) unattended by any formal service).[158] In its 1999 decision in *Murphy Bros., Inc. v. Michetti Pipestringing, Inc.*,[159] the Supreme Court explained:

> First, if the summons and complaint are served together, the 30–day period for removal runs at once. Second, if the defendant is served with the summons but the complaint is furnished to the defendant sometime after, the period for removal runs from the de-

153. 28 U.S.C. § 1446(b) (2000) (emphasis added).

154. BCC Apts., Ltd. v. Browning, 994 F. Supp. 1440, 1442 (S.D. Fla. 1997) (citing Liebig v. DeJoy, 814 F. Supp. 1074, 1076 (M.D. Fla. 1993).

155. Harris Corp. v. Kollsman, Inc., 97 F. Supp. 2d 1148, 1151 (M.D. Fla. 2000).

156. *Liebig*, 814 F. Supp. at 1076 (quoting Maybruck v. Haim, 290 F. Supp. 721, 723 (S.D.N.Y. 1968)).

157. *Harris Corp.*, 97 F. Supp. 2d at 1152.

158. Murphy Bros. v. Michetti Pipe Stringing, 526 U.S. 344, 347–48 (1999). *But see* Imco USA, Inc. v. Title Ins. Co., 729 F. Supp. 1322, 1323 (M.D. Fla. 1990) ("Service of process under state law does not control for removal purposes. What is important is that the Defendant was on notice of the pending action through receipt of the 'initial pleading.'") (citing Perimeter Lighting, Inc. v. Karlton, 456 F. Supp. 355 (N.D. Ga. 1978)) (internal citations omitted).

159. *Murphy Bros.*, 526 U.S. at 353–55.

> fendant's receipt of the complaint. Third if the defendant is served with the summons and the complaint is filed in court, but under local rules, service of the complaint is not required, the removal period runs from the date the complaint is made available through filing. Finally, if the complaint is filed in court prior to any service, the removal period runs from the service of the summons.[160]

Nonetheless, although the Eleventh Circuit has not addressed the issue, it is relatively clear that a defendant is permitted to remove a case prior to proper service of process, as long as the complaint has been filed.[161] Accordingly, a defendant's removal of a case from state court to federal district court is not premature if such removal is made before formal service of process takes place.[162]

3. Multiple Defendants Served at Different Times

A still unresolved issue is when a notice of removal must be filed when there are multiple defendants served at different times.[163] Some courts, including the Middle District of Florida, have held that service upon the first of multiple defendants starts the § 1446(b) clock.[164] Therefore, the first-served defendant must petition for removal within thirty days, in accordance with *Murphy Bros.*, regardless of when the other defendants have been served.[165] Other courts have rejected the first-served rule and have held that a later-served defendant has thirty days from his receipt of service to remove, with the consent of the other defendants (including those previously-served defendants who failed to remove).[166]

4. No Later Than One Year Since Commencement of State Court Proceedings

28 U.S.C. § 1446(b) provides that "a case may not be removed on the basis of jurisdiction conferred by section 1332 [diversity] of this title more

160. *Id.* at 354.

161. *See* Bell v. Am. Gen. Fin., Inc., 267 F. Supp. 2d 582, 583–84 (S.D. Miss. 2003).

162. *See* Delgado v. Shell Oil Co., 231 F.3d 165, 176–77 (5th Cir. 2000).

163. *See* Smith v. Health Ctr. of Lake City, Inc., 252 F. Supp. 2d 1336, 1345–46 (M.D. Fla. 2003).

164. *See id.*; Faulk v. Superior Indus. Int'l, Inc., 851 F. Supp. 457, 458 (M.D. Fla. 1994).

165. *Health Ctr. of Lake City, Inc.*, 252 F. Supp. 2d at 1344–45 (M.D. Fla. 2003).

166. *See* Brierly v. Alusuisse Flexible Packaging, Inc., 184 F.3d 527, 533 (6th Cir. 1999); *see also* Diebel v. S.B. Trucking Co., 262 F. Supp. 2d 1319, 1327–28 (M.D. Fla. 2003) (declining to decide whether "later-served" or "first-served" rule applies).

than 1 year after commencement of the action."[167] Some courts, most recently the Fifth Circuit, have held that the one-year time limit is not jurisdictional and is subject to equitable tolling.[168] Accordingly, if a plaintiff has requested less than 75,000 dollars in his or her complaint, and over one year later, files a motion in state court for leave to add a claim for punitive damages pursuant to section 768.72 of the *Florida Statutes,* plaintiff's motion could serve as a basis for defendant removing beyond the one-year limit.[169] However, the Eleventh Circuit has expressed in dicta that the one-year bar on removal should not be equitably tolled.[170]

5. Prerequisites to Removal

Although, generally, a defendant can only remove a case to federal court within thirty days after receiving the pleading, 28 U.S.C. § 1446(b) provides:

> If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service . . . of a copy of an amended pleading, motion, order or *other paper* from which it *may first be ascertained* that the case is one which is or has become removable.[171]

The words "other paper" in the above-quoted provision have been broadly interpreted by courts and have allowed for a wide array of documents to serve as a trigger, commencing a new thirty-day period for previously unremovable cases that have now become removable.[172] "Other paper" includes damages interrogatories, demonstrating existence of the jurisdictional amount.[173] For example, in *Fleming v. Colonial Stores, Inc.*,[174] "[t]he

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167. 28 U.S.C. § 1446(b).

168. *See* Tedford v. Warner-Lambert Co., 327 F.3d 423, 426 (5th Cir. 2003); Wilson v. Gen. Motors Corp., 888 F.2d 779, 781 n.1 (11th Cir. 1981).

169. Pease v. Medtronic, Inc., 6 F. Supp. 2d 1354, 1358 (S.D. Fla. 1998).

170. *See* Burns v. Windsor Ins. Co., 31 F.3d 1092, 1097 n.12 (11th Cir. 1994):

> [C]ongress knew when it passed the one year bar on removal that some plaintiffs would attempt to defeat diversity by fraudulently (and temporarily) joining a non-diverse party. In that case, as long as there is some possibility that a non-diverse joined party could be liable in the action, there is no federal jurisdiction. . . . [A] plaintiff could defeat jurisdiction by joining a non-diverse party and dismissing him after the deadline. Congress has recognized and accepted that, in some circumstances, plaintiff can and will intentionally avoid federal jurisdiction..

Id.

171. 28 U.S.C. § 1446(b) (emphasis added).

172. *See* 14C CHARLES ALAN WRIGHT et al., FEDERAL PRACTICE AND PROCEDURE § 3732 (3d ed. 1998).

173. *Id.*

original complaint . . . filed in state court merely stated jurisdictional amount for the state court and was not specific in meeting the test of federal jurisdiction. . . ."[175] Defendants served damages interrogatories, to which the plaintiff asserted a claim in excess of the jurisdictional amount.[176] The northern district held that "[a]s long as the [plaintiff's] claim is indeterminate from the complaint, or otherwise, the defendant may not be charged with the running of time for removal."[177]

Likewise, in *Field v. National Life Insurance Co.*,[178] the defendant did not remove until eight months after the complaint was filed.[179] Defendant argued that it was not until it received plaintiff's answers to its damages interrogatories that defendant "could 'first ascertain' that the amount in controversy requirement had been met."[180] The middle district stated that "[i]t is clear that interrogatory answers can constitute 'other papers'" for removal purposes.[181] To determine whether the amount in controversy was apparent at the time plaintiff filed the complaint, the court analyzed the total amount of actual damages that would have accrued at that point.[182]

Other examples of "other paper" that could prompt a defendant's right to remove include transcripts of depositions, offers of judgment,[183] settlement demand letters,[184] responses to requests for admissions,[185] letters between

174. 279 F. Supp. 933 (N.D. Fla. 1968).

175. *Id.* at 934.

176. *Id.*

177. *Id.; see also* Engle v. R.J. Reynolds Tobacco Co., 122 F. Supp. 2d 1355, 1362 (S.D. Fla. 2000) (stating a nonparty's mere motion to intervene cannot furnish a basis for removal pursuant to 28 U.S.C. § 1446(b), despite defendant's claims that motion raised federal question).

178. No. 8:00-CV-989-T-24TBM, 2001 U.S. Dist. LEXIS 5451, *1 (M.D. Fla. Jan. 22, 2001).

179. *Id.* at *5 n.1.

180. *Id.* at *2.

181. *Id.* at *20.

182. *Id.* at *12; *see* Basso v. United Wis. Life Ins. Co., No. 97-573-CIV-GRAHAM, 1997 U.S. Dist. LEXIS 9996, at *3–4 (S.D. Fla. Apr. 27, 1997).

183. *See* Essenson v. Coale, 848 F. Supp. 987, 990 (M.D. Fla. 1994).

184. *See* Martin v. Mentor Corp., 142 F. Supp. 2d 1346, 1349 (M.D. Fla. 2001) (granting motion for remand because defendant did not remove within thirty days from receipt (subsequent to formal service of process) via facsimile of plaintiff's written settlement demand from which defendant could determine the case was removable because the amount in controversy requirement was satisfied).

185. *See* Hines v. AC & S, Inc., 128 F. Supp. 2d 1003, 1006 (N.D. Tex. 2001) (noting that "other paper" can include answers to interrogatories, responses to requests for admissions, deposition testimony, and documents produced in discovery).

attorneys,[186] and motions for summary judgment.[187] However, an "affidavit, created entirely by the defendant, is not 'other paper' under section 1446(b) and cannot start the accrual of the 30–day period for removing."[188]

"[A] defendant who receives a pleading or other paper indicating the post commencement . . . dismissal of a nondiverse party—may remove the case to federal court within 30 days of receiving such information."[189] The general rule regarding dismissal of a nondiverse party is "if the resident defendant was dismissed from the case by the voluntary act of the plaintiff, the case became removable, but if the dismissal was the result of either the defendant's or the court's action against the wish of the plaintiff, the case could not be removed."[190]

6. Revival Exception

The Middle District of Florida has:

> acknowledged the existence of a judicially created "revival exception" under which removal rights may be revived in two types of cases: where a plaintiff deliberately misleads a defendant about the true nature of the case until the thirty day removal limit expires or when an amended complaint is filed which "fundamentally al-

186. *See* Polk v. Sentry Ins., 129 F. Supp. 2d 975, 978–79 (S.D. Miss. 2000) (stating that the letter between attorneys confirming that plaintiff's dismissal of nondiverse defendants was voluntary is "other paper" sufficient to trigger time to remove).

187. *See* Miller v. BAS Technical Employment Placement Co., 130 F. Supp. 2d 777, 780 (S.D. W. Va. 2001) (holding that first defendant's motion for summary judgment was "other paper," the filing of which provided notice to second defendant that the action was removable under diversity jurisdiction on basis that nondiverse defendant was fraudulently joined).

188. S.W.S. Erectors, Inc. v. Infax, Inc., 72 F.3d 489, 494 (5th Cir. 1996).

189. Caterpillar Inc. v. Lewis, 519 U.S. 61, 69 (1996); 28 U.S.C. §1446(b). *See also* Hessler v. Armstrong World Indus., Inc., 684 F. Supp. 393, 395 (D. Del. 1988) (finding that the thirty-day period begins to run when the defendants received "actual notice that the case has become removable, which may be communicated in a formal or informal manner."); *See also* Broderick v. Dellasandro, 859 F. Supp. 176, 180 (E.D. Pa. 1994) (finding that attorney's letter advising of client's changed residence that created diversity jurisdiction was "other paper" such that it triggered the thirty-day time period for removal under removal statute).

190. Insinga v. LaBella, 845 F.2d 249, 252 (11th Cir. 1988) (citing Weems v. Louis Dreyfus Corp., 380 F.2d 545, 546 (5th Cir. 1967)) (quoting Note, *The Effect of Section 1446(b) on the Nonresident's Right to Remove*, 115 U. PA. L. Rev. 264, 267 (1966)).

> ter[s]" the complexion of the case to such a degree that the amended complaint creates "an essentially new lawsuit."[191]

"[T]he revival exception is available only in those very narrow circumstances where the facts of the case are compelling enough to risk contravention of the two-fold purpose of the thirty day removal limitation."[192]

7. Removal Pursuant to Other Statutes

Other statutes provide specific prerequisites for removal of a case under their provisions. For example, the Federally Supported Health Centers Assistance Act of 1995 ("FSHCAA") provides specific prerequisites for removal.[193] Likewise, "removal of an action under [28 U.S.C.] section 1442(a)(1) [Federal Officer Removal Statute] has historically required the satisfaction of two separate requirements. First the defendant must advance a 'colorable defense arising out of [his or her] duty to enforce federal law;'"[194] and "[s]econd, the defendant must establish that there is a 'causal connection between what the officer has done under asserted official authority' and the action against him" or her.[195]

8. Removal Permitted Even if State Court Lacked Jurisdiction

Until 1986, it was generally accepted that "[i]f the state court lacks jurisdiction of the subject-matter or of the parties, the federal court acquires

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191. Clegg v. Bristol-Myers Squibb Co., 285 B.R. 23, 31 (M.D. Fla. 2002) (quoting Wilson v. Intercollegiate (Big Ten) Conference Athletic Ass'n, 668 F.2d 962, 965–66 (7th Cir. 1982)).

192. *Clegg*, 285 B.R. at 31. (citing *Wilson*, 668 F.2d at 966.).

193. *See* Allen v. Christenberry, 327 F.3d 1290, 1291 (11th Cir. 2003). Under 42 U.S.C. § 233(l)(1), the Attorney General may remove case if he makes an appearance in state court within fifteen days and:

> Upon a certification by the Attorney General that the defendant was acting in the scope of his employment at the time of the incident out of which the suit arose, any such civil action or proceeding commenced in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States of the district and division embracing the place wherein it is pending . . . .

42 U.S.C. § 233(c) (2000). If the Attorney General does not make an appearance within fifteen days, § 233(l)(2) provides that the entity, employee, or contractor can remove the case to district court. 42 U.S.C. 233(1)–(2). Under the general removal statute, the individual has thirty days from notification in which to remove this case. 28 U.S.C. § 1446(b).

194. Magnin v.Teledyne Cont'l Motors, 91 F.3d 1424, 1427 (11th Cir. 1996) (citing Mesa v. California, 487 U.S. 121, 133 (1989) (in turn quoting Willingham v. Morgan, 395 U.S. 402, 407 (1969)).

195. *Magnin*, 91 F.3d at 1427 (quoting Maryland v. Soper, 270 U.S. 9, 33 (1926) (interpreting predecessor statute)).

none, although it might in a like suit originally brought there have had jurisdiction."[196] This theory (known as "derivative jurisdiction") was abrogated by the 1986 amendments to 28 U.S.C. § 1441(e), which "provides that a district court to which a civil action is removed is 'not precluded from hearing and determining any claim' simply because the state court from which the action was removed 'did not have jurisdiction over that claim.'"[197]

B. *Waiver - Actions in State Court Prior to Removal*

A defendant waives its right to remove by taking "clear and unequivocal" actions in state court that manifest its intent to have the matter adjudicated there, after it is apparent that the case is removable.[198] Although it is not always clear what actions are considered "clear and unequivocal" manifestations of a defendant's intent to have the matter adjudicated in state court, the Southern District of Florida recently explained that, "[i]n general, the right of removal is waived when the defendant seeks affirmative relief, recovery or an adjudication on the merits in the state court."[199] For example, in *Paris v. Affleck*,[200] the Middle District held that the defendant waived the right to remove to federal court by first filing a counterclaim in state court.[201] Likewise, in *Scholz v. RDV Sports, Inc.*,[202] the Middle District remanded a case on grounds that defendant had filed a motion to dismiss in state court and scheduled a hearing on that motion.[203] However, the Middle District has subsequently held that the filing of a motion to dismiss "in and of itself does not necessarily constitute a waiver of defendant's right to proceed in the federal forum."[204] Similarly, the Southern District of Florida, in *Somoano v.*

196. Lambert Run Coal Co. v. Baltimore & Ohio R.R. Co., 258 U.S. 377, 382 (1922).

197. *See* Hollis v. Fla. State Univ., 259 F.3d 1295, 1298 (11th Cir. 2001); Bland v. Freightliner LLC, 206 F. Supp. 2d 1202, 1212 (M.D. Fla. 2002) (quoting 28 U.S.C. § 1441(e) (2000)).

198. Scholz v. RDV Sports, Inc., 821 F. Supp. 1469, 1470 (M.D. Fla. 1993) (citing Miami Herald Publ'g Co. v. Ferre, 606 F. Supp. 122, 124 (S.D. Fla. 1984)) (holding that a defendant waives the right to remove if the defendant's intent to proceed in state court is clear and unequivocal).

199. Engle v. R.J. Reynolds Tobacco Co., 122 F. Supp. 2d 1355, 1360 (S.D. Fla. 2000).

200. 431 F. Supp. 878 (M.D.. Fla. 1977).

201. *Id.* at 880; *see also* Briggs v. Miami Window Corp., 158 F. Supp. 229, 230 (M.D. Ga. 1956) (defendant waived removal by filing non-compulsory cross-action in state court).

202. 821 F. Supp. 1469 (M.D. Fla. 1993).

203. *Id.* at 1471; *see also* Kam Hon, Inc. v. Cigna Fire Underwriters Ins. Co., 933 F. Supp. 1060, 1063 (M.D. Fla. 1996) (holding that defendant waived right to remove when it first filed a motion to dismiss in state court).

204. Hill v. State Farm Mut. Auto. Ins. Co., 72 F. Supp. 2d 1353, 1354 (M.D. Fla. 1999).

Ryder Systems, Inc.,[205] held that a defendant whose sole action in the state court is filing a motion to dismiss prior to petitioning for removal did not indicate an intent to waive his rights to remove because "[t]he Florida Rules of Civil Procedure cannot operate to shorten the time period within which to remove a state court Complaint to federal court, and a defendant should not be required to file a motion for extension of time in state court merely to observe both courts' procedural requirements."[206]

An action to maintain the status quo in state court, as opposed to an action to dispose of the matter, does not constitute a waiver.[207] Examples of actions to maintain the status quo include defending preliminary injunctions, filing answers and affirmative defenses.[208] The Fifth Circuit has held that "the right to removal is not lost by participating in state court proceedings short of seeking an adjudication on the merits."[209]

C. *Filing Requirements*

28 U.S.C. § 1446(a) provides:

> 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 *signed pursuant to Rule 11* of the Federal Rules of Civil Procedure and *containing a short and plain statement of the grounds for removal*, together with a copy of *all process, pleadings, and orders served upon such defendant* or defendants in such action.[210]

1. Short and Plain Statement of the Grounds for Removal

28 U.S.C. § 1446(a) requires a short and plain statement of the basis for removal.[211] The notice of removal should contain "all grounds which support the federal court's jurisdiction."[212] The Eleventh Circuit recently expressed

205. 985 F. Supp. 1476 (S.D. Fla. 1998).
206. *Id.* at 1478.
207. *See Paris*, 431 F. Supp. at 880.
208. *See id.*
209. Tedford v. Warner-Lambert Co., 327 F.3d 423, 428 (5th Cir. 2003) (citing Beighley v. F.D.I.C., 868 F.2d 776 (5th Cir. 1989), quoting 1A JAMES A. MOORE, ET AL., MOORE'S FEDERAL PRACTICE ¶ 0.157[4] at 153 (3d ed. 1987)).
210. 28 U.S.C. § 1446(a) (2000) (emphasis added).
211. *Id.*
212. Lewis v. AT & T Corp., 898 F. Supp. 907, 908 (S.D. Fla. 1995).

that "it is undoubtedly best to include all relevant evidence in the petition for removal and motion to remand."[213]

2. All Process, Pleadings, and Orders Served upon Such Defendant

28 U.S.C. § 1446(a) requires that the removing defendant must file, with the notice of removal, "a copy of all process, pleadings, and orders served upon such defendant or defendants in such action."[214] Pursuant to 28 U.S.C. § 1447(b), local rules of procedure have expanded upon this requirement.[215] For example, Middle District of Florida Local Rule 4.02(b) requires a removing defendant to file with the Notice of Removal not only those documents required by 28 U.S.C. § 1446(a), but also "all process, pleadings, orders, and other papers or exhibits of every kind, including depositions, then on file in the state court."[216] The Northern District also requires a removing defendant to file "all process, pleadings, motions, and orders then on file in the state court," but allows the defendant 10 days to do so.[217]

3. Filing Fee and Civil Cover Sheet

Pursuant to 28 U.S.C. § 1914, a party "instituting any civil action, suit or proceeding . . . by . . . removal" must pay a filing fee.[218] Additionally, a removing party must submit a civil cover sheet.[219]

4. Signed Pursuant to Rule 11

At least one attorney of record must sign the Notice of Removal pursuant to the duties set forth in Rule 11, and must provide his or her address and telephone number.[220] Rule 11 requires defendant to "investigate the appropriateness of removal."[221] "Further, '[e]very lawyer is an officer of the court.

213. Sierminski v. Transouth Fin. Corp., 216 F.3d 945, 949 (11th Cir. 2000) however, "there is no good reason to keep a district court from eliciting or reviewing evidence outside the removal petition." *Id.*

214. 28 U.S.C. § 1446(a).

215. 28 U.S.C. § 1447(b) provides that a district court "may require the removing party to file with its clerk copies of all records and proceedings in such State court."

216. 28 U.S.C. § 1446(a); M.D. FLA. R. 4.02(b).

217. N.D. FLA. LOC. R. 7.2(A).

218. 28 U.S.C. § 1914(a)(2000).

219. M.D. FLA. LOC. R. 1.05(e).

220. FED. R. CIV. P. 11(a).

221. Collings v. E-Z Serve Convenience Stores, Inc., 936 F. Supp. 892, 895 (N.D. Fla. 1996) (citing McKinney v. Bd. of Trs. of Mayland Cmty. Coll., 955 F.2d 924 (4th Cir. 1992)).

And, in addition to his duty of diligently researching his client's case, he always has a duty of candor to the tribunal.'"[222]

5. Multiple Defendants - Unanimity Rule

In cases involving multiple defendants, all named defendants must join the removal petition for removal to be proper pursuant to 28 U.S.C. § 1446.[223] "This is commonly referred to as the 'rule of unanimity.'"[224] There is disagreement among the district courts as to what exactly is required to effectuate consent, although most courts have held that the removing defendant must do more than simply state in the removal notice that all defendants consent to removal.[225] At the very least, the Notice of Removal should state that all defendants consent to the removal and should be signed by counsel on behalf of all defendants.[226]

In *Engle v. R.J. Reynolds Tobacco Co.*,[227] the Southern District recently held that all defendants consented to removal where 1) "the first sentence of the Notice stated that it was jointly filed by all Defendants," 2) "the Notice

222. Letner v. Unum Life Ins. Co. of Am., 203 F. Supp. 2d 1291, 1296 n.2 (N.D. Fla. 2001) (quoting Burns v. Windsor Ins. Co., 31 F.3d 1092, 1095 (11th Cir. 1994)).

223. *See* Loftis v. United Parcel Serv., Inc., 342 F.3d 509, 516 (6th Cir. 2003); Hernandez v. Seminole County, 334 F.3d 1233, 1237 (11th Cir. 2003) ("The failure to join all defendants in the petition is a defect in the removal procedure.") (*citing In re* Bethesda Mem'l Hosp., Inc., 123 F.3d 1407, 1410 n.2 (11th Cir. 1997)); *In re* Ocean Marine Mut. Prot. and Indem. Ass'n. Ltd. 3 F.3d 353, 355 (11th Cir. 1993).

224. Engle v. R.J. Reynolds Tobacco Co., 122 F. Supp. 2d 1355, 1359 (S.D. Fla. 2000) (citing Codapro Corp. v. Wilson, 997 F. Supp. 322, 325 (E.D.N.Y. 1998)).

225. *See* Jones v. Fla. Dep't of Children & Family Servs., 202 F. Supp. 2d 1352, 1355 (S.D. Fla. 2002) (citing Getty Oil Corp. v. Ins. Co. of N. Am., 841 F.2d 1254, 1262 n.11 (5th Cir. 1988)) (holding that statement in Notice that all defendants have consented to removal was insufficient without "some timely filed written indication from each served defendant, or from some person or entity purporting to formally act on its behalf in this respect and to have authority to do so, that it has actually consented to such action"); Nathe v. Pottenberg, 931 F. Supp. 822, 825 (M.D. Fla. 1995) (stating "to effect removal, each defendant must join in the removal by signing the notice of removal or by explicitly stating for itself its consent on the record, either orally or in writing, within the 30-day period prescribed in 28 U.S.C. § 1446(b)"); Jasper v. Wal-Mart Stores, 732 F. Supp. 104, 105 (M.D. Fla. 1990) (citing Fellhauer v. City of Geneva, 673 F. Supp. 1445 (N.D. Ill. 1987)) (noting "all defendants, served at the time of filing the petition, must join in the removal petition; the petition must be signed by all defendants or the signer must allege consent of all defendants"); Crawford v. Fargo Mfg. Co., 341 F. Supp. 762, 763 (D.C. Fla. 1972) (noting "[t]here is authority to the effect that all defendants need not sign the original removal petition . . . [h]owever, it is clear that all defendants who have been served must join in the petition for removal") (internal citations omitted).

226. *See* Smith v. Health Ctr. of Lake City, Inc., 252 F. Supp. 2d 1336, 1340 (M.D. Fla. 2003) (citing *Getty*, 841 F.2d at 1262 n.11).

227. 122 F. Supp. 2d 1355 (S.D. Fla. 2000).

explained that each defendant had decided to join in the single Notice of Removal in order to avoid a multiplicity of notices of removal,"[228] 3) the notice was signed counsel for the corporate defendant "on behalf of all defendants for purposes of removal only,"[229] and 4) "all the defendants expressed their consent to removal by appearing before [the court at a] Status Conference," at which the counsel for the corporate defendant acknowledged that he spoke on behalf of the other defendants and indicated that defendants had agreed to file a single response to both motions to remand.[230]

6. Exceptions to the Unanimity Rule

There are three exceptions to the unanimity rule; namely: "1) the nonconsenting defendants had not been served with process at the time the notice of removal was filed; 2) the unconsenting defendants are nominal or formal defendants; or 3) removal is pursuant to § 1441(c)."[231] In addition, the requirement of unanimity for consent of all defendants does not apply where removal is pursuant to a statute other than the general removal provisions.[232] Where an exception would apply, "[a]lthough the preferred practice is for a removing defendant to explain in its Notice of Removal why other defendants have not joined in the Notice, there is no clear authority that this failure constitutes a fatal defect in a Notice of Removal."[233]

a. *Later-Served Defendants*

With regard to the first exception, "a defendant that has not been served with process need not join in or consent to removal."[234] Defendants who had

228. *Id.* at 1360.

229. *Id.*

230. *Id.* at 1360; *see also* Diebel v. S.B. Trucking Co., 262 F. Supp. 2d 1319, 1327–28 (M.D. Fla. 2003) (holding where the Notice of Removal was signed by counsel for two of the three named defendants only on behalf of those two defendants, removal was improper despite the fact that the defense counsel for the two defendants expected to represent the third in the near future).

231. Bradwell v. Silk Greenhouse, Inc., 828 F. Supp. 940, 943 n.2 (M.D. Fla. 1993) (citing Alexander v. Goldome Credit Corp., 772 F. Supp. 1217, 1222 n.11 (M.D. Ala. 1991)).

232. *See In re* Fed. Savs. & Loan Ins. Corp., 837 F.2d 432, 435 (11th Cir. 1988) (Federal Savings and Loan Insurance Corporation removal provisions); Sheinberg v. Princess Cruise Lines, Ltd., 269 F. Supp. 2d 1349, 1351 (S.D. Fla. 2003) (Convention on Recognition of Foreign Arbitral Awards removal provision).

233. Liebig v. DeJoy, 814 F. Supp. 1074, 1076 (M.D. Fla. 1993).

234. GMFS, L.L.C. v. Bounds, 275 F. Supp. 2d 1350, 1354, (S.D. Ala. 2003).

not been served at the time of removal must join an otherwise timely removal within thirty days after service of the complaint.[235]

b. *Nominal Defendants*

With regard to the:

> exception to the unanimity rule which provides that 'nominal or formal parties, being neither necessary nor indispensable, are not required to join in the petition for removal' . . . '[t]he ultimate test of whether the . . . defendants are . . . indispensable parties . . . is whether in the absence of the [defendant], the Court can enter a final judgment consistent with equity and good conscience which would not be in any way unfair or inequitable to plaintiff.'[236]

c. *28 U.S.C. § 1441(c)*

With regard to the exception relating to actions removed pursuant to 28 U.S.C. § 1441(c), an action may be removed if:

> a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.[237]

D. *Notice of Removal*

The notice of removal must in writing and be given to all adverse parties in the action, and a copy of the notice of removal must be filed promptly

235. Jasper v. Wal-Mart Stores, Inc., 732 F. Supp. 104, 105 (M.D. Fla. 1990) (citing Fellhauer v. City of Geneva, 673 F. Supp. 1445 (N.D. Ill. 1987)); McKinney v. Bd. of Trs. of Mayland Cmty. Coll., 955 F.2d 924, 928 (4th Cir. 1992).

236. *Health Ctr. of Lake City, Inc.*, 252 F. Supp. 2d at 1338 n.5 (citations omitted) (citing to Tri-Cities Newspapers, Inc. v. Tri-Cities Printing Pressmen & Assistants Union of N.A., 427 F.2d 325, 327 (5th Cir. 1970)).

237. 28 U.S.C. § 1441(c) (2000); *see* Belasco v. W.K.P. Wilson & Sons, Inc., 833 F.2d 277 (11th Cir. 1987) (stating removal under § 1441(c) was unavailable because all claims against the insurer and insurance broker arose from one single injury to plaintiffs).

with the state court.[238] "[F]ailure of notice to the state court is a procedural defect that does not defeat federal jurisdiction . . . ."[239]

E. Section 1.01 Amendments to the Notice of Removal

Amendments within the original thirty-day period for removal are generally freely made; however, after the thirty-day period has expired, amendments are generally permitted only to allow the correction of errors or to provide more detail regarding grounds for removal which have been previously stated.[240] Although an amendment may be allowed, most courts have held that it is not necessary.[241]

F. *To Which Court Should the Case Be Removed?*

A case should be removed "to the district court of the United States for the district and division embracing the place where such action is pending."[242] However, the Eleventh Circuit recently determined that failure to comply with these geographic requirements does not amount to a jurisdictional defect.[243]

Middle District Local Rule 4.02(a) requires that all removed cases be docketed "in the Division encompassing the county of the State in which the case was pending."[244]

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238. 28 U.S.C. § 1446(d) (2000).

239. Peterson v. BMI Refractories, 124 F.3d 1386, 1395 (11th Cir. 1997).

240. *See* Bradwell v. Silk Greenhouse, Inc., 828 F. Supp. 940, 943 (M.D. Fla. 1993)

> Deficiencies in the notice of removal can be corrected within the thirty day time period; however, once the thirty day period has elapsed 'the notice of removal may be amended only to set out more specially grounds of removal that already have been stated, albeit, imperfectly in the original petition.

Id. (quotes and citations omitted); Denton v. Wal-Mart Stores, Inc., 733 F. Supp. 340, 341 (M.D. Fla. 1990) ("Assuming that a petition for removal is properly filed, it may be amended freely only within the statutory period of thirty days from service of the complaint. Thereafter, it may be amended only to set forth more specifically grounds for removal which were stated imperfectly in the original petition.").

241. *See, e.g.,* Yarnevic v. Brink's, Inc., 102 F.3d 753, 755 (4th Cir. 1996); *see also* Willingham v. Morgan, 395 U.S. 402, 407 n.3 (1969) (stating that when reviewing a removal petition for diversity jurisdiction "it is proper to treat the removal petition as if it had been amended to include the relevant information contained in the later-filed affidavits.").

242. 28 U.S.C. § 1441(a) (2000).

243. *See Peterson*, 124 F.3d at 1395.

244. M.D. FLA. LOC. R. 4.02(a).

III. POST-REMOVAL PROCEDURES

Post-removal procedures are governed by 28 U.S.C. § 1447 and Rule 81(c) of the *Federal Rules of Civil Procedure*, with which a defendant should strictly comply in order to avoid remand.[245] Upon removal, repleading is not necessary unless the court so orders.[246]

Removal is effective as of the date the removal petition is filed, therefore after a defendant files its notice of removal and serves notice to both the adverse parties and to the clerk of the court, "the state court shall proceed no further unless and until the case is remanded."[247] Accordingly, the Eleventh Circuit has concluded that "the filing of a removal petition terminates the state court's jurisdiction until the case is remanded, even in a case improperly removed."[248] However, Florida state courts have been less willing to accept this proposition, and in at least one case held "that proceedings subsequent to removal 'are valid if the suit was not in fact removable.'"[249] Nonetheless, a district court may enjoin proceedings in a state court where the case has been removed to federal court under the Anti-Injunction Act, because an exception to 28 U.S.C. § 2283 allows for injunctions that a federal court finds "necessary in aid of its jurisdiction."[250]

A. *Answer*

Pursuant to Rule 81(c) of the *Federal Rules of Civil Procedure*, in a removed action in which the defendant has not answered,

> the defendant shall answer or present the other defenses or objections . . . within 20 days after the receipt through service or otherwise of a copy of the initial pleading setting forth the claim for relief upon which the action or proceeding is based, or within 20 days after the service of summons upon such initial pleading, then filed, or within 5 days after the filing of the petition for removal, whichever period is longest.[251]

245. 28 U.S.C. § 1447 (2000); FED. R. CIV. P. 81(c).
246. FED. R. CIV. P. 81(c).
247. 28 U.S.C. § 1446(d) (2000).
248. Maseda v. Honda Motor Co., 861 F.2d 1248, 1254 n.11 (11th Cir. 1988) (citing Lowe v. Jacobs, 243 F.2d 432, 433 (5th Cir. 1957)).
249. *See* Hunnewell v. Palm Beach County, 786 So. 2d 4, 4–5 (Fla. 4th Dist. Ct. App. 2000).
250. *Maseda*, 861 F.2d at 1254; *see* 28 U.S.C. § 2283 (2000).
251. FED. R. CIV. P. 81(c).

"[B]ecause it is the latest of these periods which defines the time within which a responsive pleading must be filed, a responsive pleading will be required under Rule 81(c) only when: the defendant is in receipt of the complaint; he has been served with a summons; and the complaint has been filed."[252]

B. *Demand for Jury Trial*

Rule 81(c) of the *Federal Rules of Civil Procedure* provides:

> If at the time of removal all necessary pleadings have been served, a party entitled to trial by jury under Rule 38 shall be accorded it, if the party's demand therefor is served within 10 days after the petition for removal is filed if the party is the petitioner, or if not the petitioner within 10 days after service on the party of the notice of filing the petition. A party who, prior to removal, has made an express demand for trial by jury in accordance with state law, need not make a demand after removal. If state law applicable in the court from which the case is removed does not require the parties to make express demands in order to claim trial by jury, they need not make demands after removal unless the court directs that they do so within a specified time if they desire to claim trial by jury. The court may make this direction on its own motion and shall do so as a matter of course at the request of any party. The failure of a party to make demand as directed constitutes a waiver by that party of trial by jury.[253]

C. *Legal Memoranda*

Middle District Local Rule 4.02(c) provides: "When a case is removed to this court with pending motions on which briefs or legal memoranda have not been submitted, the moving party shall file and serve a supporting brief within ten (10) days after the removal in accordance with Rule 3.01(a) [governing form of motions] . . . ."[254]

252. Silva v. City of Madison, 69 F.3d 1368, 1371 (7th Cir. 1995) (emphasis added) The court stated consistent with fundamental principles of federal procedure, "a responsive pleading is required only after service has been effected." *Id.* at 1376.

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

254. M.D. FLA. LOC. R. 4.02(c). *See also* N.D. FLA. LOC. R. 7.2(B); S.D. FLA. LOC. R. 7.2.

D. *Rule 59 Motions-Motions to Vacate State Court Judgment Must Be Filed Within 10 Days of Date of Removal*

"[W]hen a case . . . has in it at the time of removal an order or judgment of the state trial judge which, had it been entered by a district judge, would be appealable . . . the party seeking an appeal [must first] move that the district judge modify or vacate the order or judgment."[255] A motion to modify or vacate the order or judgment must be filed within ten days of removal in order to preserve the right to appeal.[256]

E. *Plaintiff's Responses to Defeat Removal*

1. Amended Complaint

In an effort to defeat removal, plaintiffs occasionally attempt to amend the complaint to seek damages in an amount no greater than $49,999.[257] This tactic was rejected by the Seventh Circuit in *Harmon v. OKI Systems*.[258] The *Harmon* court also noted another case where the plaintiff's effort to file a post-removal stipulation stating that he would not seek to recover more than the jurisdictional amount, was no more than an effort "to pull the rug out from under the district court."[259] The court further recognized that evidence that was not on the record on the date of removal should not be considered because it does not "shed[] light on the situation which existed when the case was removed."[260]

Additionally, in a federal question case, a plaintiff may attempt to dismiss its federal claims after removal in an effort to effectuate remand.[261] In *Carnegie-Mellon University v. Cohill*,[262] the Supreme Court upheld a district court's remand in such a case.[263] In *Cohill*, the plaintiff sued in state court for age discrimination under applicable federal and state laws.[264] After re-

255. Jackson v. Am. Sav. Mortgage Corp., 924 F.2d 195, 199 (11th Cir. 1991).
256. *See* Resolution Trust Corp. v. Bakker, 51 F.3d 242, 245–46 (11th Cir. 1995).
257. *See* Harmon v. OKI Sys., 115 F.3d 477, 479 (7th Cir. 1997).
258. 115 F.3d 477, 479–80 (7th Cir. 1997).
259. *Id.* at 479; *see generally*, *In re* Shell Oil Co. 970 F.2d 355, 356 (7th Cir. 1992).
260. *Id.* at 480. *See also* George v. Marriott Senior Living Services, Inc., 2001 U.S. Dist. LEXIS 22822 at *7 (S.D. Fla. Nov. 13, 2001) ("Plaintiff, after more than a year of litigation and obvious attempts by defendant to obtain a firmer number [regarding amount of damages sought], cannot now seek to amend the complaint to affirmatively demand an amount of damages below the jurisdictional threshold.").
261. *See* Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343 (1988).
262. 484 U.S. 343 (1988).
263. *Id.* at 357.
264. *Id.* at 345.

moval, the plaintiff dismissed the federal claim and requested remand.[265] The Court held that remand was appropriately within the district court's discretion.[266]

2. Joinder

Plaintiffs also occasionally respond to a notice of removal by attempting to amend the complaint by joining a Florida resident as an additional party defendant.[267] This tactic would destroy complete diversity and would compel the remand of this action.[268] However, joinder must be proper in accordance with the *Federal Rules of Civil Procedure*.[269] Moreover, 28 U.S.C. § 1447 (e) provides that "[i]f after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court."[270]

F. *Miscellaneous*

1. Motion to Dismiss Venue

The Eleventh Circuit in *Hollis v. Florida State University* recently held that state-law venue deficiencies can not be the basis for dismissal of a removed action.[271] The court held that "[u]pon removal the question of venue is governed by federal law, not state law, and under § 1441(a), a properly removed action necessarily fixes venue in the district where the state court action was pending."[272] The court explained that "once a case is properly removed to federal court, a defendant cannot move to dismiss on § 1391 venue grounds."[273] However, "[a] defendant dissatisfied with venue after removal may . . . seek a transfer to another division or district under federal law."[274]

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265. *Id.* at 347.
266. *Id.* at 357.
267. Basso v. United Wis. Life Ins. Co., 1997 U.S. Dist. LEXIS 9996, at *4 (S.D. Fla. Apr. 27, 1997).
268. *Id.*
269. *Id.*
270. 28 U.S.C. § 1447(e) (2000).
271. 259 F.3d 1295, 1300 (11th Cir. 2001).
272. *Id.* at 1296.
273. *Id.* at 1299.
274. *Id.* at 1296.

2. Process After Removal

28 U.S.C. § 1448 provides that in removed cases "in which any one or more of the defendants has not been [properly] served with process . . . such process or service may be completed or new process issued in the same manner as in cases originally filed in such district court."[275]

G. *Remand*

The proper method for challenging removal is a motion for remand.

1. Grounds for Remand

Grounds for remand include: 1) defective removal procedure; 2) lack of subject matter jurisdiction; and 3) discretionary remand under 28 U.S.C. § 1367.[276]

2. Procedure for Remand

a. *Time for Motions: Thirty Days for Defective Procedure, Otherwise Waived*

28 U.S.C.§ 1447(c) provides that "[a] motion to remand the case on the basis of *any defect* other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a)."[277] Objections to defects in removal are waived by a plaintiff's failure to timely file a motion for remand within thirty days.[278]

In general, a procedural defect is any technical substantive or procedural error which is not a challenge to lack of subject matter jurisdiction.[279] "The failure to join all defendants in the petition is a defect in the removal procedure."[280]

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275. 28 U.S.C. § 1448 (2000).

276. *See* Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 348 (1988) (holding that "a district court has discretion to remand a removed case to state court when all federal-law claims have dropped out of the action and only pendent state-law claims remain.").

277. 28 U.S.C. § 1447(c) (2000)(emphasis added).

278. Wilson v. General Motors Corp., 888 F.2d 779, 781 n.1 (11th Cir. 1989).

279. *See* Pierpoint v. Barnes, 94 F.3d 813, 818 (2d Cir. 1996).

280. Hernandez v. Seminole County, 334 F.3d 1233, 1237 (11th Cir. 2003) (quoting In re Bethesda Mem'l Hosp., Inc. 123 F.3d 1407, 1410 n.2 (11th Cir. 1997)). *See generally* Russell Corp. v. Am. Home Assurance Co., 264 F.3d 1040, 1044 (11th Cir. 2001).

b. *Lack of Jurisdiction at Any Time*

28 U.S.C. § 1447(c) provides that "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded."[281] The Supreme Court has interpreted this provision as meaning that remand may take place 'at any time' because of lack of subject matter jurisdiction may take place "at any time."[282] Remands based upon forum selection clauses are remands based upon jurisdiction rather than defects in removal procedure.[283]

c. *Sua Sponte Remand for Defective Removal Procedure Not Permitted*

Although a court may remand because of lack of subject matter jurisdiction *sua sponte*,[284] the Eleventh Circuit recently held in *Whole Health Chiropractic & Wellness, Inc. v. Humana Medical Plan, Inc.*[285] that 28 U.S.C. § 1447(c) does not authorize any *sua sponte* remand order not based on subject matter jurisdiction–even if made within the thirty-day period.[286] Rather, the court must wait for the plaintiff to file a motion for remand.[287]

d. *Sua Sponte Consideration of Discretionary Remand of Non-Federal Claims in Federal Jurisdiction Cases*

28 U.S.C. § 1441(c) provides that where removal was based upon a "separate and independent" federal question claim, the court may remand the otherwise non-removable portions.[288] In addition, a district court exercising supplemental jurisdiction over a state claim related to a removed federal claim may, in the exercise of its inherent authority, remand the state law claim once the federal claim has been dismissed.[289]

281. 28 U.S.C. § 1447(c) (2000).

282. Wisc. Dep't of Corr. v. Schacht, 524 U.S. 381, 392 (1998). Additionally, a court may grant a remand after final judgment has been entered; *see* Lupo v. Human Affairs Int'l Inc., 28 F.3d 269, 272–74 (2d Cir. 1994).

283. *See* Snapper, Inc. v. Redan, 171 F.3d 1249, 1256–57 (11th Cir. 1999).

284. *Id.* at 1252.

285. 254 F.3d 1317 (11th Cir. 2001).

286. *Id.* at 1320–21; *see also* In Re Bethesda Mem. Hosp., Inc., 123 F.3d 1407, 1410–11 (11th Cir. 1997).

287. *Whole Health Chiropractic*, 254 F.3d at 1321.

288. 28 U.S.C. § 1441(c) (2000).

289. *See* Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 348 (1988).

e. *Hearing*

The district court may hold an evidentiary hearing on the remand motion, but if it is apparent from the face of the removal petition that the removal is improper, the district court may dispense with the hearing.[290]

f. *Remand Must Be to the State Court in Which the Case Originated*

If the district court remands the case, it must remand it to the state court in which it originated.[291]

H. *Attorneys' Fees*

If remand is ordered, the district court has statutory authority to award costs and any actual expenses, including attorneys' fees, incurred as a result of defendant's removal.[292] The Middle District of Florida has expressed that "the award of fees is completely discretionary . . . ."[293] A showing of bad faith is no longer necessary as a predicate to the award of attorneys' fees, thus fees may be awarded even where defendants acted in good faith in filing a notice of removal.[294]

In *Letner v. Unum Life Insurance Co.*,[295] the Northern District of Florida awarded plaintiff attorneys' fees where defendant insurer, claiming preemption under ERISA, removed a breach of contract action in which plaintiff employee was seeking to recover benefits under a long term disability policy.[296] The court reasoned that the evidence clearly showed that the employee's plan was not an ERISA plan because her policy was separate from, and had no relationship to, the group plan from the insurer, and the employer did not sponsor her policy. [297]

290. Wright v. Cont'l Cas. Co., 456 F. Supp. 1075, 1078 (M.D. Fla. 1978) ("[A] hearing may be necessary to determine if the allegations of the petition for removal are true.").

291. *See* Petrofsky v. ARA Group, Inc., 878 F. Supp. 85, 86 (S.D. Tex. 1995).

292. 28 U.S.C. § 1447(c) (2000).

293. IMCO USA, Inc. v. Title Ins. Co. of Minn., 729 F. Supp. 1322, 1324 (M.D. Fla. 1990).

294. *See* Seminole County v. Pinter Enters., Inc., 184 F. Supp. 2d 1203, 1210 (M.D. Fla. 2000); Liebig v. DeJoy, 814 F. Supp. 1074, 1077 (M.D. Fla. 1993) (holding fees awarded where "[n]otice was both untimely and improper since the federal court lacked subject matter jurisdiction . . . .").

295. 203 F. Supp. 2d 1291 (N.D. Fla. 2001).

296. *Id.* at 1302.

297. *Id.* at 1301.

Incidentally, where a case is removed from state court, the Eleventh Circuit has held that "Rule 11 does not apply to pleadings filed before removal."[298] Therefore Rule 11 sanctions are unavailable for pre-removal motions or pleadings. Rule 11, "however, is applicable to papers filed in federal court after removal."[299] Accordingly, Rule 11 sanctions "clearly apply to frivolous motions to remand filed after removal."[300]

IV. REMOVAL ISSUES

A. *Diversity - Establishing Amount in Controversy*

Recently, courts have clarified the methods by which a defendant may establish the amount in controversy.

1. When the Complaint Seeks Damages Exceeding $75,000

"[W]hen the complaint seeks damages exceeding $75,000, a removing defendant may rely on the plaintiff's valuation of the case to establish the amount in controversy unless it appears to a legal certainty that the plaintiff cannot recover the amount claimed."[301] In such a case, it is generally not difficult for a defendant to meet its burden of showing that subject matter jurisdiction is present based on diversity, in part because where the plaintiff "'instituted the case in state court, there is a strong presumption that the plaintiff has not claimed a large amount in order to confer jurisdiction on a federal court or that the parties have colluded to that end.'"[302]

2. Where a Plaintiff Fails to Specify the Total Amount of Damages Demanded

Where a plaintiff fails to specify the total amount of damages demanded, defendant must establish jurisdiction by a preponderance of the evidence.[303] In *Williams v. Best Buy Co.*,[304] the Eleventh Circuit recently

298. *See* Worldwide Primates, Inc. v. McGreal, 26 F.3d 1089, 1091 (11th Cir. 1994) (citing Griffin v. City of Oklahoma City, 3 F.3d 336, 339 (10th Cir. 1993)).

299. *Worldwide Primates, Inc.*, 26 F.3d at 1091(citing FED. R. CIV. P. 81 (C)).

300. Nutt v. Trynoski, No. 96-CV-96-MMP, 1996 U.S. Dist. LEXIS 12823, at *5 (N.D. Fla. Aug. 6, 1996).

301. Mitchell v. Brown & Williamson Tobacco Corp., 294 F.3d 1309, 1315 (11th Cir. 2002) (citing Singer v. State Farm Mut. Auto Ins. Co., 116 F.3d 373, 375 (9th Cir. 1997)).

302. *Mitchell*, 294 F.3d at 1315 (citing *Singer*, 116 F.3d at 375).

303. *See* Leonard v. Enter. Rent a Car, 279 F.3d 967, 972 (11th Cir. 2002); Sierminski v. Transouth Fin. Corp., 216 F.3d 945, 949 (11th Cir. 2000) ("Under any manner of proof, the

clarified the standards district courts are to apply in determining whether the jurisdictional amount is in controversy: 1) "[t]he district court may consider whether it is 'facially apparent' from the complaint that the jurisdictional amount is in controversy;" 2) if not facially apparent from the complaint, "the court may consider facts in the removal petition;" and 3) the court may consider post-removal evidence.[305]

a. *Facially Apparent from Complaint*

In determining whether the case is removable based on the initial pleading, courts will analyze all relief sought by the plaintiff, including but not limited to, the amount of actual damages alleged. For example, in *Viacom, Inc. v. Zebe*,[306] the court held that defendant's notice of removal, filed beyond thirty days from service of the complaint, was untimely.[307] Although plaintiff sought an indeterminate amount of damages, the value of the injunctive relief sought was "clearly in excess of the minimum jurisdictional amount."[308]

b. *Facts in Removal Petition*

If it is not "facially apparent" from the complaint that the jurisdictional amount is in controversy, "the court may consider facts in the removal petition."[309] Indeed, "it is inappropriate for a district court to look only at a plaintiff's complaint when considering its removal jurisdiction."[310] However, a defendant cannot meet its burden with "conclusory allegation[s] in the no-

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jurisdictional facts that support removal must be judged at the time of the removal, and any post-petition affidavits are allowable only if relevant to that period of time.") (quoting Allen v. R & H Oil & Gas Co., 65 F.3d 1326, 1335 (5th Cir. 1995)). *See also* Jackson v. Purdue Pharma Co., No. 6:02-CV-1428-ORL-19KRS, 2003 U.S. Dist. LEXIS 6998, at *3–4 (M.D. Fla. Apr. 10, 2003); George v. Marriot Senior Living Services, Inc., No. 01-8707-CV-HURLEY, 2001 U.S. Dist. LEXIS 22822, at *5 (S.D. Fla. 2001).

304. 269 F.3d 1316 (11th Cir. 2001).

305. *Id.* at 1319–20 (citing *Sierminski*, 216 F.3d at 949 (quoting *Singer*, 116 F.3d at 377 (in turn quoting *Allen*, 63 F.3d at 1335–36))) (internal citations and quotations omitted).

306. 882 F. Supp. 1063 (S.D. Fla. 1995).

307. *Id.*

308. *Id.* at 1065; *see also* Faulk v. Superior Indus. Int'l, Inc., 851 F. Supp. 457, 460 (M.D. Fla. 1994) (holding that although the complaint stated that "this is an action for damages in excess of fifteen thousand dollars," it was apparent from the face of the complaint that the amount in controversy exceeded the minimum jurisdictional amount).

309. *Williams*, 269 F.3d at 1319.

310. Lewis v. AT& T Corp., 898 F. Supp. 907, 909 (S.D. Fla. 1995).

tice of removal that the jurisdictional amount is satisfied, without setting forth the underlying facts supporting such an assertion."[311]

Yet, courts have not generally required lengthy statements as to the underlying facts.[312] For example, in *Lewis v. AT & T Corp.*,[313] the Southern District held that where the defendant alleged "that the amount in controversy in this case exceeds $50,000.00 [pre-amendment] exclusive of interest and costs," and the plaintiff did not challenge this allegation, but instead "asserts that Defendant must prove those facts by a preponderance of the evidence," the defendant had satisfied its burden.[314] The court explained that

> 'if the notice affirmatively shows on its face the necessary jurisdictional facts and these are not contradicted by the record, the motion to remand must challenge these allegations or they will be deemed true. Thus a motion to remand which fails to put in issue the averments of the notice of removal raises only the legal sufficiency of the factual allegations, and the party seeking removal is not required to furnish proof of the allegations.'[315]

c. *Post Removal Evidence*

The Eleventh Circuit has made clear that the "district court may properly consider post-removal evidence in determining whether the jurisdictional amount was satisfied at the time of removal."[316] The Eleventh Circuit has reasoned that "[w]hile it is undoubtedly best to include all relevant evidence in the petition for removal and motion to remand, there is no good reason to keep a district court from eliciting or reviewing evidence outside

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311. *Williams*, 269 F.3d at 1319–20.

312. *See, e.g.*, Woolard v. Heyer-Schulte, 791 F. Supp. 294, 296 (S.D. Fla. 1992) (Allegations in the defendant's petition for removal, if not contradicted by the allegations of the complaint, are alone sufficient to establish *prima facie* the existence of federal jurisdiction. *The mere fact that the plaintiff's complaint is silent as to some fact necessary to establish federal jurisdiction*, such as the amount in controversy, *does not preclude removal of a case by the defendant.* Of course, as pointed out above, if the plaintiff denies any material allegations contained in the petition for removal, then the burden rests with the defendant to prove them.)

Id. (quoting Wright v. Cont'l Cas. Co., 456 F. Supp. 1075, 1078 (M.D. Fla. 1978)).

313. 898 F. Supp. 907 (S.D. Fla. 1995).

314. *Id.* at 909.

315. *Id.* at 909 (quoting from 1A MOORE'S FEDERAL PRACTICE ¶ 0.168[4.-1] at 644–45). *See also* Federated Mut. Ins. Co. v. McKinnon Motors, 329 F.3d 805, 808 (11th Cir. 2003) (stating the court will "give great deference to [a lawyer's representations as to amount of damages and will] presume them to be true.").

316. *Williams*, 269 F.3d at 1319.

the removal petition."[317] Accordingly, the district court may "'require parties to submit summary-judgment-type evidence relevant to the amount in controversy at the time of removal.'"[318]

Because damages in employment law cases are often difficult to enumerate or substantiate, a continuing concern for removing employers is what evidence may be used to establish that the amount in controversy has been met. Courts have accepted the following forms of evidence in support of removal.

i. Defendant's Declarations as to Damages

In *Sierminski*, a Florida Whistleblower Act case,

> [a]fter removal but before the district court ruled on the motion for remand, . . . defendant filed a response to plaintiff's motion in which defendant attached a declaration from the company's Director of Human Resources indicating plaintiff's salary and benefits information. The motion itself contained detailed calculations indicating that damages exceed the $50,000 jurisdictional amount.[319]

The district court denied plaintiff's motion to remand, in part because of these declarations as to damages.[320] The Eleventh Circuit affirmed, reasoning that the "[p]laintiff presented no evidence to contradict defendant's damages calculations."[321]

ii. Requests for Admissions

In *Sierminski*, "defendant sent plaintiff requests to admit that her claim was not worth more" than the jurisdictional amount.[322] Plaintiff failed to respond to these requests within the time-frame provided in Rule 36 of the *Federal Rules of Civil Procedure*.[323] Defendant then "filed a motion to strike or deny Plaintiff's motion to remand as moot after plaintiff failed to respond

317. Sierminski v. Transouth Fin. Corp., 216 F.3d 945, 949 (11th Cir. 2000).

318. *Williams*, 269 F.3d at 1319 (quoting *Sierminski*, 216 F.3d at 949 (quoting Singer v. State Farm Mut. Auto. Ins. Co., 116 F.3d 373, 377 (9th Cir. 1997) (quoting Allen v. R & H Oil & Gas Co., 63 F.3d 1326, 1335–36 (5th Cir. 1995)))).

319. *Sierminski*, 216 F.3d at 942.

320. *Id.* at 949.

321. *Id.*

322. *Sierminski*, 216 F.3d at 947.

323. *Id.*

to the requests" and the district court granted the motion.[324] In affirming, the Eleventh Circuit considered the fact that plaintiff did not deny that the damages exceeded the jurisdictional amount when given the opportunity.[325] The Eleventh Circuit held that, "[u]nder these circumstances, the district court correctly determined that defendant carried its burden of establishing removal jurisdiction."[326] Defendants may also attempt to obtain admissions or damages breakdowns from a plaintiff prior to removal. Plaintiffs have objected to such discovery requests on the grounds of relevancy. In *Sunrise Mills ("MLP") Limited Partnership v. Adams*,[327] a Florida appellate court held that a request for admission "'that you are seeking damages exclusive of interest and costs in excess of $50,000'" was relevant and therefore quashed the trial court's order sustaining plaintiff's objection that the request was "'not a material evidentiary issue in [this] case.'"[328]

3. Interrogatories

Post-removal interrogatories may be used to determine whether removal jurisdiction was proper.[329] For example, in *Sierminski*, the Eleventh Circuit cited with approval the Seventh Circuit decision in *Harmon v. OKI Systems*,[330] in which "the district court relied upon post-removal answers to interrogatories to determine whether removal jurisdiction was proper."[331]

Additionally, courts have held that interrogatories issued prior to removal may be used by a defendant to establish that the amount in controversy requirement has been met and may form a basis for removing.[332] For

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324. *Id.*

325. *Id.* at 949.

326. *Id.; see also* Wilson v. Gen. Motors Corp., 888 F.2d 779, 782 (11th Cir. 1989) (finding that plaintiff's response to defendant's requests for admission in which plaintiff admitted that none of the named fictitious defendants existed triggered the thirty day period for removal).

327. 688 So. 2d 464 (Fla. 4th Dist. Ct. App. 1997).

328. *Id.* at 465.

329. Sierminski v.Transouth Fin. Corp., 216 F.3d 945, 949 (11th Cir. 2000) (citing Harmon v. OKI Sys., 115 F.3d 477, 479–80 (7th Cir. 1997)).

330. 115 F.3d 477 (7th Cir.1997).

331. *Sierminski*, 216 F.3d at 949 (citing *Harmon*, 115 F.3d at 479–80).

332. *See* Field v. Nat'l Life Ins. Co., No. 8:00-CV-989-T-24TBM, 2001 U.S. Dist. LEXIS 5451, at *20 (M.D. Fla. Jan. 22, 2001); Basso v. United Wis. Life Ins. Co., No. 97-573-CIV-GRAHAM, 1997 U.S. Dist. LEXIS 9996, at *2 (S.D. Fla. Apr. 27, 1997); Viens v. Wal-Mart Stores, Inc., Civ. No. 3:9602602, 1997 U.S. Dist. LEXIS 24029 at *8 (D. Conn. Mar. 4, 1997) (finding Defendant's removal action satisfied § 1446(b) because it was filed seventeen days after receipt of plaintiff's responses to defendant's interrogatories); Wood v. Malin Trucking, Inc., 937 F. Supp. 614, 616 (E.D. Ky. 1995) (holding that thirty day period for filing notice for removal of negligence action began when trucking company received plaintiff's answers to

example, in *George v. Marriott Senior Living Services, Inc.*,[333] plaintiff asserted a claim for age discrimination under the FCRA and alleged her damages "'exceed Fifteen Thousand Dollars', but did not otherwise provide any specific numerical calculation of damages . . . ."[334] Defendant served interrogatories, to which "plaintiff did not indicate the total amount of damages sought, but provides a categorical breakdown of the damages and the methods that would be used to calculate them."[335] Defendant used this breakdown as the basis for its calculations that the amount in controversy exceeded $75,000.[336] The court held defendant met its burden of proof.[337]

4. Post-Petition Affidavits

In *Sierminski*, the Eleventh Circuit suggested that post-petition affidavits could be considered by the district court.[338] This suggestion is consistent with *Williams v. Best Buy Co.*,[339] in which the Eleventh Circuit stated that parties could "submit summary-judgment-type evidence relevant to the amount in controversy at the time of removal."[340]

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interrogatories); Ellis v. Logan Co., 543 F. Supp. 586, 589 (W.D. Ky. 1982) (noting removal petition timely filed by defendant pursuant to § 1446(b) when filed within thirty days of receipt of interrogatory answers); Miller v. Stauffer Chem. Co., 527 F. Supp. 775, 778 (D. Kan. 1981) (noting responses to defendant's interrogatories established for first time, since complaint was filed, that damages sought were sufficient for removal); Fleming v. Colonial Stores, Inc., 279 F. Supp. 933, 934 (N.D. Fla. 1968).

333. No. 01-8707-CIV-HURLEY, 2001 U.S. Dist. LEXIS 22822, at *1 (S.D. Fla. Nov. 13, 2001).

334. *Id.* at *2.

335. *Id.* at *7.

336. *Id.*

337. *Id.* at *6–7.

338. *Sierminski*, 216 F.3d at 949 (citing Allen v. R & H Oil & Gas Co., 63 F.3d 1326, 1335 (5th Cir. 1995)).

339. 269 F.3d 1316 (11th Cir. 2001).

340. *Id.* at 1319 (quoting *Sierminski*, 216 F.3d at 949 (quoting Singer v. State Farm Mut. Auto. Ins. Co., 116 F.3d 373, 377 (quoting Allen v. R & H Oil & Gas Co., 63 F.3d 1326, 1335–36 (5th Cir. 1995)))); *see also* Occidental Chem. Corp. v. Bullard, 995 F.2d 1046, 1047 (11th Cir. 1993) (ruling that an appraiser's affidavit regarding property valuation demonstrated an appropriate amount in controversy existed); Fuller v. Exxon Corp., 78 F. Supp. 2d 1289, 1295 (S.D. Ala. 1999) (stating "where it is not readily apparent from the face of the complaint that the amount in controversy exceeds the jurisdictional minimum at the time of removal, federal courts may examine affidavits and other evidence to help determine that amount in controversy.").

5. Initial Disclosures

A recent decision has held that plaintiff's initial disclosures may serve as evidence that the amount in controversy exceeds the jurisdictional amount.[341]

6. Settlement Demands / Offers of Judgment

In *Essenson v. Coale*,[342] the Middle District held that defendant's use of plaintiff's offer of judgment figures as a basis for removal was proper.[343] In contrast, in *Golden v. Dodge-Markham Co.*,[344] the Middle District held that although defendant properly used plaintiff's settlement demand as notice that the case could be removed, the settlement demand could not be used as evidence that the amount in controversy was satisfied.[345] The court, citing cases standing for the proposition that settlement demands are frequently "mere posturing", reasoned that plaintiff's settlement demand was not an honest assessment of damages.[346]

7. Damages Routinely Awarded in Similar Cases

As evidence that more than 75,000 dollars was in controversy, a defendant may provide evidence that damages in similar cases routinely approach or exceed 75,000 dollars.[347] However, general blanket statements that damages could entitle the plaintiff to 75,000 dollars or more are unlikely to suffice.[348]

8. Plaintiff's Failure to Stipulate

In *Golden*, the middle district held that an employee's failure to stipulate as to damages was not evidence that the amount in controversy exceeded the jurisdictional amount.[349] The Eleventh Circuit has agreed.[350] In *Williams*

341. *See* Brady v. Mercedes-Benz USA, Inc., 243 F. Supp. 2d 1004, 1008 (N.D. Cal. 2002).
342. 848 F. Supp. 987 (M.D. Fla. 1994).
343. *Id.* at 990.
344. 1 F. Supp. 2d 1360 (M.D. Fla. 1998).
345. *Id.* at 1364–65.
346. *Id.* at 1364 (quoting Broderick v. Dellasandro, 859 F. Supp. 176, 179 (E.D. Pa. 1994)).
347. Pease v. Medtronic, Inc., 6 F. Supp. 2d 1354, 1357 (S.D. Fla. 1998).
348. *Golden*, 1 F. Supp. 2d at 1366.
349. *Id.* at 1365.

v. Best Buy Co. the Eleventh Circuit refused to accept plaintiff's refusals to stipulate that her claims did not exceed 75,000 dollars as proof that the jurisdictional amount in controversy was met.[351] The court explained that "[t]here are several reasons why a plaintiff would not so stipulate, and a refusal to stipulate standing alone does not satisfy Best Buy's burden of proof on the jurisdictional issue."[352]

9. Where a Plaintiff Has Specifically Claimed Less Than the Jurisdictional Amount

Where a plaintiff has specifically claimed less than the jurisdictional amount in state court, a defendant must prove to a "legal certainty" that the plaintiff would not recover less than the jurisdictional amount if he or she prevailed.[353] Although "the defendant's burden of proof [is] . . . a heavy one,"[354] the *Burns* court made it clear that:

> [a]dopting this standard does not mean that a removing defendant can never prevail. A defendant could remain in federal court if he showed that, if plaintiff prevails on liability, an award below the jurisdictional amount would be outside the range of permissible awards because the case is clearly worth more than [the jurisdictional threshold].[355]

B. *Federal Questions*

1. Nonremovable Actions

"[Every] civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed," "[e]xcept as otherwise *expressly* provided by Act of Congress."[356] Congress has expressly prohibited removal of certain actions under 28 U.S.C. § 1445.[357] Additionally, some courts have held that the Fair Labor Standards Act

350. *See* Williams v. Best Buy Co., 269 F.3d 1316, 1319 (11th Cir. 2001).
351. *Id.* at 1320.
352. *Id.*
353. Burns v. Windsor Ins. Co., 31 F.3d 1092, 1094, 1095 (11th Cir. 1994) (citing St. Paul Mercury Indem. Corp. v. Red Cab Co., 303 U.S. 283, 288–89 (1938)); *Golden*, 1 F. Supp. 2d at 1362.
354. *Burns*, 31 F.3d at 1095.
355. *Id.* at 1096.
356. 28 U.S.C. § 1441(a) (2000) (emphasis added).
357. *See* 28 U.S.C. § 1445 (2000).

("FLSA") and related statutes that proscribe removal based on language in those statutes "may be maintained" in state court.[358]

a. *28 U.S.C. § 1445*

In the *United States Code* Congress expressly proscribes removal of four classes of actions: 1) claims "arising under the workmen's compensation laws" of the forum state; 2) claims arising under certain sections of the Violence Against Women Act; 3) certain claims against railroads brought under the Federal Employees' Liability Act; and 4) certain claims against common carriers brought under the Jones Act.[359]

The Eleventh Circuit has held that the prohibition against removal of claims arising under the workmen's compensation laws extends to retaliation claims brought pursuant to state workers' compensation laws.[360]

b. *FLSA* - Breuer v. Jim's Concrete of Brevard, Inc.

In 2003, the Supreme Court held that FLSA lawsuits brought in state court are removable.[361] *Breuer* addressed whether the language in the FLSA that allows FLSA suits to "be maintained against any employer . . . in any Federal or State court of competent jurisdiction," proscribed removal of such cases.[362] The Court held that this provision did not constitute an express prohibition of removal as required by 28 U.S.C. §1441(a).[363]

Prior to *Breuer*, the circuits were split on the issue.[364] *Breuer* is significant in that it also assures the removability of cases under the Age Discrimination in Employment Act, the Equal Pay Act, the Employee Polygraph Pro-

358. *See, e.g.*, Johnson v. Butler Bros., 162 F.2d 87, 89 (8th Cir. 1947).
359. 28 U.S.C. § 1445(a)-(d).
360. Reed v. Heil Co., 206 F.3d 1055, 1060 (11th Cir. 2000).
361. Breuer v. Jim's Concrete of Brevard, Inc., 123 S. Ct. 1882, 1884 (2003).
362. *Id.*; 29 U.S.C. § 216(b) (2000).
363. *Breuer*, 123 S. Ct. at 1884.
364. *Compare* Johnson v. Butler Bros., 162 F.2d 87, 89 (8th Cir. 1997) (not removable), *with* Breuer v. Jim's Concrete of Brevard, Inc., 292 F.3d 1308, 1308 (11th Cir. 2002) (removable). The Middle District of Florida was equally split. *Compare* Lemay v. Budget Rent A Car Sys., Inc., 993 F. Supp. 1448, 1450 (M.D. Fla. 1997) ("FLSA claims are not removable to Federal court."), *with* Tucker v. Labor Leasing, Inc. 872 F. Supp. 941, 943 (M.D. Fla. 1994) (permitting removal). The Southern District was equally split. *Compare* Valdivieso v. Atlas Air, Inc., 128 F. Supp. 2d 1371, 1374 (S.D. Fla. 2001) (removable) *and* Hakim v. Sentry Equip., Inc., No. 01-8359, 2001 U.S. Dist. LEXIS 22881, at *3 (S.D. Fla. June 25, 2001) (same), *with* McHugh v. Elan Pharms., Inc., No. 01-6560-CIV, 2001 U.S. Dist. LEXIS 22882 at *1–2 (S.D. Fla. May 31, 2001) (not removable) and Maranto v. Jenne, No. 00-7463-CIV 2000 U.S. Dist. LEXIS 21820 at *7–8 (S.D. Fla. Nov. 29, 2000) (same).

tection Act, and the Family and Medical Leave Act, all of which contain similar "may be maintained" language.[365]

2. Issues Relating to Complete Preemption Removal

a. Beneficial National Bank v. Anderson

In *Beneficial National Bank v. Anderson*,[366] the United States Supreme Court addressed the removability of state law usury claims on the ground of preemption by the National Bank Act.[367] The court found that two sections of the Act

> create a federal remedy for overcharges that is exclusive, even when a state complainant . . . relies entirely on state law. Because §§ 85 and 86 provide the exclusive cause of action for such claims, there is, in short, no such thing as a state-law claim of usury against a national bank.[368]

The Court reasoned that "the same federal interest that protected national banks from the state taxation" (e.g. "power to destroy") in *McCulloch v. Maryland*[369] supported the interpretation of the National Bank Act that gives its provisions the "requisite pre-emptive force to provide removal jurisdiction."[370]

Anderson is significant because it potentially expands the scope of the complete preemption doctrine.[371] Prior to *Anderson*, the Court was very hesitant to expand this exception to the well-pleaded complaint rule.[372] However, in *Anderson*, the Court suggested that a federal statute is completely preemptive when "it provid[es] the exclusive cause of action for the claim asserted."[373] This definition is closer to that of "ordinary preemption," and as Justice Scalia noted in his dissent, finds no basis in the Court's precedent in this area.[374] Accordingly, defendants may be able to use *Anderson* as a basis for

365. *Breuer*, 123 S. Ct. at 1887.
366. 123 S. Ct. 2058 (2003).
367. *Id.* at 2060.
368. *Id.* at 2064.
369. 17 U.S. 316 (1819).
370. *Anderson*, 123 S. Ct. at 2064
371. *See id.*
372. *See* Caterpillar Inc. v. Williams, 482 U.S. 386, 393 (1987).
373. *Anderson*, 123 S. Ct. at 2063.
374. *Id.* at 2067 (Scalia, J., dissenting).

removing pursuant to "complete preemption," where before only "ordinary preemption" would have existed.

Subsequently, in *Brocato v. Angelo Brocato Ice Cream & Confectionery, Inc.*[375] a district court, citing *Anderson*, held that plaintiff's state law trademark claims were completely preempted by the Lanham Act, in part because "the *only* way [p]laintiffs can obtain the certainty they seek is by having a court determine *[d]efendant's* rights under its *federal* trademarks."[376]

b. *Complete Preemption Under ERISA*

Although the Supreme Court of the United States has extended the complete preemption doctrine to cases implicating ERISA, the mere invocation of ERISA preemption does not automatically make a nonremovable case removable. Rather, in order for a claim to be completely preempted under ERISA section 502(a) (ERISA's civil enforcement provision): 1) "there must be a relevant ERISA plan[;]" 2) "the plaintiff must have standing under that plan;" 3) "the defendant must be an ERISA entity;" and 4) "the complaint must seek compensatory relief akin to that available under section 1132(a); often this will be a claim for benefits due under a plan."[377] A removal based on "ERISA complete preemption" where these elements are lacking may result in an award of fees to plaintiff.[378]

i. Must Be an ERISA Plan

Under the first element, if the benefit plan at issue in the case does not constitute an ERISA plan, preemption will not exist, as there will be no federal question or removal jurisdiction.[379] Therefore, remand determinations will sometimes involve substantive inquiries into whether an ERISA plan exists. For example, in *Stern v. IBM*,[380] IBM discontinued paying an employee benefits under its '"Sickness and Accident Income Plan', which provide[d] up to 52 weeks of an employee's 'regular salary' when he is unable

375. No. 03-1316, 2003 U.S. Dist. LEXIS 12770, at * 1 (E.D. La. July 22, 2003).

376. *Id.* at *9. *But see In re* Wal-Mart Employee Litig., No. 03-C-0503, 2003 U.S. Dist. LEXIS * 12075, at 8, 11 (E.D. Wis. June 30, 2003) (awarding fees and costs to plaintiff where defendant attempted to argue that the FLSA completely preempted state wage and hour claims).

377. Butero v. Royal Maccabees Life Ins. Co., 174 F.3d 1207, 1212 (11th Cir. 1999).

378. Letner v. Unum Life Ins. Co., 203 F. Supp. 2d 1291, 1302 (N.D. Fla. 2001).

379. Stern v. Int'l Bus. Mach., Corp., 326 F.3d 1367, 1370 (11th Cir. 2003), *reh'g, en banc, denied*, 2003 U.S. App. LEXIS 17633 (11th Cir. June 10, 2003).

380. *Id.* at 1369.

to work due to sickness or an accident."[381] The employee sued in state court for breach of his employment agreement.[382] IBM removed based upon its argument that its program was an ERISA "welfare benefit plan."[383] The Eleventh Circuit held that because defendant's program was a payroll practice that was exempted by regulation from ERISA, the doctrine of complete preemption was inapplicable and no federal question jurisdiction existed, therefore removal was improper.[384]

ii. Plaintiff Must Have Standing

As to the second element, the plaintiff must have standing for there to be complete preemption.[385] Thus, preemption depends not only on the nature of the claim, but the party bringing it. Generally, the plaintiff must be a beneficiary or fiduciary of an ERISA plan.[386] In *Hobbs v. Blue Cross & Blue Shield of Alabama,* [387] the Eleventh Circuit ordered the remand of a case brought by physicians' assistants seeking payment for services on the basis of lack of standing, despite the fact that the assistants would have had standing under Eleventh Circuit law had they held valid assignments of benefits.[388] In *Pederson v. Country Life Insurance Co.*,[389] the Ninth Circuit dismissed an appeal of a remand order, holding that the district court's determination that the plaintiff was an independent contractor rather than an employee with standing to sue was an appropriate decision to make so that the court could determine its jurisdiction under ERISA.[390]

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381. *Id.* at 1369.

382. *Id.*

383. *Id.*

384. *Stern.* 326 F.3d at 1374. *See also* Thomas v. Admin. Comm. of the Wal-Mart Stores, Inc., 210 F. Supp. 2d 1296, 1301 (M.D. Fla. 2002) (explaining "Florida Statutes death statute interfere with the operation of an employee benefit plan to the extent that it may preclude operation of a reimbursement provision interpreted under an ERISA regulated employee benefit contract. Such an interference will provide federal question jurisdiction, under the ERISA complete preemption doctrine . . . ."). *Id.*

385. Engelhardt v. Paul Revere Life Ins. Co., 139 F.3d 1346, 1349 (11th Cir. 1998).

386. *Id.* at 1351; Sonoco Prods. Co. v. Physicians Health Plan, Inc., No. 02-2137, 2003 U.S. App. LEXIS 15285, at *20 (4th Cir. July 31, 2003) (holding "Sonoco is not asserting the breach of contract claims in its fiduciary capacity, but rather is seeking to enforce its own rights under the Contract . . . Sonoco has no standing to assert the breach of contract claims under § 502(a)(3); those claims are not completely preempted . . . .").

387. 276 F.3d 1236 (11th Cir. 2001).

388. *Id.* at 1240–43.

389. No. 00-15205, 2001 WL 20923, at *1 (9th Cir. July 19, 2001).

390. *Id.*; *See also* Ward v. Alternative Health Delivery Sys., Inc., 261 F.3d 624, 627 (6th Cir. 2001) (concluding that despite the existence of an ERISA claim at the time of removal,

iii. Defendant Must Be an ERISA Entity

There is no preemption at all, not even defensive preemption, when the defendant is "a non-ERISA entity" and the claims do not "affect relations among principal ERISA entities as such. . . ."[391]

iv. Must Seek Relief Akin to ERISA

Under the fourth element, "[s]tate law claims are completely preempted by ERISA, and thus removable to federal court as federal claims," if they state a claim seeking the relief "akin to" that provided for in section 1132(a).[392] Section 1132(a)(1)(B) permits a civil action by a participant or beneficiary "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan . . . ."[393]

Under this test, "[n]ot all state law claims are completely preempted and may be subject to ERISA defensive preemption only."[394] For example, in *Ervast v. Flexible Products Co.*, the plaintiff claimed that his employer breached its corporate fiduciary duty to communicate material information relating to an undisclosed merger to him as a shareholder through the company ESOP plan, and that as a result he was entitled to the difference in the price he received for his ESOP shares and post-merger announcement price of the shares.[395] The Eleventh Circuit held that the plaintiff's state law claims for breach of corporate fiduciary duty were not completely preempted by ERISA and therefore not removable on that basis.[396] The court reasoned that the plaintiff did not contest his distribution under the terms of the ESOP, but rather claimed "a right to information that, if he possessed, would have changed his decision making process with regard to the time he sought to collect his benefits."[397]

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the district court lost jurisdiction once it determined on ruling on a motion to dismiss that the plaintiff lacked standing to bring an ERISA claim).

391. Morstein v. Nat'l Ins. Servs., Inc., 93 F.3d 715, 722 (11th Cir. 1996) (en banc) (finding independent insurance agent and his agency not ERISA entities); *See also* Franklin v. QHG of Gadsden, Inc., 127 F.3d 1024, 1029 (11th Cir. 1997).

392. *See* Ervast v. Flexible Prods. Co., No. 02-15769, 02-15941, 2003 WL 22203472, at *4 (11th Cir. Sept. 24, 2003).

393. 29 U.S.C. § 1132(a)(1)(B).

394. *Ervast*, 2003 WL 22203472, at *5.

395. *Id.*

396. *Id.* at *6.

397. *Id.*

Likewise, where a plaintiff's state law claims relate to the provision of inadequate services or substandard treatment, as opposed to the denial of benefits under an ERISA health care plan, removal under the complete preemption doctrine is improper.[398] In contrast, in *Krasny v. Waser*,[399] the Middle District held that where a plaintiff's medical malpractice claims included allegations of denial of benefits due under an ERISA plan—and not solely substandard medical treatment—the plaintiff "asserted claims for relief that is 'akin to' the relief available under 29 U.S.C. § 1132(a) 'to recover benefits due . . . under the terms of [the] plan,'" and therefore such claims were completely preempted and removal was proper.[400]

Finally, the complete preemption doctrine will not support removal where Congress has the power to completely eliminate certain remedies by preempting state actions, while providing no substitute federal action. In such cases "preemption serves only as a federal defense, the barred claims are not completely preempted, and thus not removable to federal court."[401] For example, in *King v. Marriott International, Inc.*, an employee alleged "that she was discharged for complaining about and refusing to violate" ERISA.[402] The Fourth Circuit held that the employee's state wrongful discharge claim was not removable, because none of the employee's actions were "protected under section 510 [of ERISA], the only potentially relevant provision."[403] The only portion of that provision that possibly applied was the sentence barring discharge of any person, because he gave information or was about to testify in an inquiry or proceeding relating to the pertinent chapter of ERISA.[404] However, there was no allegation that the employee testified in any proceeding or was about to do so.[405] Consequently, her wrongful discharge claim is not completely preempted, and removal of her claim was inappropriate.[406]

398. Lazorko v. Pa. Hosp., 237 F.3d 242, 250 (3d Cir. 2000) (where plaintiff requested relief for the consequences of U.S. Healthcare's provision of inadequate services and not for the denial of benefits under his health care plan, claim fell outside the scope of ERISA's complete preemption clause and therefore, removal on the basis of complete preemption was improper), *cert. denied*, 533 U.S. 930 (2001).

399. 147 F. Supp. 2d 1300 (M.D. Fla. 2001).

400. *Id.* at 1308.

401. King v. Marriott Int'l, Inc., 337 F.3d 421, 425 (4th Cir., 2003).

402. *Id.* at 423.

403. *Id.* at 428.

404. *Id.* at 427.

405. *Id.*

406. *King*, 337 F.3d at 428.

C. *Fraudulent Joinder - Defeating Fraudulent Joinder in Diversity Cases*

To remove on the basis of diversity jurisdiction, diversity of citizenship among the parties must be complete (e.g., only if there is no plaintiff and no defendant who are citizens of the same state).[407] Consequently, a defendant cannot remove a case that contains some claims against "diverse" defendants as long as there is one claim brought against a "non-diverse" defendant.[408] Therefore, plaintiffs will sometimes name nondiverse defendants in an effort to preclude removal. Accordingly, courts have recognized that "[a] party who has been 'fraudulently joined,' however, may be disregarded for purposes of determining whether there is diversity."[409]

In defeating "'fraudulent joinder, the removing party has the burden of proving that either: (1) there is no possibility the plaintiff can establish a cause of action against the resident defendant; or (2) the plaintiff has fraudulently pled jurisdictional facts to bring the resident defendant into state court.'"[410]

Under this test, when considering whether a defendant has been fraudulently joined on a motion for remand, "'federal courts are not to weigh the merits of a plaintiff's claim beyond determining whether it is an arguable one under state law.'"[411] Accordingly, the Eleventh Circuit has stated that when there are one or more defendants from the forum state whose presence if proper would defeat removal, then "[i]f there is even a possibility that a state court would find that the complaint states a cause of action against any one of the resident defendants, the federal court must find that the joinder was proper and remand the case to the state court."[412] Moreover, a plaintiff's motivation for joining a defendant is irrelevant as long as the plaintiff has a

407. *See* Carden v. Arkoma Assocs., 494 U.S. 185, 187 (1990). *But cf.* FED. R. CIV. P. 21; Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 832 (1989) (Rule 21 authorizes courts to dismiss nondiverse defendants in order to cure jurisdictional defects, instead of the entire case).

408. *See* Caterpillar Inc. v. Lewis, 519 U.S. 61, 68 (1996).

409. Bouie v. Am. Gen. Life and Accident Ins. Co., 199 F. Supp. 2d 1259, 1262 (N.D. Fla. 2002).

410. Pacheo de Perez v. AT&T Co., 139 F.3d 1368, 1380 (11th Cir. 1998) (citing Crowe v. Coleman, 113 F.3d 1536, 1538 (11th Cir. 1997)).

411. *Id. See also* Ross v. Citifinancial, Inc., 344 F.3d 458, 462 (5th Cir. 2003) (finding "there must be a reasonable possibility of recovery, not merely a theoretical one").

412. Coker v. Amoco Oil Co., 709 F.2d 1433, 1440–41 (11th Cir. 1983), *superseded by statute on other grounds as noted in* Wilson v. Gen. Motors Corp., 888 F.2d 779, 782 (11th Cir. 1989); *see also* Tillman v. R.J. Reynolds Tobacco, 253 F.3d 1302, 1305 (11th Cir. 2001).

colorable claim, and intends to obtain (as opposed to collect on) a judgment, against that defendant.[413]

D. *Eleventh Amendment*

By removing a case to federal court, the state waives its eleventh amendment immunity.[414] A state may not claim eleventh amendment immunity after it voluntarily removes to federal court a sexual harassment lawsuit involving state claims in which it has consented to be sued.

V. APPEAL

As a general rule, an appellate court may not review a district court's order remanding a case back to state court.[415] There are, however, two widely recognized exceptions to this rule: the *Thermtron Products* exception; and the "matter of substantive law" exception.[416] Moreover, remands based upon procedural defects in the removal ordered sua sponte by a district court are reviewable.[417]

A. *The Thermtron Products Exception*

The Supreme Court held that only remands based on grounds specified in 28 U.S.C. § 1447(c) are insulated from review under 28 U.S.C. § 1447(d).[418] Therefore, courts of appeal have jurisdiction over an appeal from a district court's discretionary decisions to remand that are not based on lack of subject matter jurisdiction or defects in the removal procedure.[419]

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413. Samples v. Conoco, Inc., 165 F. Supp. 2d 1303, 1319 (N.D. Fla. 2001) (citing Triggs v. John Crump Toyota, Inc. 154 F.3d 1284, 1291 (11th Cir. 1998).

414. Lapides v. Bd. of Regents of Univ. Sys. of Ga., 535 U.S. 613, 618 (2002).

415. *See* 28 U.S.C. § 1447(d) (2000); New v. Sports & Recreation, Inc., 114 F.3d 1092, 1096 (11th Cir. 1997) ("Cases remanded for lack of jurisdiction are immune from review even if the district court's decision is clearly erroneous.").

416. Sammie Bonner Constr. Co. v. W. Star Trucks Sales, Inc., 330 F.3d 1308, 1311 (11th Cir. 2003).

417. Velchez v. Carnival Corp., 331 F.3d 1207, 1209 (11th Cir. 2003).

418. Thermtron Prods., Inc. v. Hermansdorfer, 423 U.S. 336, 351 (1976).

419. *See* Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 711–12 (1996); Hernandez v. Seminole County, Fla. 334 F.3d 1233, 1236 (11th Cir. 2003) (contractual forum selection clauses).

B. *The "Matter of Substantive Law" Exception*

"[T]he 'matter of substantive law exception,' allows the courts of appeals to review those remands to state court that are based on determinations of the substantive rights of the parties."[420] However, the "'matter of substantive law exception'" does not apply "when 'the substantive issue is intrinsic to the district court's decision to remand for lack of subject matter jurisdiction.'"[421] "Thus, when a district court rules on a matter of substantive law that must be resolved to determine whether the court has jurisdiction over the case, [the appellate court] may not review the court's ruling on that issue even if it is erroneous."[422]

C. *Sua Sponte Remands Based on Procedural Defects*

Remands based upon procedural defects in the removal ordered *sua sponte* by a district court are not permitted and therefore, are reviewable.[423] However, a remand order based upon a procedural defect, different from the one asserted in the remand motion filed by a party, does not amount to a *sua sponte* order over which appellate jurisdiction exists.[424]

VI. CONCLUSION

The recent increase in state legislation relating to employment-related matters has brought about an upsurge in employment lawsuits filed in state courts. Employers often perceive federal courts as more experienced and neutral in employment law issues and generally benefit by removing such cases to federal court. Recent decisions have set forth guidance and standards to which employers' counsel should adhere when attempting to remove. Failure to do so may result in remand back to state court.

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420. Aquamar S.A. v. Del Monte Fresh Produce N.A., Inc., 179 F.3d 1279, 1285 (11th Cir. 1999).

421. *Id.* (emphasis added) (quoting Calderon v. Aerovias Nacionales de Colombia, 929 F.2d 599, 602 (11th Cir. 1991)).

422. *Sammie Bonner Constr. Co.*, 330 F.3d at 1311 (issue of whether plaintiff was entitled to attorneys' fees therefore "intrinsic to the jurisdictional question" and is, consequently, unreviewable on appeal).

423. *Velchez*, 331 F.3d at 1209.

424. *Id.*