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Improper Use of Removal and Its Disruptive Effect on State Court Proceedings: A Call to Reform 28 U.S.C. 1446.

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IMPROPER USE OF REMOVAL AND ITS DISRUPTIVE EFFECT ON STATE COURT PROCEEDINGS: A CALL TO REFORM 28 U.S.C. § 1446

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I. INTRODUCTION

Removal is the process by which the case originally filed by the plaintiff in state court is transferred by the defendant or defendants to federal court. Removal jurisdiction in the federal court may be based

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on general diversity,[1] federal question grounds,[2] or on a number of specific statutory grounds.[3] This article is limited to a discussion of the removal of civil cases solely on diversity grounds.

The purpose of removal is "to secure a presumably unprejudiced forum for one who has been brought unwillingly to the state court."[4] Legitimate reasons to seek removal to federal court may include "closer judicial supervision and management of the case"; "more favorable interpretations of substantive law"; different jury demographics, size and unanimity requirements; "the opportunity to transfer to another [judicial] district"; different evidentiary rules; and different rules on the awarding of attorney fees.[5]

Removal is an important and useful tool when it is employed for its proper purpose. Unfortunately, it is a procedure which is often abused, either through ignorance or as a result of improper litigation tactics. Because removal is automatic,[6] compliance with the statutory procedures will effect a removal even when no right to remove exists.[7] This can cause severe disruption in the state court where the case has been proceeding, as well as an intolerable waste of time, money and other resources.

The issue of disruption of state proceedings has concerned many courts. An Oregon court of appeals summarized the frustration with this quotation from a federal judge:

> There's something wrong with a procedure that allows a party to simply walk out on a Judge and remove to another Court. The State Court would be put in an impossible position if this were the rule. The procedure would allow any party to force a continuance even after a denial by a trial Judge by simply filing the removal petition. In this City, where the Courthouses are only two blocks apart, it would be even

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1. 28 U.S.C. § 1441(b) (1982).

2. *Id.* § 1441(a).

3. *See* 28 U.S.C. § 1442 (1982)(removal by federal officers); *see also* 28 U.S.C. § 1442a (1982)(removal by members of the armed forces); 28 U.S.C. § 1443 (1982)(removal of civil rights cases); 28 U.S.C. § 1444 (1982)(removal of foreclosure actions against the United States).

4. Marketing Showcase, Inc. v. Alberto-Culver Co., 445 F. Supp. 755, 760 (S.D.N.Y. 1978).

5. *See* Fousekis & Brelsford, *Removal*, 11 LITIGATION 39 (1985)(listing legitmate reasons for seeking removal). Fousekis and Brelsford also cite a preference for federal judges as a reason for removal, but with some reservations as to its legitimacy. *See id.*

6. *See infra* text accompanying notes 103-106.

7. *See infra* text accompanying notes 103-106.

> easier. And remember that the removal petition can be filed and the Court ousted of his power to proceed whether or not there's any merit in the removal petition.
>
> I'm just positive that the framers of this rule did not intend for it to act in this way . . .[8]

The Court of Appeals for the Fourth Circuit expressed similar sentiments:

> We are concerned that this construction of section 1446 makes it susceptible to substantial abuse by individuals seeking to interrupt or delay state trials . . . [T]he conclusion that subsequent proceedings in the state court, before remand, are absolutely void creates a great potential for disruption of judicial proceedings in the state courts. It permits one wishing to delay a state trial to do so, even though his removal petition is subsequently found to be frivolous. It is a situation which deserves congressional attention, for that kind of disruption of state court proceedings seems wholly unnecessary and unwarranted.[9]

Despite this sympathy with the plight of the state courts, the federal courts have been unable or unwilling to ameliorate the situation. Some, like the Court of Appeals for the Fourth Circuit in *South Carolina v. Moore*, see the problem as one for congressional attention.[10] Others simply seem to believe that the problem is one with which the state courts alone must wrestle. For example, after acknowledging the "potential havoc" of removal during trial and noting that such removal can be accomplished "regardless of the actual merits of the petition for removal," one federal district court stated that "[t]he Court cannot here be concerned with the effect the attachment of federal jurisdiction had on the subsequent state court proceedings and jury verdict . . . The state court will have to grapple with this problem."[11]

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8. Ramahi v. Hobart Corp., 615 P.2d 348, 351-52 (Or. Ct. App. 1980).

9. South Carolina v. Moore, 447 F.2d 1067, 1074 (4th Cir. 1971). In *Moore*, the court held that state court action between removal and remand is void. *Id.*

10. *Id.* Because of the longstanding and uniform construction of the removal statutes, as discussed *infra*, the court is probably correct in asserting that reform must come from the legislature rather than the courts.

11. First Nat'l Bank in Little Rock v. Johnson & Johnson, 455 F. Supp. 361, 363 (E.D. Ark. 1978). The Court of Appeals for the Fifth Circuit has also been willing to let the burden fall on the state courts. In *Butler v. King*, the court expressed dismay at the abuse of the system caused by meritless last-minute removal but implied that it was no great concern because a "brief recess and a short ride to the federal courthouse . . . undoubtedly would have resulted in quick and successful consideration of a motion to remand." 781 F.2d 486, 489-90

This article will address the problem of abuse of the removal statutes and the difficulties caused by the automatic nature of removal combined with the forced stay on state court proceedings. In order to illustrate this problem, the article will focus on the case of *Brentwood Financial Corp. v. Lamprecht*,[12] which involves the misuse of removal during the state court trial. If the attempted removal had been successful, a mistrial would have resulted and defendants would have been afforded a preview of plaintiff's case and a second opportunity to prepare a defense.[13] After examining the problems created by the language and construction of the present removal laws, the article will present several alternative solutions. These include application of removal law as amended in 1988, a return to pre-1948 construction of the effect of removal on state court jurisdiction, imposition of existing sanctions, application to civil cases of portions of the law for removal of criminal cases, and a statutory amendment proposed by the American Law Institute.

II. FACTS OF *BRENTWOOD FINANCIAL CORP. V. LAMPRECHT*

On the night of December 31, 1984, the Chateau Orleans Apartments in San Antonio, Texas were rocked by an explosion.[14] One tenant was killed and several others suffered personal injury and/or property loss. Among the injured was Heidi Lamprecht, who was thrown from her bed in her second floor apartment into the parking

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(5th Cir. 1986). The court did not consider the disorder that even a brief recess can cause or the lack of respect such an attitude displays towards the state court. *Id.* Furthermore, no consideration was given to the fact that a "short ride to the federal courthouse" and a quick resolution of the removal issue is not always possible. The Court of Appeals for the Fourth Circuit has acknowledged this concern with the following language, but it has not offered a solution to the problem:

> The problem is not acute if the state court is sitting where a federal judge is readily available, the removal petition is promptly brought to his attention, he recognizes it as an attempt to delay or disrupt the state court proceedings and promptly files a remand order. State courts, however, sit in many places in which federal judges are not readily available or are not always so. In such situations, the present statute . . . does permit a party seeking to do so to seriously delay and disrupt state court proceedings by filing a removal petition, though the removal claim, itself, be frivolous.

Moore, 447 F.2d at 1074 n.23.

12. 736 S.W.2d 836 (Tex. App.—San Antonio 1987, writ ref'd n.r.e.).

13. The author was involved in the appeal of the *Lamprecht* case on behalf of the plaintiff. However, the author disclaims any personal knowledge that the defense attorneys involved in the *Lamprecht* case purposefully abused the removal statutes as part of their defense strategy.

14. Brentwood Fin. Corp. v. Lamprecht, 736 S.W.2d 836, 838 (Tex. App.—San Antonio 1987, writ ref'd n.r.e.).

lot below.[15] She sustained severe physical injury as well as psychological trauma.[16] On January 7, 1985, Ms. Lamprecht filed a personal injury suit in Texas state court[17] naming the managing entity of the apartment complex, Brentwood Financial Corporation (hereinafter referred to as "Brentwood"), as the sole defendant.[18] At the time of this filing, plaintiff Lamprecht was a citizen of Texas and defendant Brentwood was a citizen of California.[19] Brentwood filed its Original Answer on January 29, 1985,[20] but made no attempt to remove the case at that time. Some six months later, on July 29, 1985, Ms. Lamprecht filed her Second Amended Original Petition naming Chateau Orleans, Ltd., the owner of the apartment complex, as a party defendant.[21] Chateau Orleans, Ltd. (hereinafter referred to as "Chateau Orleans") was a citizen of California at the time of this filing.[22] Two general partners of Chateau Orleans, both citizens of California, were also named as defendants but the lawsuit was not pursued against them at the time of trial. None of these defendants attempted to remove the case to federal court. By subsequent amendment on September 11, 1985, plaintiff named the City of San Antonio and City Public Service of the City of San Antonio (hereinafter referred to as "the City" and "CPS," respectively) as defendants.[23] Both were citizens of Texas for diversity purposes.[24]

The trial of this cause commenced in the 166th Judicial District

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15. *Id.*

16. *Id.*

17. Plaintiff's Original Petition at 1, Lamprecht v. Brentwood Fin. Corp. (Tex. Dist. Ct. Jan. 21, 1986) (No. 85CI-00243). The original lawsuit was brought on behalf of several plaintiffs, all citizens of Texas. *Id.* By the time of trial only Ms. Lamprecht remained as a plaintiff. Plaintiff's Fifth Amended Original Petition at 1, *Lamprecht* (No. 85CI-00243).

18. Plaintiff's Original Petition at 1, *Lamprecht* (No. 85CI-00243). Plaintiff's petition alleged that the apartment explosion was caused by a natural gas leak and that Brentwood, as managing entity, should have discovered the leak before the explosion occurred. *Id.* at 2-3.

19. Plaintiff's Original Petition at 1, Lamprecht v. Brentwood Fin. Corp. (Tex. Dist. Ct. Jan. 21, 1986) (No. 85CI-00243). Brentwood was a California corporation with its principle place of business in California. *Id.*

20. Defendant's Original Answer at 1, *Lamprecht* (No. 85CI-00243). Brentwood's answer consisted of a general denial and assertions of sole proximate cause and unavoidable accident. *Id.*

21. Plaintiff's Second Amended Original Petition at 1, *Lamprecht* (No. 85CI-00243).

22. *Id.* Chateau Orleans was a limited partnership with its principle place of business in California. *Id.*

23. Plaintiffs' Third Amended Original Petition at 1, Lamprecht v. Brentwood Fin. Corp. (Tex. Dist. Ct. Jan. 21, 1986) (No. 85CI-00243).

24. *Id.*

Court of Bexar County, Texas on January 13, 1986. A jury was selected and plaintiff began to present her case. On January 15, 1986, at approximately 2:00 p.m., plaintiff rested her case.[25] At this time counsel for defendants Chateau Orleans and Brentwood approached the bench and orally moved that the City and CPS be dismissed as defendants on the ground that no evidence of negligence had been introduced against them.[26] Counsel for plaintiff opposed the motion and stated that evidence had been introduced showing that overpressurization of natural gas lines may have caused the explosion.[27] The judge orally granted the motion to dismiss and pandemonium ensued.[28] Counsel for Brentwood and Chateau Orleans handed the judge a copy of a document entitled "Notice of Removal," stated that the petition was "on file,"[29] that the action was now removed to federal court, and that the state court had no further jurisdiction.[30] The record does not indicate that defendants filed a copy of the petition for removal with the clerk of the state court, or even that such a copy was handed to the state judge on the bench. The judge immediately reversed his ruling on the motion to dismiss the City and CPS on the ground that counsel who had made the motion did not represent those parties and had no authority to present the motion on their behalf.[31] During the dispute that followed, counsel for plaintiff suggested that a brief recess be taken and that the judge sequester the jury while a remand was sought.[32] The judge informed everyone that he intended to proceed to judgment.[33] Nevertheless, counsel for Brentwood and Chateau Orleans, as well as their designated corporate representatives, packed their belongings and walked out of the

25. Statement of Facts at 545, *Lamprecht* (No. 85CI-00243).

26. *Id.* The jury had been excused from the courtroom and was not present during the making of this motion or the exchange which followed.

27. *Id.* at 546.

28. *Id.*

29. Statement of Facts at 546-47, Lamprecht v. Brentwood Fin. Corp. (No. 85CI-00243). It is not clear from the record whether counsel meant that the petition was on file in the federal court or the state court. While there is no indication in the record that the petition had been filed with the state court at this time, or that it was *ever* filed with the state court, counsel had filed a removal petition in the federal court two hours earlier. It appears, therefore, that this federal petition is the one to which he referred when he informed the state court judge that the petition was "on file."

30. *Id.*

31. *Id.* at 546.

32. *Id.* at 547.

33. Statement of Facts at 547, *Lamprecht* (No. 85CI-00243).

courtroom as the judge admonished them from the bench not to leave.[34]

Brentwood and Chateau Orleans filed their verified petition for removal and accompanying bond with the United States District Court for the Western District of Texas, San Antonio Division at approximately 12:00 on January 15, 1986.[35] The petition alleged that diversity of citizenship existed by virtue of plaintiff having "abandoned her claim" against the resident defendants.[36] The petition further alleged that it was filed "immediately after the Plaintiff rested" her case,[37] although it was in fact filed some two hours prior to the time plaintiff rested. Defendants specifically alleged that written notice of the filing of the petition had been given to all adverse parties, but no mention was made of a copy of the petition having been filed with the state court.[38]

At approximately 4:00 p.m. that same afternoon the state court judge received a telephone call from a judge of the federal court.[39] The federal judge stated that he had reviewed the removal petition and had found it defective on its face for a variety of reasons.[40] He notified the state judge that the case was remanded and that the state court was free to proceed.[41] On January 17, 1986, the federal court memorialized its oral order of remand with a written memorandum

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34. *See id.* at 575-76 (court explains sequence of events for record). For a similar sequence of events, see Ramahi v. Hobart Corp., 615 P.2d 348, 351 (Or. Ct. App. 1980)(defendant filed "Notice of Filing Petition for Removal", and counsel and representatives left courtroom).

35. Memorandum Opinion and Order *Nunc Pro Tunc* at 3, Lamprecht v. Brentwood Fin. Corp. (W.D. Tex. Jan. 17, 1986) (No. SA-86-CA-126).

36. *Id.* at 3-4.

37. *Id.*

38. Petition for Removal at 4, *Lamprecht* (No. SA-86-CA-126).

39. Statement of Facts at 580, *Lamprecht* (No. 85CI-00243).

40. Among the reasons articulated in the federal court's subsequent written order was failure to demonstrate total diversity of citizenship. Memorandum Opinion and Order *Nunc Pro Tunc* at 3, Lamprecht v. Brentwood Fin. Corp., (W.D. Tex. Jan. 17, 1986) (No. SA-86-CA-126). The removal petition was filed in federal court two hours before plaintiff had rested, yet it asserted that at the time of filing plaintiff had rested her case and had abandoned her claim against the resident defendants. *Id.* Because of the error of this assertion, the resident defendants were still parties to the suit at the time the removal petition was filed and diversity of citizenship was lacking. *Id.* Therefore, the district court judge's telephone notification of his remand order to the state court judge entitled the state court to proceed to judgment. *Id.* at 5-6.

41. Statement of Facts at 580, *Lamprecht* (No. 85CI-00243).

opinion and order *nunc pro tunc* remanding the case to state court.[42] As stated by the federal court, "[t]he purpose of this order [was] to articulate to the parties the reasons for the summary order of remand of January 15, 1986."[43] A certified copy of this order was filed in the state court on January 23, 1986.[44] In the meantime, the state court trial had resumed on January 15, 1986, without the presence of counsel or corporate representatives for Brentwood or Chateau Orleans. The City and CPS presented their case in the form of a stipulation read into the record, the court delivered instructions to the jury, and plaintiff and defendants City and CPS delivered their closing arguments.[45] On January 16, 1986, the jury returned its verdict in favor of plaintiff against defendants Brentwood and Chateau Orleans in the amount of 2.7 million dollars.[46] The jury did not find that defendants City and CPS were negligent. Judgment upon the verdict was entered on January 21, 1986.[47]

Brentwood and Chateau Orleans filed a Motion for New Trial which was heard on April 7, 1986, but the trial court denied the motion.[48] They then filed an appeal with the Fourth Court of Appeals in San Antonio. Of various points raised on appeal, two points addressed the circumstances of defendants' purported removal. One point raised the issue of the propriety of the trial court proceeding to verdict at a time when the defendants alleged that the federal court had exclusive jurisdiction. Additional points of error questioned the propriety of proceeding with the trial after defendants had left the courtroom without giving defendants notice that the case would proceed.[49]

The Court of Appeals found that it did not appear from the record

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42. Memorandum Opinion and Order *Nunc Pro Tunc* at 1, *Lamprecht* (No. SA-86-CA-126).

43. *Id.* at 2.

44. *Id.* at 5.

45. The record on appeal indicates that some of this activity took place before the federal court notified the state court that the removal was improper. The validity of this interim action is discussed *infra* at text accompanying notes 136-162.

46. Statement of Facts at 577-78, Lamprecht v. Brentwood Fin. Corp. (No. 85CI-00243). The jury found the amount of actual damages to be $222,000. *Id.* Punitive damages were assessed against Brentwood in the sum of $1.5 million and against Chateau Orleans in the sum of $1 million. *Id.*

47. Judgment at 4, *Lamprecht* (Jan. 21, 1986) (No. 85CI-00243).

48. Statement of Facts at 592-635, *Lamprecht* (Tex. Dist. Ct. Apr. 7, 1986) (No. 85CI-00243).

49. Appellants' Brief at 30, Brentwood Fin. Corp. v. Lamprecht, 736 S.W.2d 836 (Tex.

that the removal process was completed or the removal effected because "the record does not in any way indicate that appellants gave the trial court or the clerk of the state district court a copy of the removal petition."[50] Because Defendants did not show that the removal was effected, the state court did not lose jurisdiction and the judgment of the state court was affirmed.[51] Defendants next sought redress in the Texas Supreme Court,[52] but their application for writ of error was refused with the notation "no reversible error."

App.—San Antonio 1987, writ ref'd n.r.e.)(No. 4-86-00240). The actual wording of the points of error raised by defendants is as follows:

POINT OF ERROR NO. 6: THE TRIAL COURT ERRED WHEN IT RECONVENED THE TRIAL PROCEEDINGS AT A TIME WHEN THE FEDERAL COURT RETAINED EXCLUSIVE JURISDICTION OVER THOSE PROCEEDINGS.

POINT OF ERROR NO. 7: THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY RE-CONVENING THE TRIAL PROCEEDINGS THAT LED TO A VERDICT ADVERSE TO APPELLANTS WITHOUT ATTEMPTING TO NOTIFY APPELLANTS' COUNSEL OF THOSE PROCEEDINGS, AND COMPOUNDED THAT ERROR BY REFUSING TO GRANT A NEW TRIAL ONCE APPELLANTS' COUNSEL AHD (sic) BROUGHT THE ERROR TO THE TRIAL COURT'S ATTENTION.

1. A Brief Review of the Relevant Facts
2. The Trial Court's Failure to Give Appellants Any Notice of the Resumption of Trial Proceedings Represents a Violation of Appellants' Federal and State Due Process Rights, and Therefore Constitutes the Commission of Reversible Error.

Id. at 27, 30-31.

The remainder of defendants' points of error raised procedural issues, no evidence, and insufficient evidence claims which are not relevent to this discussion. *Id.* at Table of Contents of Appellant's Brief.

50. Brentwood Fin. Corp. v. Lamprecht, 736 S.W.2d 836, 844 (Tex. App.—San Antonio 1987, writ ref'd n.r.e.).

51. *Id.* at 845. The effect of defendants' apparent failure to file a copy with the state court is discussed in detail below. The Court of Appeals also found that because the case was not effectively removed "[a]ny error concerning the court's proceeding without appellants is totally due to appellants' action in voluntarily leaving the courtroom." *Id.*

Dade County Classroom Teachers' Ass'n v. Rubin provides support for the *Lamprecht* court's decision. 238 So. 2d 284 (Fla. 1970), *cert. denied*, 400 U.S. 1009 (1971). In *Rubin*, the appellate record did not contain the petition for removal nor did it appear that a written notice was given to the adverse parties or a copy of the petition was filed with the clerk of the state court. *Id.* at 286. The Florida court held that the burden rested on the removing party to show by the record when the removal was effected. *Id.* Because this was not done, the court held that the state court had not lost jurisdiction and its actions were valid. *Id.*

52. Defendants' points of error (relevent to the discussion herein) in their application for writ of error read as follows:

POINT OF ERROR IV: THE COURT OF APPEALS ERRED IN HOLDING THAT THE RECORD BEFORE THE COURT WAS INADEQUATE TO ALLOW THE COURT TO PASS ON THE SUBSTANTIVE ISSUES PRESENTED BY PETITIONERS' REMOVAL OF THIS CASE.

III. REMOVAL LAW IN EFFECT AT TIME OF *LAMPRECHT*

A. *Caveat*

The following discussion sets forth the removal law as it existed in 1986, at the time *Lamprecht* was removed, and until November 19, 1988. On that date the removal laws were amended by the Judicial Improvements Act.[53] The 1988 amendment is not extensive and most of the statutory provisions discussed below are still in effect. Any changes made by the amendment in the statutes discussed below are noted in footnotes and are presented in more detail in the text in a section specifically addressing the amendment.

B. *Strict Construction*

The right to remove a case from state to federal court is a right solely conferred by statute.[54] Construction of the removal statutes is a matter of federal law.[55] The federal courts uniformly hold that these statutes are to be strictly construed against removal[56] in order to "prevent encroachment on the state court's right to decide cases properly brought before it."[57] Strict construction is particularly important in cases removed on diversity grounds.[58]

The burden rests on the defendant to show that removal is proper.[59] This burden includes establishing not only the jurisdictional basis for

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POINT OF ERROR V: THE COURT OF APPEALS ERRED IN FAILING TO ORDER SUPPLEMENTATION OF THE TRANSCRIPT.

POINT OF ERROR VI: THE COURT OF APPEALS ERRED IN FAILING TO HOLD THAT THE RESUMPTION OF PROCEEDINGS AFTER PETITIONERS' REMOVAL OF THE CASE VIOLATED PETITIONERS' STATUTORY AND CONSTITUTIONAL RIGHTS.

Petitioners' Application for Writ of Error at 19-22, Brentwood Fin. Corp. v. Lamprecht (Tex. Jan. 20, 1988) (No. C-6978).

53. Judicial Improvements Act, Pub. L. No. 100-702, 102 Stat. 4669 (1988).

54. Gould v. Mut. Life Ins. Co. of New York, 790 F.2d 769, 773 (9th Cir. 1986), *cert. denied*, 479 U.S. 987 (1986); McCurtain County Prod. Corp. v. Cowett, 482 F. Supp. 809, 812 (E.D. Okla. 1978).

55. Brown v. Demco, Inc., 792 F.2d 478, 480 (5th Cir. 1986).

56. *E.g.*, *Brown*, 792 F.2d at 482; Libhart v. Santa Monica Dairy Co., 592 F.2d 1062, 1064 (9th Cir. 1979); Schwinn Bicycle Co. v. Brown, 535 F. Supp. 486, 487 (W.D. Ark. 1982).

57. Harris v. Huffco Petroleum Corp., 633 F. Supp. 250, 253 (S.D. Ala. 1986).

58. *Id.*

59. Abels v. State Farm Fire & Casualty Co., 770 F.2d 26, 29 (3d Cir. 1985); Harris v. Huffco Petroleum Corp., 633 F. Supp. 250, 253 (S.D. Ala. 1986); Gorman v. Abbott Laboratories, 629 F. Supp. 1196, 1203 (D.R.I. 1986).

removal, but also compliance with the statutory procedures.[60] In *Lamprecht*, defendants Brentwood and Chateau Orleans failed to meet this burden for reasons that are discussed below.

C. *Requirements of Removal in a Civil Case*

The general removal statute, section 1441 of title 28, provides that:

> [e]xcept as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.[61]

"Diversity actions are removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which [the] action is brought."[62] Diversity of citizenship for removal purposes is determined by examining plaintiff's pleadings.[63] Complete diversity must exist both at the time the case is filed and at the time of removal,[64] unless some voluntary act by plaintiff creates diversity where none existed from the face of the original complaint.[65] The citizenship of purely nominal parties is not, however, to be considered in determining the existence of diversity jurisdiction or the presence of a resident defendant.[66]

The remainder of section 1441 addresses specific removal issues such as the removal of separate and independent claims.[67] These is-

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60. Albonetti v. GAF Corp.—Chem. Group, 520 F. Supp. 825, 827 (S.D. Tex. 1981).

61. 28 U.S.C. § 1441(a) (1982). This section has recently been amended. *See infra* text accompanying notes 219-225.

62. 28 U.S.C. § 1441(b) (1982). Section 1441(b) makes it clear that this requirement does not apply to the removal of cases based on federal question jurisdiction. *See id.* (claims founded on federal question jurisdiction are "removable regardless of the citizenship or residence of the parties").

63. Gould v. Mutual Life Ins. Co. of New York, 790 F.2d 769, 773 (9th Cir. 1986), *cert. denied*, 479 U.S. 987 (1986); Self v. General Motors Corp., 588 F.2d 655, 657 (9th Cir. 1978).

64. Strasser v. KLM Royal Dutch Airlines, 631 F. Supp. 1254, 1256 (C.D. Cal. 1986); New England Explosives Corp. v. Maine Ledge Blasting Specialist, Inc., 542 F. Supp. 1343, 1347 (D. Me. 1982); Kerstetter v. Ohio Casualty Ins. Co., 496 F. Supp. 1305, 1307 (E.D. Pa. 1980).

65. *Gould*, 790 F.2d at 773; *see also* discussion of voluntary-involuntary rule *infra* text accompanying notes 88-102.

66. Abels v. State Farm Fire & Casualty Co., 770 F.2d 26, 29 (3rd Cir. 1985). The legislature has recently enacted a provision expressly authorizing the courts to disregard the citizenship of defendants sued under fictitious names. *See infra* text accompanying note 219.

67. 28 U.S.C. § 1441 (1982). The remainder of section 1441 provides:

sues are beyond the scope of this article.

When plaintiff filed her original petition in *Lamprecht*, complete diversity existed between the parties because the sole named defendant was not a citizen of the State of Texas.[68] The case was thus removable at that time. At the time that defendants actually attempted to remove the case, though, complete diversity was lacking and two named defendants were citizens of the forum state.[69] No voluntary act of the plaintiff created diversity;[70] therefore, the case failed to meet the basic criterion of federal removal jurisdiction.[71]

D. *How Removal Is Effected*

A civil action is removed by filing a verified petition[72] with the federal district court "for the district and division within which such action is pending."[73] This petition must contain a short and plain statement of facts showing that the removing party is entitled to remove the case.[74] Copies of "all process, pleadings and orders" served

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(c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, 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 not otherwise within its original jurisdiction.

(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without a jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

(e) The court to which such civil action is removed is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim.

Id.

68. Plaintiff's Original Petition at 1, Lamprecht v. Brentwood Fin. Corp. (Tex. Dist. Ct. Jan. 21, 1986) (No. 85CI-00243). At this point in time the only defendant was Brentwood, a citizen of California. *Id.*

69. Plaintiff's Fifth Amended Original Petition at 1, *Lamprecht* (No. 85CI-00243) (plaintiff's final petition). The defendants in the case at this time included the City of San Antonio and City Public Service of the City of San Antonio, both citizens of Texas. *Id.*

70. *See infra* text accompanying notes 88-102.

71. Memorandum and Order *Nunc Pro Tunc* at 1-5, Lamprecht v. Brentwood Fin. Corp. (W.D. Tex. Jan. 17, 1988) (No. SA-86-CA126).

72. Because of recent statutory amendments, a verified petition is no longer required. *See* discussion of amendment of November 19, 1988, *infra* pp. 93-94.

73. 28 U.S.C. § 1446(a) (1982).

74. *Id.* This language also applies to the "notice of removal" called for by section 1446 as amended. 28 U.S.C.A. § 1446(a) (West Supp. 1989).

upon the removing party must accompany this petition.[75] The petition must also include a bond of sufficient amount to cover the costs of the removal proceedings in the event that the case could not be removed or was improperly removed.[76] Although it is not explicitly stated in the statute, it has been held that "all defendants, except purely nominal parties, who have been served and who may properly join in a removal petition, must so join in order to effect the removal."[77] Thus, if one defendant is prevented from removing a case (*i.e.* he is a citizen of the state in which the case is filed and the federal removal jurisdiction is based on diversity), his fellow non-resident defendants are also prevented from removing the case.

If a defendant wishes to take advantage of the removal statute, the petition for removal must be filed within thirty days after defendant receives "a copy of the initial pleading setting forth the claim for relief upon which [the] action or proceeding is based."[78] The thirty-day requirement is designed to minimize delay and wasted resources by preventing a defendant from waiting to see how the case progresses and then starting over in federal court after substantial proceedings have taken place in the state court.[79] This time limit is not jurisdictional, yet it is to be strictly applied.[80] A defendant may find that he has waived his right to remove by failing to exercise it in a timely fashion or by invoking the processes of the state court.[81] He cannot

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75. *Id.*

76. 28 U.S.C. § 1446(d) (1982). A bond is not required if the removal petition is filed on behalf of the United States. *Id.* The general bond requirement has been deleted from the statute by amendment dated November 19, 1988. 28 U.S.C.A. § 1446(d) (West Supp. 1989); *see also* discussion of amendment of November 19, 1988, *infra* p. 93.

77. Friedrich v. Whittaker Corp., 467 F. Supp. 1012, 1013 (S.D. Tex. 1979); *see also* Brown v. Demco, Inc., 792 F.2d 478, 481 (5th Cir. 1986); McCurtain County Prod. Corp. v. Cowett, 482 F. Supp. 809, 812 (E.D. Okla. 1978).

78. 28 U.S.C. § 1446(b) (1982). This section also provides an alternative method of computing the thirty-day filing deadline. The defendant may be allowed to file "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 . . . ." *Id.* Defendant must file his removal petition within the shorter of the alternative periods of time. *Id.*

79. Gorman v. Abbott Laboratories, 629 F. Supp. 1196, 1199 (D.R.I. 1986).

80. Powers v. Chesapeake & Ohio Ry. Co., 169 U.S. 92, 98 (1898)(time requirement is not jurisdictional but is "modal and formal" and may be waived); *Brown*, 792 F.2d at 481 (failure to file removal petition within thirty day period "may render the removal improvident" and result in remand); Albonetti v. GAF Corp.—Chem. Group, 520 F. Supp. at 825, 827 (S.D. Tex. 1981)(neither stipulation by parties nor court order can extend time period).

81. *Brown*, 792 F.2d at 481; Aynesworth v. Beech Aircraft Corp., 604 F. Supp. 630, 637 (W.D. Tex. 1985); Gore v. Stenson, 616 F. Supp. 895, 897 (S.D. Tex. 1984). One court has

"experiment on his case in the state court, and, upon an adverse decision, then transfer it to the Federal court."[82]

Because all defendants must join in a removal petition, the thirty-day time period effectively runs from the time the *first* defendant receives a pleading or other paper showing the action is removable.[83] Subsequently served defendants must then join the petition or consent to the removal within thirty days of service upon them.[84] If the first defendant served does not remove the case within thirty days, he has waived his right to remove and later cannot join a removal petition sought to be filed by subsequently added defendants.[85] The subsequent defendants cannot remove the case even if they file their petition within thirty days of service upon them because unanimity is lacking due to the first defendant's inability to join.[86] Thus, by failing to timely file a petition for removal, one defendant may effectively waive the right of removal for all defendants, even those who were not party to the suit at the time the "waiver" occurred.[87]

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held that a delay of fifteen minutes in announcing an intent to remove constitutes waiver of the right to remove. Walker v. American Telephone & Telegraph, 684 F. Supp. 475, 478 (S.D. Tex. 1988). *Walker* involved a case which was not originally removable, but became removable during trial when the resident defendant reached a settlement with plaintiff and was dismissed from the action. *Id.*; *see also infra* text accompanying notes 88-102 (discussion of cases becoming removable). The resident defendant was dismissed during a settlement conference at approximately 1:15 p.m. The nonresident defendants gave notice that they intended to remove the case at 1:30 p.m. The court noted that "where the right to remove occurs immediately before, at, or during trial, the diverse defendant must exercise his right to remove without delay." *Walker*, 684 F. Supp. at 477. The court then concluded that "without delay" means "immediately" and that even a fifteen minute delay is too long. Failure to give immediate notification of an intent to remove results in waiver of the right to remove. *Id.*

82. *Aynesworth*, 604 F. Supp. at 637 (quoting Rosenthal v. Coates, 148 U.S. 142 (1893)).

83. Friedrich v. Whittacker Corp., 467 F. Supp. 1012, 1014 (S.D. Tex. 1979). *Contra* Adams v. Lederle Laboratories, 569 F. Supp. 234, 243 (W.D. Mo. 1983).

84. *Adams*, 569 F. Supp. at 243.

85. Brown v. Demco, Inc., 792 F.2d 478, 481 (5th Cir. 1986); Gorman v. Abbott Laboratories 629 F. Supp. 1196, 1201-02 (D.R.I. 1986); *Friedrich*, 467 F. Supp. at 1014.

86. *See Brown*, 792 F.2d at 481(case removable when filed, defendant added four years later cannot remove); *Gorman*, 629 F. Supp. at 1199 (first defendant did not remove, so later-added defendants could not remove).

87. One court has recently repudiated this effect of the "rule of unanimity." *See* Garside v. Osco Drug, Inc., 702 F. Supp. 19, 22 (D. Mass. 1988)(case removable by defendant despite ability of co-defendants to remove four years prior). In *Garside*, the defendant removed within thirty days of service upon him, but four years after other defendants had waived their right to remove. *Id.* In an unusual twist, the removing defendant then sought to remand the case on the ground that the removal was not timely. Plaintiff opposed the remand. *Id.* at 20. The court acknowledged that published opinions supported the view that the subsequently added defendant was barred from removing because the other defendants could not join the removal,

If a case as originally stated is not removable, the thirty-day time period for filing the removal petition begins to run upon defendant's receipt 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."[88] Most commonly, cases become removable after the dismissal of a defendant whose presence in the case prevented removal,[89] so long as the dismissal is voluntary on the part of the plaintiff.[90] It is generally accepted that this "voluntary-involuntary" test of removability survived the 1948 revision and 1949 amendment of the removal statutes.[91]

Ordinarily, diversity is measured both at the time the suit is filed and at the time the removal petition is filed, but if the plaintiff voluntarily drops a nondiverse defendant then the court may look only to the time of removal to determine diversity.[92] The dismissal may be

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but found itself free to disagree because there was no First Circuit case on point. The court relied primarily on commentary by Wright and Moore and held that "a subsequently served defendant has thirty days to seek removal, even though its co-defendants may be time-barred from doing so." *Id.* at 21-22; *see also* 14A C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3731, at 504-08 (2d ed. 1985).

88. 28 U.S.C. § 1446(b) (1982). It is important to note that a defendant desiring to remove must seize the first opportunity and file for removal within 30 days of the *first pleading* establishing federal jurisdiction. Hubbard v. Union Oil of California, 601 F. Supp. 790, 795 (S.D.W. Va. 1985). If a defendant waives the first opportunity to remove, he cannot remove when successive grounds arise. *Id.* Subsequent events will not make a case "more removable" or "again removable" if it was originally removable. *Id.* By recent amendment, a one year time limit is now applied to removal of cases which are not originally removable but later become removable. *See infra* text accompanying notes 219-225.

89. This is commonly a defendant who is a citizen of the same state as the plaintiff or is a citizen of the forum state.

90. Whitcomb v. Smithson, 175 U.S. 635, 637-38 (1900)(directed verdict); Gould v. Mutual Life Ins. Co. of New York, 790 F.2d 769, 773 (9th Cir. 1986)(summary judgment), *cert. denied*, 479 U.S. 987 (summary judgment); *In re* Iowa Mfg. Co. of Cedar Rapids, Iowa, 747 F.2d 462, 463 (8th Cir. 1984)(voluntary-involuntary rule is bright line test of removability); Weems v. Louis Dreyfus Corp., 380 F.2d 545, 547-49 (5th Cir. 1967) (directed verdict).

91. *In re Iowa*, 747 F.2d at 464; Self v. General Motors Corp., 588 F.2d 655, 658 (9th Cir. 1978); *Weems*, 380 F.2d at 548. The purpose of the voluntary-involuntary rule was to prevent premature removals where the issue of the dismissal of the resident defendant, against plaintiff's wishes, had not been finally determined by the state court because plaintiff still had a right to appeal from the adverse ruling. *Weems*, 380 F.2d at 546; Saylor v. General Motors Corp., 416 F. Supp. 1173, 1175 (E.D. Ky. 1976). The question has now been raised whether the voluntary-involuntary rule should continue to apply once the time for filing a state appeal has passed or once all avenues of appeal have been exhausted. *Self*, 588 F.2d at 658; Strassey v. KLM Royal Dutch Airlines, 631 F. Supp. 1254, 1256-58 (C.D. Cal. 1986). This issue is beyond the scope of this paper.

92. Aynesworth v. Beech Aircraft Corp., 604 F. Supp. 630, 633 (W.D. Tex. 1985); New England Explosives Corp. v. Maine Ledge Blasting Specialist, Inc., 542 F. Supp. 1343, 1347

formal, such as by written motion or amended pleadings, or it may be found in plaintiff's words or actions at trial.[93] In *Heniford v. American Motors Sales Corp.*,[94] the plaintiff specifically told the jury not to return a verdict against the resident defendant and, in effect, dismissed his claim against that defendant.[95] The court held that such a voluntary, express abandonment of claims against the resident defendant rendered the action removable.[96] Because the resident defendant had not been formally dismissed from the case, the court realigned that defendant with the plaintiff for purposes of determining diversity.[97]

In contrast, the plaintiff in *Aynesworth v. Beech Aircraft Corp.*[98] urged the jury in summation to find against the nonresident defendant, but did not address the cause of action against the resident defendants.[99] This left open the alternative of finding against the resident defendants even though plaintiff did not specifically request such relief in summation. The court found that this conduct did not constitute an express, voluntary abandonment of plaintiff's claim against the resident defendants and that the action had not become removable.[100]

As a final example, in *Cudney v. Mid-Continent Airlines*,[101] the court dismissed the resident defendant at the close of plaintiff's case on the ground that plaintiff had made no effort to prove his case

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(D. Me. 1982); Heniford v. American Motors Sales Corp., 471 F. Supp. 328, 334 (D.S.C. 1979).

93. It is interesting to note that while the language of section 1446(b) governing cases which were not originally removable refers to receipt of an "amended pleading, motion, order or other paper," the courts have read this provision as not requiring a written pleading to create the right to remove. *Aynesworth*, 604 F. Supp. at 637.

94. 471 F. Supp. 328 (D.S.C. 1979).

95. *Id.* at 332. The chronology of events in *Heniford* was as follows: On February 1, 1979, plaintiff delivered his closing argument to the jury, during which he asked the jury not to find against the sole resident defendant. *Id.* at 331-32. On February 2, 1979, the remaining defendant announced that he was removing the case to federal court. At 3:12 p.m., on that day, the jury retired to deliberate. At 4:25 p.m., the petition for removal was filed in the federal court. At 5:00 p.m., a copy of the petition was delivered to the state court and notice was given to plaintiff. At 6:10 p.m., the jury returned a verdict in favor of plaintiff against the nonresident defendant. *Id.*

96. *Id.* at 334-35.

97. *Id.* at 333.

98. Aynesworth v. Beech Aircraft Corp., 604 F. Supp. 630 (W.D. Tex. 1985).

99. *Id.* at 635-36.

100. *Id.* at 636-37.

101. 98 F. Supp. 430 (E.D. Mo. 1951).

against the resident defendant at trial. The nonresident defendant then sought to remove the action. The court held that the action was not removable because the dismissal of the resident defendant was involuntary and plaintiff had a right to appeal from that dismissal.[102]

The final steps in the removal process concern giving notice to the state court and opposing parties. "Promptly after the filing of [the removal] petition and bond the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the petition with the clerk of [the] State court."[103] This sequence of events effects the removal.[104] If the procedures set forth in the removal statute are followed properly, then the removal occurs automatically and no order granting the removal is required.[105] Once the statutory steps are completed, the case falls solely under the jurisdiction of the federal court and "the State court shall proceed no further unless and until the case is remanded."[106] It is the automatic nature of removal combined with this language barring further state court action which is the crux of the problem addressed by this article. Moreover, even if the right of removal is being abused, if the case is not removable and if removal is being sought merely as a means to force a mistrial in the state court, that court is stripped of any power to prevent the abuse so long as statutory procedures are followed by the removing party.

The requirement of filing a copy of the petition with the clerk of the state court has been the subject of numerous court opinions and has also been the victim of considerable erosion. It has been labelled a "procedural and ministerial act" which simply informs the state court not to proceed further.[107] One court has held that handing a copy of the removal petition to the state court judge in open court is sufficient compliance with this requirement.[108] The Court of Appeals for the

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102. Cudney v. Mid-Continent Airlines, 98 F. Supp. 430, 405 (E.D. Mo. 1951).

103. 28 U.S.C. § 1446(e) (1982).

104. *Id.*

105. Okot v. Callahan, 788 F.2d 631, 633 (9th Cir. 1986); Libhart v. Santa Monica Dairy Co., 592 F.2d 1062, 1064 (9th Cir. 1979).

106. 28 U.S.C. § 1446(e).

107. Manufacturers and Traders Trust Co. v. Hartford Accident & Indem. Co., 434 F. Supp. 1053, 1055 (W.D.N.Y. 1977).

108. Adair Pipeline Co. v. Pipeliners Local Union No. 798, 203 F. Supp. 434, 437 (S.D. Tex. 1962)(only purpose of filing requirement is notice), *aff'd*, 325 F.2d 206 (5th Cir. 1963). In *Adair*, the counsel for the defendant appeared in open court and informed the judge that the cause had been removed. *Id.* at 436. He tendered a copy of the petition and bond to the judge

Fifth Circuit has gone so far as to determine that not only is a filing not mandatory, but actual notice is not required and constructive notice to the state court is sufficient.[109] In *Dukes v. South Carolina Insurance Co.*,[110] the court found that actual notice to plaintiff's counsel constituted constructive notice to the court because it was the duty of plaintiff's counsel, as officers of the court, to advise the state court of the removal.[111] The failure to file a copy of the removal petition with the state court was deemed a procedural defect which would not defeat federal jurisdiction.[112] As a result, plaintiff's failure to object to

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and also gave a copy to counsel for the plaintiff. The judge remarked that "he guessed that that was all that he could do" and counsel for defendant then left the courthouse. *Id.* Counsel for the plaintiff suggested that jurisdiction remained in the state court because a copy of the petition had not been filed with the clerk of the court pursuant to section 1446(e). The judge then issued a temporary injunction as requested by the plaintiff. The federal court held, however, that handing the copy to the judge on the bench in open court did constitute compliance with section 1446(e) and that jurisdiction was removed from the state court. *Id.* at 437.

Some concern over acceptance of this manner of compliance with the statute was expressed in a concurring opinion by Justice Gewin of the Court of Appeals for the Fifth Circuit:

> I concur in the result reached, but certainly there is a better manner and method of effecting removal in the circumstances of this case than was employed here. State Judges deserve and are entitled to respect, proper deference, and as much consideration as other Judges. If an emergency, or circumstances of unusual stress were shown to be present which prevented counsel for the Appellee from filing his removal petition earlier and calling the same to the State Judge's attention in a more respectful manner, the method used would probably be considered appropriate. No such emergency or stress were shown to exist here.

Adair, 325 F.2d at 207 (Gewin, J., concurring).

109. *See, e.g.*, Butler v. King, 781 F.2d 486, 488 (5th Cir. 1986) (actual or constructive notice satisfies statute); Dukes v. South Carolina Ins. Co., 770 F.2d 545, 547 (5th Cir. 1985) (actual or constructive notice sufficient); Medrano v. Texas, 580 F.2d 803, 804 (5th Cir. 1978) (constructive notice sufficient).

110. 770 F.2d 545 (5th Cir. 1985).

111. *Id.* at 547. In *Dukes*, the defendant sent the state court notice of removal but the court records did not reflect receipt of any such notice. *Id.* at 546. Plaintiff and defendant engaged in discovery in the federal court. *Id.* at 546-47. On July 20, 1984, plaintiff took a default judgment against defendant in the state court without informing that court that the action had been removed and was proceeding in the federal court. *Id.* at 547. On August 16, 1984, defendant took a summary judgment against plaintiff in federal court. It is apparent that the Fifth Circuit's ruling concerning constructive notice was appropriate on the facts of this case because of plaintiff's counsel's egregious behavior. Generally, however, removal requirements are to be strictly construed. Brown v. Demco, Inc., 792 F.2d 478, 480 (5th Cir. 1986). The burden rests on the defendant to see that all requirements are met and proved in order to properly effect a removal. Abels v. State Farm Fire & Casualty Co., 770 F.2d 26, 29 (3d Cir. 1985). Because plaintiffs should not be made to do jobs statutorily assigned to defendants, the court's ruling, without limiting it to the facts of this case, appears to be erroneous.

112. Dukes v. South Carolina Ins. Co., 770 F.2d 545, 547 (5th Circ. 1985). *But see* Ramahi v. Hobart Corp., 615 P.2d 348, 352-53 (Or. Ct. App. 1980)(failure of notice is proce-

the defect constituted waiver of that requirement.[113]

In contrast to the Fifth Circuit's approach, the court in *Delavigne v. Delavigne* required strict compliance with the notice requirement.[114] *Delavigne* was a divorce and custody case which the defendant sought to remove to federal court under section 1443 of title 28.[115] The defendant properly filed the removal petition with the federal court but failed to file a copy of that petition with the state court.[116] Instead, the state court received a "Notice of Filing of Petition for Removal."[117] The district court held that this was not sufficient compliance with section 1446(e) and that the automatic stay of state court proceedings did not take effect until a copy of the petition was actually filed.[118]

In *Lamprecht*, defendants Brentwood and Chateau Orleans filed their verified petition and bond with the proper federal court, yet the petition was improper on its face. Not all of the named defendants joined in the removal petition, thus unanimity was lacking.[119] Defendants argued that the City and City Public Service were not required to join the petition and that they should be aligned with the plaintiff for diversity purposes because the plaintiff had abandoned her claim against them. This argument does not pass the test of the voluntary-involuntary rule. Even if the City and City Public Service

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dural defect). In *Ramahi*, defendants left the courtroom after having filed a "Notice of Filing Petition for Removal." *Id.* at 351. The actual copy of the removal petition was not filed until after the state court had entered its judgment. The Court of Appeals held that the state court did not lose jurisdiction until the copy was filed and that its proceedings in the interim were valid. *Id.* at 353.

113. *Dukes*, 770 F.2d at 548.

114. 402 F. Supp. 363 (D. Md. 1975), *aff'd*, 530 F.2d 598 (4th Cir. 1976).

115. Delavigne v. Delavigne, 402 F. Supp. 363, 365 (D. Md. 1975), *aff'd*, 530 F.2d 598 (4th Cir. 1976).

116. *Id.*

117. *Id.*

118. *Delavigne*, 402 F. Supp. at 365. On appeal, the Court of Appeals for the Fourth Circuit acknowledged that the failure to file the copy was a significant omission but found that the district court should not have declared when the removal was effected. *Delavigne*, 530 F.2d at 601. The Fourth Circuit refused to take a view concerning the correctness of the district court's declaration, but noted that the Second Circuit accepted substantial compliance with section 1446(e). *Id.* at 601 n.5. The Circuit Court stated that the lower court's declaration was dictum and that it should be disregarded. *Id.* at 602.

119. Petition for Removal at 1, Brentwood Fin. Corp. v. Lamprecht (W.D. Tex. Jan. 17, 1986) (No. SA-86-CA-126). The City of San Antonio and City Public Service did not join the petition, nor did individual defendants whose names appeared on defendants' removal petition but against whom plaintiff's action was not actively pursued. *Id.*

were effectively dismissed by the state court and that court had no power to rescind its order, that dismissal would not make the case removable because it was involuntary on the part of the plaintiff. Indeed, the plaintiff actively opposed the dismissal and had a right to appeal from the order.[120] Unlike *Heniford*, the plaintiff did not expressly abandon her claims against the resident defendants by specifically requesting that the jury not find against them.[121] *Lamprecht* is more akin to *Aynesworth* where the plaintiff left open the possibility of a verdict against the resident defendant, or to *Cudney* where the resident defendant was dismissed by court order and plaintiff had a right to appeal from that dismissal.[122] Because the dismissal of the City and City Public Service, if effective, was not voluntary, diversity was lacking and the case did not become removable.

Further complications arise because Brentwood and Chateau Orleans' removal petition was not timely filed. It was alleged that the petition was filed within thirty days from the time that it was first ascertained that the case had become removable and that it could not have been filed earlier because the suit lacked diversity of citizenship.[123] As has just been discussed, the action did not become removable at the close of the plaintiff's case. Even if it had, however, the filing of the petition would still not have been timely because of defendants' failure to seize the first opportunity to remove.[124]

As originally filed, the lawsuit named various citizens of Texas as plaintiffs, but only one defendant, Brentwood, was a citizen of California.[125] The case was removable at that time and the time to remove began to run when Brentwood received that pleading.[126] Because Brentwood did not file for removal within thirty days of receipt of that initial pleading, it waived its right to remove and also its right to join any subsequent removal petition.[127] When Chateau Orle-

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120. The time for appeal had not even begun to run when defendants purported to remove the case. Thus, appeal was still a viable alternative.

121. *See supra* text accompanying notes 94-97.

122. *See supra* text accompanying notes 98-102.

123. *See* Petition for Removal at 2, *Lamprecht* (No. SA-86-CA-126).

124. Because the case was originally removable, the subsequent dropping of the City and CPS would not make it "more removable" or "again removable." *See Hubbard*, 601 F. Supp. at 795 (subsequent events do not revive right to remove).

125. Plaintiff's Original Petition at 1, Lamprecht v. Brentwood Fin. Corp. (Tex. Dist. Ct. Jan. 21, 1986) (No. 85CI-00243).

126. *See* 28 U.S.C. § 1446(b) (1982)(time runs from receipt of initial pleading).

127. *E.g.*, Brown v. Demco, Inc., 792 F.2d 478, 481 (5th Cir. 1986)(after initial defendant

ans was named as a defendant six months later, diversity still existed but the case was no longer removable because of Brentwood's inability to join.[128] Brentwood had effectively waived Chateau Orleans' right to remove.[129] In any event, Chateau Orleans made no attempt to remove the case at that time. Because the time to remove expired in February of 1985,[130] a petition for removal filed in January of 1986 could not be timely. Even though the time requirement is "modal and formal" rather than jurisdictional,[131] a petition filed approximately one year late is improvident at the least and would require a remand.[132]

In addition to failing to meet diversity and time elements, Brentwood and Chateau Orleans also failed to comply with the notice provision of section 1446(e) of title 28. Although the state court was given a "notice of removal," no copy of the removal petition was filed with that court.[133] Under the Fifth Circuit's application of the law, this "notice" document would constitute sufficient compliance with the requirements of section 1446(e) and the case would have been removed.[134] The Fourth Court of Appeals, however, took a view similar to that taken by the federal district court in *Delavigne* by effectively holding that the notice handed to the judge was not sufficient compliance with the statute and that an actual copy of the petition was required.[135]

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fails to timely remove, subsequently joined defendant may not remove); Friedrich v. Whittacker Corp., 467 F. Supp. 1012, 1014 (S.D. Tex. 1979)(subsequently joined defendants may not remove if initial defendant did not remove timely). *Contra* Garside v. Osco Drug, Inc., 702 F. Supp. 19, 21 (D. Mass. 1988)(each defendant has thirty days to file removal).

128. *See Friedrich*, 467 F. Supp. at 1014 (defendant cannot join subsequent removal petition once he has waived right to remove).

129. *Id.*

130. The original petition was filed on January 7, 1985, and defendant Brentwood answered on January 29, 1985. Thirty days from defendant's receipt of the original petition would, therefore, fall in February 1985.

131. Powers v. Chesapeake & Ohio Ry. Co., 169 U.S. 92, 98 (1898).

132. *See* Brown v. Demco, Inc., 792 F.2d 478, 481 (5th Cir. 1986) (failure to remove during thirty-day period may render removal improvident).

133. Brentwood Fin. Corp. v. Lamprecht, 736 S.W.2d 836, 844 (Tex. App.—San Antonio 1987, writ ref'd n.r.e.). The assumption is that no such copy was filed because there is no indication in the record on appeal showing that a copy was filed. *Id.*

134. *See* Dukes v. South Carolina Ins. Co., 770 F.2d 545, 547 (5th Cir. 1985)(even constructive notice is sufficient); *see also* Adair Pipeline Co. v. Pipeliners Local Union No. 798, 203 F. Supp. 434, 437 (S.D. Tex. 1962)(copy of petition handed to judge in open court sufficient compliance), *aff'd*, 325 F.2d 206 (5th Cir. 1963).

135. *Lamprecht*, 736 S.W.2d at 844. This result is the effect of the court's holding that

E. *Effect of Removal on State Court Jurisdiction*

Before 1948, it was clear that the state court could deny a removal petition and proceed if the state court was not convinced of the validity of a removal petition.[136] If the case was not "in fact removable," then the state court proceedings were valid.[137] If the case was properly removable, the state court proceedings subsequent to the removal were void.[138] Since the 1948 revision, state court action subsequent to the removal is void regardless of whether or not the case was "in fact removable."[139] Thus, it has become vitally significant to determine exactly when a removal is effected and at what point the state court loses jurisdiction over the case.

Central to the discussion which follows is an understanding of the difference between a case that is not removable and a case that is not removed. A case is not removable if it fails to meet the criteria of section 1441 of title 28 (*i.e.* complete diversity is lacking or a defendant is a resident of the forum state).[140] The fact that a case is "not removable" does not mean that it cannot be removed. Such a case can be automatically removed if the defendant or defendants file a verified petition and bond with the federal court, file a copy of the petition with the state court, and give notice to all adverse parties. When the federal court receives such a case, it will remand the case as having been removed "improvidently and without jurisdiction," but, nonetheless, the case will have been removed and the state court will have lost jurisdiction. Any state court action taken in the case be-

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the record was inadequate because it did not show that a copy of the petition had been filed. *Id.* If the court had deemed the notice to be sufficient compliance with section 1446(e), then the record would have been sufficient for a ruling on whether the case was effectively removed and whether the state court properly proceeded to verdict. *Id.* at 844-45. Had the case been decided under Fifth Circuit law, the result would have been quite different. *See supra* text accompanying note 109.

136. *See infra* text accompanying notes 171-182.

137. Metropolitan Casualty Ins. Co. v. Stevens, 312 U.S. 563, 566 (1941); *see also infra* text accompanying notes 171-179.

138. *Metropolitan Casualty*, 312 U.S. at 566; *see also infra* text accompanying note 172.

139. Hopson v. North Am. Ins. Co., 233 P.2d 799, 802 (Idaho 1951)(first case to construe revision); *see also infra* text accompanying notes 210-217.

140. A case may also not be removable because the thirty-day time period of section 1446 has expired. Because the courts have held this requirement to be mandatory but not jurisdictional, it is possible that a case removed after the time period has run will be accepted by the federal court. It is likely, though, that such a case will be remanded as having been removed improvidently. *See* Brown v. Demco, Inc., 792 F.2d 478, 481 (5th Cir. 1986) (failure to remove within thirty-day limit may render removal improvident and lead to remand).

tween the effective time of the removal and the time of remand is void.[141]

A case that is not removed is one in which defendant has failed to satisfactorily perform all of the statutory procedures (*i.e.* filing a petition and bond, filing a copy with the state court, giving notice to adversaries). If removal is never properly effected, the state court never loses jurisdiction of the case, and it is free to proceed to judgment.[142]

The courts are in agreement that the federal court acquires jurisdiction over a removed case when the petition and bond are filed in the federal court.[143] The courts also agree that the state court does not lose jurisdiction over the case until the procedural steps of removal are completed, but they differ in their construction of sufficient compliance with the procedural requirements. Some form of notice to the state court is universally required,[144] but as has previously been noted, the Court of Appeals for the Fifth Circuit has consistently held that even constructive notice of the removal is sufficient.[145] Other courts require strict compliance with *all* of the statutory procedures before state jurisdiction is ousted.[146] A similar source of conflict is the effect of noncompliance with the requirement of giving notice to adverse parties. Some courts hold that the state court does not lose jurisdiction until notice is given to the plaintiff.[147] Other courts hold that the

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141. Annotation, *Effect, On Jurisdiction of State Court, of 28 U.S.C.S. § 1446(e), Relating to Removal of Civil Case to Federal Court*, 38 A.L.R. FED. 824, 831 (1978).

142. *See id.* at 831, 833-34 (failure to accomplish statutory steps defeats claim that state court acted without jurisdiction).

143. *See, e.g.*, Berberian v. Gibney, 514 F.2d 790, 792 (1st Cir. 1975) (federal jurisdiction attaches when removal petition filed); Howes v. Childers, 426 F. Supp. 358, 360 (E.D. Ky. 1977) (federal jurisdiction attaches when petition filed); Hornung v. Master Tank & Welding Co., 151 F. Supp. 169, 172 (D.N.D. 1957) (federal jurisdiction vests when petition filed).

144. *See* Medrano v. Texas, 580 F.2d 803, 804 (5th Cir. 1989)(lack of any notice, either actual or constructive, will not divest state court of jurisdiction).

145. *See, e.g.*, Butler v. King, 781 F.2d 486, 488 (5th Cir. 1986) (actual or constructive notice sufficient); Dukes v. South Carolina Ins. Co., 770 F.2d 545, 547 (5th Cir. 1985) (actual or constructive notice sufficient); Murray v. Ford Motor Co., 770 F.2d 461, 463 (5th Cir. 1985) (state court has jurisdiction until given actual or constructive notice).

146. *See* Beleos v. Life & Casualty Ins. Co. of Tennessee, 161 F. Supp. 627, 628 (E.D.S.C. 1956)(procedures contained in 1446(e) mandatory conditions precedent to termination of state court jurisdiction); Crown Const. Co. v. Newfoundland Am. Ins. Co., 239 A.2d 452, 455 (Pa. 1968)(notice and copy requirements not modal or formal but mandatory conditions precedent to termination of state court jurisdiction).

147. *E.g.*, *Beleos*, 161 F. Supp. at 628; McClure v. Kelley, 268 S.E.2d 393, 394 (Ga. Ct. App. 1980); Green Seed Co. v. Harrison Tobacco Storage Warehouse, Inc., 663 S.W.2d 755, 757 (Ky. Ct. App. 1984).

court is ousted of jurisdiction once it receives notice of the removal, whether plaintiff has been given notice or not.[148]

Between the time when the federal court acquires jurisdiction of the case and the time the state court loses jurisdiction, however that time is measured, both courts may exercise jurisdiction over the case.[149] In the event of conflicting proceedings, the federal court predominates.[150] The completion of the removal process has effect retroactive to the date the removal petition was filed with the federal court.[151] For example, in *Master Equipment, Inc. v. Home Insurance Co.*, the defendant filed its removal petition with the federal court on September 21.[152] A copy was forwarded to plaintiff's attorney on September 22, yet the plaintiff took a state court default on September 28. A copy of the removal petition was filed with the state court on October 1. The court held that between September 21, and October 1, the state and federal courts had dual jurisdiction.[153] After the copy was filed with the state court, the removal process was completed and the notice operated retroactively to "effect the removal" as of the date the petition was filed with the federal court.[154] The court found that the state court default was a nullity and ordered it stricken.[155]

Once a case is effectively removed, the state court is powerless to proceed unless and until the action is remanded by the federal court.[156] "This acts as a protective device which keeps separate tribu-

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148. *See* Howes v. Childers, 426 F. Supp. 358, 360 (E.D. Ky. 1977) (recognizes that some courts require completion of all steps before state jurisdiction lost); Barrett v. Southern Ry. Co., 68 F.R.D. 413, 419 (D.S.C. 1975)(actual notice to adversary is sufficient). *Contra* Nebraska v. Lehman, 278 N.W.2d 610, 615 (Neb. 1979) (jurisdiction not ousted without proper notice to plaintiff).

149. Berberian v. Gibney, 514 F.2d 790, 792-93 (1st Cir. 1975); Windac Corp. v. Clarke, 530 F. Supp. 812, 814 (D. Neb. 1982); Master Equipment, Inc. v. Home Ins. Co., 342 F. Supp. 549, 551 (E.D. Pa. 1972).

150. *Windac Corp.*, 530 F. Supp. at 814; *Master Equipment*, 342 F. Supp. at 552; Hornung v. Master Tank & Welding Co., 151 F. Supp. 159, 172 (D.N.D. 1957).

151. *See, e.g.*, *Master Equipment*, 342 F. Supp. at 551 (retroactive effect); *Hornung*, 151 F. Supp. at 172 (removal order effect retroactive to filing); Shenandoah Chamber of Progress v. Frank Assocs., 95 F. Supp. 719, 720 (E.D. Pa. 1950)(retroactive effect). *But see* 14A C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3737, at 549-50 (2d ed. 1985)(no retroactive effect because removal not effective until all statutory steps taken).

152. 342 F. Supp. 549, 550-51 (E.D. Pa. 1972).

153. Master Equipment, Inc. v. Home Ins. Co., 342 F. Supp. 549, 550-51 (E.D. Pa. 1972).

154. *Id.*

155. *Id.* at 551-52.

156. 28 U.S.C. § 1446(e) (1982)(current version at 28 U.S.C.A. § 1446(e) (West Supp. 1989)).

nals from adjudicating the merits of the same controversy."[157] If the federal court finds that the action was not properly removed, it will order the case remanded.[158] Section 1447(c) requires that "[a] certified copy of the order of remand shall be mailed by its clerk to the clerk of the State court. The State court may thereupon proceed with such case."[159] The Court of Appeals for the Fifth Circuit has also taken a lenient view toward this requirement. In *Johnson v. Estelle*,[160] the federal court made an oral order of remand, in the presence of the parties, on April 14, 1975. This oral order was followed by a written order on May 27, 1975, which was backdated to April 14.[161] The Fifth Circuit held that because the parties were present in the federal forum at the time of the oral order and thus received notice of the remand, the oral order accompanied by a backdated written order was sufficient to vest jurisdiction in the state court.[162]

It is clear from the discussion above that the *Lamprecht* case was not removable.[163] Even so, federal jurisdiction attached in *Lamprecht* at approximately noon on January 15, 1986, when the petition for removal was filed. Jurisdiction was shared with the state court at that

157. Wood v. DeWeese, 305 F. Supp. 939, 941 (W.D. Ky. 1969).

158. Prior to the 1988 amendment, section 1447(c) read as follows: "If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case . . . ." 28 U.S.C. § 1447(c) (1982). The United States Supreme Court held that the *only* grounds upon which a federal court can remand a case to the state court are that the case was removed "improvidently and without jurisdiction." *See* Thermtron Prods., Inc. v. Hermansdorfer, 423 U.S. 336, 342-45 (1976)(only authorized to remand on statutory grounds). The amended statute now 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." 28 U.S.C.A. § 1447(c) (West Supp. 1989). The amendment also states that any motion to remand based upon defective removal procedure must be made within 30 days after the filing of the notice of removal. *Id.* Following the spirit of *Thermtron*, these are the only grounds for remand. Both before and after amendment, the statute states that an order of remand is not reviewable "on appeal or otherwise." 28 U.S.C. § 1447(d) (1982)(current version at U.S.C.A. § 1447(d) (West Supp. 1989)); *see also* FDIC v. Santiago Plaza, 598 F.2d 634, 636 (1st Cir. 1979) (no review on appeal or otherwise).

159. 28 U.S.C. § 1447(c) (1982).

160. 625 F.2d 75 (5th Cir. 1980).

161. Johnson v. Estelle, 625 F.2d 75, 77 (5th Cir. 1980). "The record does not disclose when, if ever, that order was certified and served by the federal court clerk on the clerk of the Texas Criminal District Court." *Id.*

162. *Id.*

163. To recap the defects in removability, *Lamprecht* lacked diversity of citizenship, it did not pass the voluntary-involuntary test, the removal was not timely, and unanimity was lacking because of Brentwood and Chateau Orleans' prior waiver of their right to remove. *See supra* text accompanying notes 119-135.

time because the remaining steps in the removal process had not been completed. At approximately 2:00 p.m. that same day, the defendants purported to complete the removal steps. The Fourth Court of Appeals considered *Lamprecht* not only a case that was not removable, but also one that was not removed. Because a copy of the petition was not filed with the state court, the removal was never effected and the state court never lost jurisdiction. The court was free to proceed to judgment without any further notice to defendants, who had voluntarily left the courtroom.[164]

If the *Lamprecht* court had applied Fifth Circuit law, the result would have been very different. The Fifth Circuit holds that constructive notice to the state court is sufficient compliance with section 1446(e).[165] Therefore, the *Lamprecht* court certainly would have considered the actual notice, both in writing and in defendants' oral pronouncement in open court, as sufficient compliance. The case would have been considered one that was not removable yet one which was removed. The removal would have been effected at the time of notice to the state court, retroactive to the time the petition was filed with the federal court, and the state court would have been stayed from any further action unless and until the action was remanded.[166]

Although the *Lamprecht* court refrained from actually proceeding to judgment until it had received notice that the removal was improper, some proceedings were held in the case between the departure of the defendants and the phone call from the federal court.[167] Under

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164. *See* Brentwood Fin. Corp. v. Lamprecht, 736 S.W.2d 836, 845 (Tex. App.—San Antonio 1987, writ ref'd n.r.e.)(no abuse of discretion to continue trial without presence of defendants).

165. *See* Butler v. King, 781 F.2d 486, 488 (5th Cir. 1986)(constructive notice sufficient); Dukes v. South Carolina Ins. Co., 770 F.2d 545, 547 (5th Cir. 1985)(constructive notice sufficient).

166. The anamoly here is that if the removal was retroactive to the noon filing in the federal court, then the state court would lose jurisdiction before even defendants acknowledged that federal diversity jurisdiction was created. This is because defendants alleged that diversity was created when plaintiff rested her case, but this did not occur until 2:00 that afternoon.

167. *Lamprecht*, 736 S.W.2d at 844. The oral remand followed by a *nunc pro tunc* order is valid under the holding of *Johnson v. Estelle*. 625 F.2d 75, 78 (5th Cir. 1980). *Lamprecht* can be distinguished from *Johnson*, however, because the parties were not present at the time of the oral remand, and the defendants apparently were not given notice of that remand until after the trial was resumed. Furthermore, the federal court in San Antonio apparently considered the case as one which had been effectively, though improperly, removed because it issued a remand order. Presumably, if the case had never been removed, a remand would have been inappropriate.

the analysis of the Fourth Court of Appeals, this interim action is valid because the removal was never effected. Under Fifth Circuit analysis, though, the action was removed at the time the notice of removal was handed to the state judge and any action occurring before receipt of the telephoned remand is void. A further effect of the application of Fifth Circuit law is that even those proceedings taking place after the remand are void because of the state court's failure to notify defendants that the trial would resume. The state appellate court excused the lack of notice because the case was never actually removed, but if the removal was effected, then notice of the resumption of the state court trial would have been required. Removal itself would invalidate action taken between the removal and the remand, and failure to give notice of resumption of the trial would invalidate the state court actions subsequent to the remand.

IV. REMOVAL PROCEDURE AND EFFECT BEFORE AND IMMEDIATELY AFTER 1948 REVISION

A. *Removal Procedure Before 1948*

Removal has been a part of the American judicial system for 200 years. The Judicial Act of 1789 permitted certain state court suits to be removed to the federal circuit courts.[168] Removal laws underwent numerous corrections and revisions before being overhauled in 1948,[169] but the procedure for removal was quite consistent throughout.[170] In most cases, the removing party presented its petition for removal to the state court.[171] If the case was removable, then the

168. 1A J. MOORE, MOORE'S FEDERAL PRACTICE § 0.156, at 13 (2d ed. 1987).

169. *See id.* at 13-29 (complete history of removal); *see also* E. SPEER, REMOVAL OF CAUSES FROM THE STATE TO FEDERAL COURTS, AN ANALYSIS OF THE LAW (1888) (history of removal prior to 1888).

170. Some significant changes were made during this time. For example, the Act of March 3, 1875 allowed either plaintiff or defendant to remove an action. Act of March 3, 1875, ch. 137, 18 (pt. 3) Stat. 470 § 2; *see also* 1A J. MOORE, MOORE'S FEDERAL PRACTICE § 0.156, at 17-18 (2d ed. 1987). The Judicial Act of 1887 restricted the right of removal to defendants only. Act of March 3, 1887, ch. 373, § 2, 24 Stat. 552, *as corrected by* Act of August 13, 1888, ch. 866, § 2, 25 Stat. 433, 434; *see also* 1A J. MOORE, MOORE'S FEDERAL PRACTICE § 0.156, at 17-18 (2d ed. 1987).

171. 1A J. MOORE, MOORE'S FEDERAL PRACTICE § 0.168, at 535 (2d ed. 1987). Removal petitions were filed in federal court for actions brought against federal officers and where removal was based on prejudice or local influence. Brown, *Removal Procedure Under the Revised Judicial Code*, 19 U. CIN. L. REV. 171, 174 (1950); Note, *State-Federal Court Conflicts Over the Removability of Causes: The Prospect Under the New Judicial Code*, 98 U. PA. L. REV. 80, 81 (1949).

state court lost jurisdiction upon the filing of the petition and bond, and any subsequent proceedings in the state court were void.[172] If upon the face of the record, including the petition, the suit did not appear to be removable, the state court was not bound to surrender its jurisdiction and could proceed as if no application for removal had been made.[173] In making its determination of removability the state court was required to accept the fact allegations of the petition as true.[174] The subsequent determination of removability by the federal court presented a mixed question of law and fact.[175] If the federal court found that the case was not in fact removable, the state court's actions following the application for removal would be valid.[176] Merely filing the petition would not work to transfer the case if the suit was not actually removable,[177] and federal jurisdiction could not attach until the state court had a duty to proceed no further.[178] "The jurisdiction is changed when the removal is demanded *in proper form and a case for removal made.*"[179]

If the state court denied defendant's petition for removal, the defendant was faced with three alternative courses of action: he could object to the denial of his petition, save an exception for appeal and continue to litigate in the state court; he could remove to the federal court despite the state court's ruling; or he could proceed in both

172. Madisonville Traction Co. v. Saint Bernard Mining Co., 196 U.S. 239, 244 (1905); *see also* Stone v. South Carolina, 117 U.S. 430, 432 (1886)(if case removed, state jurisdiction ceases upon filing petition and bond); Steamship Co. v. Tugman, 106 U.S. 118, 122 (1882)(state jurisdiction ceases upon filing of petition and bond, "the suit being removable under the statute").

173. *Madisonville Traction Co.*, 196 U.S. at 244; Butler v. King, 781 F.2d 486, 488 (5th Cir. 1986) (state court does not lose jurisdiction until petition shows party can remove as matter of right).

174. Note, *Court—U.S. Code, Judiciary and Judicial Procedure—Removal of Causes Under the Revised Judicial Code*, 33 MINN. L. REV. 738, 754 (1949); Note, *State-Federal Court Conflicts Over the Removability of Causes: The Prospect Under the New Judicial Code*, 98 U. PA. L. REV. 80, 81 (1949).

175. Note, *State-Federal Court Conflicts Over the Removability of Causes: The Prospect Under the New Judicial Code*, 98 U. PA. L. REV. 80, 81 (1949). This note points out "a case in which the state court properly allowed removal might be remanded equally properly by the federal court after the facts had been decided against the defendant." *Id.*

176. Metropolitan Casualty Ins. Co. v. Stevens, 312 U.S. 563, 566 (1941).

177. Crehore v. Ohio & Mississippi Ry. Co., 131 U.S. 240, 244 (1889); Stone v. South Carolina, 117 U.S. 430, 432 (1886).

178. *Crehore*, 131 U.S. at 244; Railroad Co. v. Koontz, 104 U.S. 5, 14 (1881).

179. *Koontz*, 104 U.S. at 14 (emphasis added).

courts at the same time.[180] The state court also had a choice. It could proceed with the action and risk having the final judgment reversed if its ruling on the removal petition was erroneous,[181] or if there was any doubt as to removability, the court could stay its action until the federal court resolved the matter. The United States Supreme Court recommended that if the state court was assured that the federal court would decide the question of removability promptly, then "it is better practice to await that decision [citations omitted] but we cannot say that failure to do so is a denial of a federal right if the cause was not removable."[182]

Had *Lamprecht* been subject to the removal laws as they existed before 1948, the conflict which this article addresses could not have arisen. The defendants would have presented their removal petition to the state court, and that court would have denied the petition for lack of diversity.[183] Whether or not the defendants chose to pursue the removal in federal court, the state court trial would have proceeded, and the defendants would have had to bear any risk attendant in absenting themselves from the proceedings. No notification to the defendants of intent to continue the trial would be required. Had the defendants pursued a ruling from the federal court, that court would have ruled that the defendants were not entitled to remove[184] and that the state court had not lost jurisdiction. Thus, all state court proceedings subsequent to the presentation of the removal petition would have been valid. Even if the defendants believed that the removal was proper, when faced with the possibility that the state court action would be deemed valid, it is unlikely that they would have walked out on the trial. If the removal in *Lamprecht* was attempted solely as a trial strategy, removal under pre-1948 law would have been of no ben-

180. *Metropolitan Casualty*, 312 U.S. at 567; *see also* Steamship Co. v. Tugman, 106 U.S. 118, 123 (1882)(defendant may defend in state court without forfeiting or impairing right to trial in federal court).

181. Stone v. South Carolina, 117 U.S. 430, 432-33 (1886); *see also* Minus v. Grote, 154 S.W.2d 140, 142 (Tex. Civ. App.—El Paso 1941, no writ)(state court may proceed at peril of having orders and judgment set aside).

182. Metropolitan Casualty Ins. Co. v. Stevens, 312 U.S. 563, 569 (1941).

183. The court could find a lack of diversity either by application of the voluntary-involuntary rule following dismissal of the City and CPS, or by the fact that its order of dismissal was rescinded and the resident defendants remained parties to the suit.

184. Defendants were not entitled to remove for the same reasons as cited by the *nunc pro tunc* order of remand previously cited. *Supra* note 36.

efit to defendants because it would not have resulted in a mistrial, or even a delay of the state trial.

B. *The 1948 Revision and 1949 Amendment*

Before 1948, removal jurisdiction and procedure were difficult and confusing because the statutes had been amended over the years in a piecemeal fashion, and the amendments had been scattered throughout various code sections.[185] In 1948, the removal statutes underwent a significant overhaul in an effort to integrate them into one coherent scheme,[186] and to "overcome the endless and multiple litigation and resulting severe hardships which arose under [prior removal law] as construed."[187] The amendments repealed obsolete provisions, consolidated related provisions, employed clearer language, and separated jurisdictional provisions from procedural provisions.[188] Previously, the state court would determine removability as a question of law, accepting the facts as given in the petition, while the federal court could reach a different result by determining removability as a question of law and fact.[189] Under the new, integrated removal law, all removal petitions were filed in, and determined by, the federal court.[190] It was believed that this procedure would decrease conflicts between the state and federal courts because state courts, no longer empowered to decide questions of removability, would be unlikely to proceed until the federal court had resolved the issue.[191] Following the 1948 revision, no removal order was necessary to stop proceedings

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185. Brown, *Removal Procedure Under the Revised Judicial Code*, 19 U. CIN. L. REV. 171, 171 (1950); Wills & Boyer, *Proposed Changes in Federal Removal Jurisdiction and Procedure*, 9 OHIO ST. L.J. 257, 257 (1948).

186. Wills & Boyer, *Proposed Changes in Federal Removal Jurisdiction and Procedure*, 9 OHIO ST. L.J. 257, 257 (1948); *see also* Note, *State-Federal Court Conflicts Over the Removability of Causes: The Prospect Under the New Judicial Code*, 98 U. PA. L. REV. 80, 80 (1949)(first attempt at thorough integration and clarification).

187. Hopson v. North American Ins. Co., 233 P.2d 799, 802 (Idaho 1951).

188. Brown, *Removal Procedure under the Revised Judicial Code*, 19 U. CIN. L. REV. 171, 171-72 (1950).

189. Wills & Boyer, *Proposed Changes in Federal Removal Jurisdiction and Procedure*, 9 OHIO ST. L.J. 257, 271-72 (1948).

190. Brown, *Removal Procedure under the Revised Judicial Code*, 19 U. CIN. L. REV. 171, 171-74 (1950). The new law effected other changes by including a uniform time requirement (except that the time requirement for removal of criminal cases remained different from civil cases) and the requirement that written notice was to be given to adversaries promptly following removal rather than before filing the removal petition and bond. *Id.* at 176, 195.

191. *Id.* at 175.

in the state court.[192] Removal was effected automatically when the petition and bond were filed, written notice was given to adversaries, and a copy of the petition was filed with the state court.[193] At that point the state court could not proceed further unless the case was remanded.[194]

The 1948 revision was followed in 1949 by an amendment intended to correct typographical errors, other minor errors and to "clarif[y] the language of some sections to conform more closely to the original law, or to remove ambiguities which have been discovered."[195] A change which is not specifically mentioned in the legislative history was made in section 1446(e). Where the 1948 revision stated that the state court shall proceed no further "unless the case is remanded,"[196] the language of the 1949 amendment reads that the court shall proceed no further "unless *and until* the case is remanded."[197] This revision could be read as support for the view that the revisers intended to change the effect of the law so that all state court action between removal and remand is void. The language "unless the case is remanded" leaves open the possibility of continuing with the action and holding that continuation valid if the case is remanded but void if it is not. The language "unless and until the case is remanded" seems to mandate that the state court has no option to proceed at all *until* the case is remanded. Because the legislative history concerning this amendment does not indicate any intent to materially alter the effect

192. *Id.* at 197.

193. *Id.* at 197. The pre-1948 statute provided that upon the filing of the removal petition and bond with the state court "[i]t shall then be the duty of the State court to accept said petition and bond and proceed no further in such suit." Act of March 3, 1911, ch. 231, 36 Stat. 1095. Notice to adversaries was required to be given prior to filing the petition. *Id.* The 1948 revision provided that filing of the removal petition and bond must be accompanied by notice to adversaries and filing a copy with the state court, "*which shall effect the removal* and the State court shall proceed no further therein unless the case is remanded." Act of June 25, 1948, ch. 646, 62 Stat. 939 (emphasis added). It is this language effecting the removal that has been construed to mean that removal is automatic.

194. Brown, *Removal Procedure under the Revised Judicial Code*, 9 OHIO ST. L.J. 171, 197-98 (1950).

195. S. REP. NO. 303, 81st Cong., 1st Sess. 2, *reprinted in* 1949 U.S. CODE CONG. & ADMIN. NEWS 1248, 1248. For example, the procedure for removal was amended "to make it fit the diverse procedural laws of the various States." *Id.* Section 1446(e) was amended to clarify the intent that notice of the filing of the petition need not be given simultaneously with the filing, but may be given promptly thereafter. *Id.* at 1268.

196. Act of June 25, 1948, ch. 646, 62 Stat. 939.

197. Act of May 24, 1949, ch. 139, 63 Stat. 102 (emphasis added).

of removal on the state court's interim jurisdiction,[198] this change in the language of the statute should probably be regarded as merely the correction of a minor misstatement or typographical error.[199]

Written commentary at the time of the revision and amendment demonstrates the confusion surrounding the effect of the new law on the state court's ability to proceed and the validity of such proceedings in a case which was not properly removable. In an article written in 1948, while the new law was pending in the legislature, the authors asserted that "it will still be possible, if H.R. 3214 is enacted as it now stands, for a state court to proceed in an action after a federal court has granted a petition to remove."[200] It was their opinion that the language "the state court shall proceed no further" would not prevent the state court from continuing because similar language in the law at that time had not prevented such conflicts.[201] The authors proposed that a statute be enacted providing that if the federal court remands a case then "any proceedings taken in the state court while the federal court was asserting jurisdiction, and in conflict with the federal court's asserted jurisdiction, shall be void."[202] An exception would be made when "from the face of the record the case is clearly not removable."[203] In such a case the state court would not lose jurisdiction while the case was pending in the federal court.[204] It is obvious from this commentary and the proposed statutory solution that the authors envisioned a continuing conflict between the state and federal courts.

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198. The legislative history of the revision also does not address this issue or indicate a deliberate intent to change the effect of removal on the state courts.

199. *See* South Carolina v. Moore, 447 F.2d 1067, 1073 n.16 (4th Cir. 1971) (revisers did not explain change).

200. Wills & Boyer, *Proposed Changes in Federal Removal Jurisdiction and Procedure*, 9 OHIO ST. L.J. 257, 273 (1948).

201. *Id.* at 273 n.90. For example, the Act of March 3, 1911, chapter 231, reads that after the filing of a petition and bond by a party entitled to remove, "[i]t shall then be the duty of the State court to accept said petition and bond and proceed no further in such suit." 36 Stat. 1095.

202. Wills & Boyer, *Proposed Changes in Federal Removal Jurisdiction and Procedure*, 9 OHIO ST. L.J. 257, 274 (1948).

203. *Id.* at 275 (quoting Grote v. Price, 139 Tex. 472, 476, 163 S.W.2d 1059, 1060 (1942)).

204. *Id.* One problem with this approach is that it requires a determination of "clearly not removable." This will likely lead to more litigation, delay and expense. A bright line rule would be more advantageous. Either the state court loses jurisdiction or it does not; either subsequent action is valid upon remand or it is not. The same rule must apply evenly to all cases.

The revised removal laws were not viewed as clearly prohibiting continued action in the state court or clearly invalidating any such action.

Other scholars, writing soon after the enactment of the new law, also believed that the revision failed to resolve the conflict between the state and federal courts between the time of removal and the time of remand. One author maintained:

> [T]he possibility that the state court and the plaintiff may disregard the petition and continue to prosecute the case in the state court is still present. Section 1446(e) commands the state court to 'effect the removal' and 'proceed no further therein' upon the filing of a copy of the petition with the clerk of the state court. But this is little stronger than the language of the old code. It seems, therefore, that if the case is in fact not removable, subsequent proceedings in the state court are valid, and that all of the perplexities of a potential dual trial persist.[205]

Another author also agreed that even under the revised law it was possible for "some state courts to insist on proceeding with a case on the ground that the face of the petition shows no right of removal."[206] This author maintained that the revised statute was seriously defective because it did not attack the doctrine that remand signifies that the state court never lost jurisdiction.[207] It was asserted that if the federal courts considered removal questions promptly then few state courts would be unwilling to stay their hands.[208] Even so, the author recommended that "it might be advisable to provide for the issuance of a temporary restraining order as a matter of course upon the filing of a removal petition and bond."[209]

These writings reveal that the effect of the 1948 revision on the validity of state court action between removal and remand was open to question. Although this effect is of the utmost importance to the state courts, the confusion and ambiguity surrounding this issue demonstrates that any change on this point was not explicit and may not have been intended by the revisers. The legislature failed to further

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205. Note, *Courts—U.S. Code, Judiciary and Judicial Procedure—Removal of Causes Under the Revised Judicial Code*, 33 MINN. L. REV. 738, 755 (1949).

206. Note, *State-Federal Court Conflicts Over the Removablilty of Causes: The Prospect Under the New Judicial Code*, 98 U. PA. L. REV. 80, 85 (1949).

207. *Id.* at 90. By extension, the revision was not viewed as attacking the doctrine that state court action before remand was valid if the case was not removable.

208. *Id.* at 87.

209. *Id.* at 89.

amend the statute to clarify its intent and resolution of the issue was left to the courts.

Despite the fact that the commentators construed the new law as sustaining the ability of the state court to proceed and the validity of such actions in subsequently remanded cases, the courts did not follow suit. The first case to construe the effect of the 1948 revision on the validity of state court action between removal and remand was *Hopson v. North American Insurance Co.*[210] In that case, the defendant properly complied with removal procedures on February 27, 1950. On March 27, 1950, the plaintiff moved for default in state court. This motion was granted. On April 6, 1950, plaintiff moved the federal court for remand. An order granting this motion was entered on June 16, 1950. The following day, defendant moved the state court to vacate the default. The default was then vacated and set aside.[211] The primary issue on appeal was "what effect, if any, the proceedings pending in the Federal District Court for the removal of the cause from the State District Court, which is not removable, have upon any proceedings taken in the State District Court while such proceedings were pending in the Federal Court and before the cause is remanded to the State District Court."[212] The court noted that the language of the prior removal statute spoke of "any party *entitled to* remove any suit . . ." while the language of section 1446 after amendment spoke of "defendant or defendants *desiring to* remove."[213] After reviewing accepted law under the prior statute holding that proceedings in the state court following a petition for removal were valid if the suit was not in fact removable, the court concluded that this was no longer the case after the 1948 revision.[214] The court reasoned that jurisdiction was moved to federal court under the prior statute only when the proper procedural steps were taken by a party *entitled to remove*.[215] The statute now permits removal by parties desiring to, though not necessarily entitled to, remove a case. The Idaho court also noted that the amended statute expressly provides that taking the

210. 233 P.2d 799 (Idaho 1951).

211. Hopson v. North Am. Ins. Co., 233 P.2d 799, 799-800 (Idaho 1951).

212. *Id.* at 800.

213. *Id.* at 800 (emphasis added).; *see also* Lowe v. Jacobs, 243 F.2d 432, 433 (5th Cir. 1957)(noting distinction between "entitled to reverse" and "desiring to reverse"), *cert. denied*, 355 U.S. 842 (1957).

214. *Hopson*, at 802.

215. *Id.* at 800 (emphasis added).

required procedural steps "effects the removal of the cause to the Federal Court."[216] Because this language was not included in the prior law, the court concluded that Congress intended that a case is removed "irrespective of the ultimate determination of the question as to whether or not it is removable" and that "[r]emovability is no longer a criterion which gives or denies validity to the proceedings in the State court while a petition for removal to the Federal Court is pending; any such proceedings in the State court under the present act are not sanctioned; they are prohibited."[217] Other courts have universally accepted and followed this construction of the revised removal statutes.

Applying the reasoning of the *Hopson* court to the *Lamprecht* case, it is evident how defendants Brentwood and Chateau Orleans could have removed the case to federal court if they had performed the removal procedures properly. Defendants were not *entitled to* remove because of jurisdictional deficiencies such as a lack of diversity. Under the prior law this deficiency would have been sufficient to prevent the ouster of state court jurisdiction. After the revision, as construed by the courts, however, once defendants merely performed the prescribed steps, removal was effected invalidating any subsequent state court proceedings.[218] As previously discussed, the case would be removed despite the fact that it was not removable.

V. AMENDMENT OF NOVEMBER 19, 1988

On November 19, 1988, the legislature enacted the Judicial Improvements Act. Section 1016 of that act deals specifically with improvements in removal procedure.[219] Section 1441(a) was amended by adding a sentence which reads: "For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded."[220] This provision simply codifies previous case law.[221]

The procedure for removing actions was amended in three signifi-

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216. Hopson v. North Am. Ins. Co., 233 P.2d 799, 802 (Idaho 1951).

217. *Id.*

218. Even though defendants desired to remove the case, the removal was not effected because, as previously discussed, defendants failed to properly perform the statutory steps.

219. *See* Judicial Improvements Act, Pub. L. No. 100-702 § 1016, 102 Stat. 4642, 4669 (1988).

220. 28 U.S.C.A. § 1441(a) (West Supp. 1989).

221. *See supra* text accompanying notes 62-66.

cant respects. First, a verified petition is no longer required. Instead, a defendant desiring to remove a case must now file with the federal court a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure containing a brief statement of the basis for removal.[222] There is no specific indication in the statute how this "notice of removal" will differ from the removal petition previously required. Second, the legislature completely deleted the bond requirement.[223] These two changes would appear to make removal easier to accomplish. The third change, however, places a new restriction on removal. Section 1446(b) was amended by adding the following language at the end of the second paragraph:[224] "[E]xcept that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title [diversity] more than 1 year after commencement of the action."[225]

Had these amendments applied to *Lamprecht*, the case would probably still have been remanded, but the effect of the removal on the state court trial would have been far more intrusive. The notice given to the judge at the time of removal would have been sufficient to effect the removal because a petition is no longer required.[226] On the other hand, the removal would not have been timely because the basis of federal jurisdiction was diversity and more than one year had passed since the commencement of the action.[227] Because the statutory amendment does not address the effect of the time requirement, it is reasonable to anticipate that the courts will construe it as they have construed the thirty-day filing requirement: the one year limitation is

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222. 28 U.S.C.A. § 1446(a) (West Supp. 1989).

223. *Id.* § 1446(d).

224. *Id.* § 1446(b). The second paragraph of 1446(b) provides for removal of cases which were not removable as originally stated by filing for removal within thirty days of receipt by defendant of notice that the case is or has become removable. *Id.*

225. Judicial Improvements Act, Pub. L. No. 100-702 § 1016, 102 Stat. 4642, 4669 (1988).

226. The amendment replaced "petition for removal" with "notice of removal" everywhere that it appears in 1446(b). 28 U.S.C.A. § 1446(b) (West Supp. 1989). Presumably the legislature also intended that references to the removal petition in subsection (e), now subsection (d), would also be replaced with "notice of removal." Thus, the statute would require that the removing party file a notice of removal with the state court clerk.

227. The action commenced on January 7, 1985 and the removal was attempted on January 15, 1986. Plaintiff's Original Petition at 1, Lamprecht v. Brentwood Fin. Corp. (Tex. Dist. Ct. Jan. 21, 1986) (No. 85CI-00243); Statement of Facts at 545, *Lamprecht* (No. 85CI-00243).

not jurisdictional, but is modal and formal.[228] Failure to comply with this time restriction should still have subjected defendants to remand, providing that a motion for remand raising this procedural defect was filed within thirty days of the notice of removal.[229] Thus, *Lamprecht* would likely have been remanded to the state court.[230] The state court would have lost jurisdiction, and any state court action which occurred before that remand would have been void, however, because the removal had been effected at the time the notice was handed to the judge. Continuation with the trial after the remand would also have been void for failure to notify defendants of the court's intent to resume proceedings.[231]

VI. PROPOSED SOLUTIONS

A. *1988 Amendment*

The one year limitation now contained in section 1446(b) will serve to prevent some removals from taking place during trial or on the eve of trial because most civil cases do not reach the courtroom within one year of commencement of the action. It is not, however, an impossibility. *Lamprecht*, itself, illustrates the potential for preparing a case quickly and getting to trial in approximately one year. Indeed, the *Lamprecht* trial commenced one year and six days from the date the action was originally filed. If the one year limit is strictly applied, then removal will be prevented in cases such as this. As previously noted, however, the courts do not view time limitations as jurisdictional in removed actions.[232] Thus, removal approximately within one year may be acceptable, cases like *Lamprecht* may be found to be in sufficient compliance with this new requirement, and removal dur-

228. *See* Powers v. Chesapeake & Ohio Ry. Co., 169 U.S. 92, 98 (1898)(time for filing petition is "modal and formal" not jurisdictional).

229. *See* Brown v. Demco, Inc., 792 F.2d 478, 481 (5th Cir. 1986)(remand for case improvidently removed because not timely).

230. It is possible that the federal court would have found the removal to have been sufficiently close in time to preclude remand. Defendants missed the one year cut-off date by only eight days. This author maintains that both this time limitation and the thirty-day filing rule should be strictly applied.

231. In ratifying the state court's actions subsequent to the removal, the Fourth Court of Appeals relied on defendants' failure to properly effect the removal by failing to file an actual copy of the petition with the state court. This is no longer required after the 1988 amendment and the reasoning used by the appellate court would no longer apply.

232. *See supra* text accompanying note 75.

ing trial may continue to occur.[233]

A further problem with the 1988 amendment as a solution to the problem of disruption of state trials is that the new time limitation does not prevent the automatic effect of fulfilling removal procedures. In fact, the omission of a bond requirement and replacement of a verified petition with a notice of removal will make removal easier to accomplish during trial and will serve to exacerbate the problem. If removal is not effected within the one year window, the case will be remanded, yet the state trial will still have been disrupted and the court ousted of jurisdiction. Any action taken by the state court between removal and remand will be void. Until the legislature addresses this effect of automatic removal, instead of merely addressing removal procedures, unwarranted interference with state court proceedings will continue. For this reason, the recent amendment to the removal statutes does not present a viable solution to the problem presented.

B. *Return to Pre-1948 Construction*

A return to pre-1948 construction of the effect of removal on state court jurisdiction could be accomplished while retaining the beneficial procedural changes made by the revision. To do so, however, would require strict application of the requirement of filing a copy of the removal petition (now notice) with the state court before removal can be effected. While not authorized to make a final determination of removability, the state court would be given the opportunity to review the removal petition and, if it found the petition to be meritless, to proceed with the action. If the case is properly removable, (and properly removed), then such action is void. If, however, the case is not removable and is remanded then such action is valid.

This construction, while removing the incentive for improper removal, recreates problems of wasted effort and resources unless accompanied by a provision requiring prompt review by the federal court to prevent duplication of proceedings in both courts. To this

233. This case illustrates how the one year limitation may be under-inclusive because improper removal may still occur during trial. The limitation may also be over-inclusive because it prevents removal of cases which properly become removable more than one year from commencement of the action. The amendment may encourage plaintiffs to include resident defendants in their pleadings for one year simply to avoid removal, and then to dismiss them after the deadline has passed. This is as much an abuse of the removal statutes as removing a case for purposes of delay or disruption.

end, it might be wise to reverse the automatic effect of removal and require entry of an order granting removal in federal court before the suit may proceed in that court and before the state court is prohibited from proceeding. It is obvious that this solution cannot be effected by a mere change in construction of the present law. First, after forty years of consistent construction of the removal laws, courts will be unwilling, and unable because of the doctrine of *stare decisis*, to suddenly reverse themselves on the effect of removal and its automatic nature. Second, language changes made in the 1948 revision and 1949 amendment[234] preclude altering the construction of the statute in the absence of congressional action. It is apparent, therefore, that simply reconstruing the statute and returning to the pre-1948 status quo is not a viable solution.

C. *Sanctions*

One of the most common methods of discouraging the abuse of legal procedures is to impose sanctions for their misuse. Before amendment in 1988, section 1447(c) of the removal laws empowered the federal court to "order the payment of just costs"[235] upon the remand of a case removed "improvidently and without jurisdiction."[236] In applying section 1447(c), many courts differentiate between the award of costs and the award of attorney fees. Costs are discretionary under section 1447(c), but they generally will be awarded where the nonremovability of the action is obvious.[237] If the removal is improper but there is no apparent bad faith, then costs will be awarded but not attorney fees.[238] If the action was removed in bad faith, then attorney fees are allowed under 1447(c) as part of "just

234. For example, the revision changed "entitled to" to "desiring to" and added the language "which shall effect the removal." The import of these changes is discussed *supra* pp. 85-93.

235. 28 U.S.C. § 1447(c) (1982)(current version 28 U.S.C.A. § 1447(c) (West Supp. 1989)).

236. *Id.*

237. Tralmer v. Galaxy Airlines, 611 F. Supp. 633, 635 (D. Nev. 1985); Olsen v. Olsen, 580 F. Supp. 1569, 1572 (N.D. Ind. 1984).

238. Dial-In, Inc. v. ARO Corp., 620 F. Supp. 27, 29 (N.D. Ill. 1985); Armstrong v. Goldblatt Tool Co., 609 F. Supp. 736, 739 (D. Kan. 1985); *see also* News-Texan, Inc. v. City of Garland, 814 F.2d 216, 220 (5th Cir. 1987)(bad faith not precondition to section 1447(c) award of just costs); Cornwall v. Robinson, 654 F.2d 685, 687 (10th Cir. 1981)(award of attorney fees requires bad faith, but award of costs does not).

costs."[239] The Court of Appeals for the Sixth Circuit provides an exception to this general rule and will allow attorney fees in the interest of justice even absent a showing of bad faith.[240]

In those jurisdictions which require a showing of bad faith to recover attorneys fees, proof of negligence, frivolity, improvidence, or simply a weak or legally inadequate case is insufficient.[241] In *Peltier v. Peltier*,[242] defendant's counsel attempted removal of a divorce action after he had unsuccessfully attempted the same course of action before.[243] The Court of Appeals for the First Circuit noted that the award of attorney's fees for improper removal was not usual and required that the removing party acted "in bad faith, vexatiously, wantonly, or for oppressive reasons."[244] The bad faith exception is to be employed "only in extraordinary circumstances and for dominating reasons of justice."[245] The court interpreted this exception as necessitating that the removing party intentionally instituted the action with knowledge that it was fictitious and wholly without merit "for the specific purpose of frustrating and harassing lawfully instituted legal procedures."[246] In applying this interpretation to the facts of *Peltier*, the court held that the defendant's attorney knew that the removal was frivolous and in bad faith and attempted the maneuver to delay and frustrate the jurisdiction of the Family Court.[247] Thus, the imposition of attorneys fees was a proper sanction.

In the Fifth Circuit case of *Muirhead v. Bonar*,[248] defendant attempted to remove the action, the action was remanded, and the defendant then attempted a second removal on the same theory.[249] The court denounced the attempted "two bites at the removal apple" and awarded attorney fees for the second removal.[250] In a similar case

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239. McLaughlin v. Western Casualty & Sur. Co., 105 F.R.D. 624, 627 (S.D. Ala. 1985).

240. Grinnell Bros. v. Touche Ross & Co., 655 F.2d 725, 726-27 (6th Cir. 1981); *see also* Ray A. Scharer & Co., v. Plabell Rubber Prods., Inc., 858 F.2d 317, 320 (6th Cir. 1988)(explaining *Grinnell*); Zoyoipoulos v. Palombo, 584 F. Supp. 867, 868 n.1 (D. Colo. 1984).

241. *Cornwall*, 654 F.2d at 687; Schmidt v. National Organization for Women, 562 F. Supp. 210, 214-15 (N.D. Fla. 1983).

242. 548 F.2d 1083 (1st Cir. 1977).

243. Peltier v. Peltier, 548 F.2d 1083, 1084 (1st Cir. 1977).

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.*

248. 556 F.2d 735 (5th Cir. 1977).

249. Muirhead v. Bonar, 556 F.2d 735, 736 (5th Cir. 1977).

250. *Id.* at 737.

where the defendant filed for a second removal after the first had been remanded, the court chastised a defendant for wasting judicial time and resources and called the defendant's action a "poorly disguised and flagrant misuse of the process and facilities of this United States District Court" and an "egregious example of abuse."[251] The defendant was ordered to pay costs to the plaintiff, the plaintiff's attorney and the state court.[252]

Not all unsuccessful attempts at removal, however, are met with section 1447(c) sanctions. In *Aynesworth v. Beech Aircraft Corp.*,[253] the court acknowledged the factors justifying the award of attorney fees as listed in *Peltier*, but added another: attorneys fees are properly awarded if the removal petition had no substantial basis.[254] Even applying this extra factor, however, the *Aynesworth* court declined to award fees because it found that defendant had not acted in bad faith and that the removal petition presented "unique issues of at least arguable merit."[255]

After amendment in November 1988, section 1447(c) now provides that "[a]n order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal."[256] There is no explicit bad faith requirement and the specific mention of attorney fees as a proper sanction may induce some courts to impose such a sanction more often.

Another source of sanctions for improper removal is rule 11 of the Federal Rules of Civil Procedure.[257] While this rule has always been

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251. Mertan v. E.R. Squibb & Sons, 581 F. Supp. 751, 753 (C.D. Cal. 1980).

252. *Id.*

253. 604 F. Supp. 630, 633 (W.D. Tex. 1985)(defendant claimed plaintiff had abandoned claim against resident defendant); *see also supra* p. 74.

254. Aynesworth v. Beech Aircraft Corp., 604 F. Supp. 630, 637-38 (W.D. Tex. 1985).

255. *Id.* at 638. This appears to be a just result on the facts of *Aynesworth*. Counsel may have been confused as to the operation of the voluntary-involuntary rule following *Heniford*. Heniford v. American Motors Sales Corp., 471 F. Supp. 328, 338 (D.S.C. 1979)(plaintiff expressly abandoned claim against resident defendant thereafter case held removable).

256. 28 U.S.C.A. § 1447(c) (West Supp. 1989).

257. Rule 11, in pertinent part, provides:

> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. . . . The signature of an attorney . . . constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any im-

available to authorize sanctions for improper removal, by the 1988 amendment, the legislature has now made its application to removal explicit by requiring that the notice of removal must be signed "pursuant to Rule 11 of the Federal Rules of Civil Procedure."[258] Rule 11 does not require a showing of bad faith in order to impose sanctions,[259] but it does "stress[ ] the need for some prefiling inquiry into both the facts and the law. The standard is one of reasonableness under the circumstances."[260] This objective standard "is more stringent than the original good-faith formula and thus . . . a greater range of circumstances will trigger its violation."[261]

Rule 11 also imposes a prohibition against interposing a pleading for an improper purpose.[262] Violation of either the duty to inquire or the prohibition against misusing judicial procedures is sufficient to allow the imposition of sanctions.[263] Indeed, because the rule states that the court *shall* impose sanctions for such violations, it has been held that imposition of sanctions is mandatory.[264] Rule 11 does not, however, justify sanctions "merely because counsel were incorrect in their view of the law, particularly in . . . a complex and uncertain area."[265]

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proper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation . . . .

FED. R. CIV. P. 11. Prior to amendment in 1983, rule 11, in pertinent part, stated:

The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information and belief there is good ground to support it; and that it is not interposed for delay. . . . For a willful violation of this rule an attorney may be subjected to appropriate disciplinary action.

FED. R. CIV. P. 11.

258. 28 U.S.C.A. § 1446(a) (West Supp. 1989).

259. News-Texan, Inc. v. City of Garland, 814 F.2d 216, 220 (5th Cir. 1987). Under the prior language of the rule, the only relevent inquiry was the subjective belief of the attorney at the time the pleading was signed and sanctions could be imposed only upon a showing of bad faith. Robinson v. Nat'l Cash Register Co., 808 F.2d 1119, 1126 (5th Cir. 1987).

260. Davis v. Veslan Enters., 765 F.2d 494, 497 (5th Cir. 1985)(quoting comments to 1983 amendments to Rule 11); *see also News-Texan, Inc.*, 814 F.2d at 220 (duty of reasonable inquiry); McLaughlin v. Western Casualty & Sur. Co., 603 F. Supp. 978, 981 (S.D. Ala. 1985) (objective standard of reasonable investigation), *upon rehearing*, 105 F.R.D. 624 (S.D. Ala. 1985).

261. *Robinson*, 808 F.2d at 1127 (quoting advisory committee note to Rule 11).

262. *McLaughlin*, 603 F. Supp. at 981.

263. *Robinson*, 808 F.2d at 1130.

264. Robinson v. Nat'l Cash Register Co., 808 F.2d 1119, 1126 (5th Cir. 1987).

265. Vatican Shrimp Co. v. Solis, 820 F.2d 674, 681 (5th Cir. 1987) (attempted removal of Jones Act case in face of unclear precedent), *cert. denied*, __ U.S. __, 108 S. Ct. 345, 98 L. Ed. 2d 371 (1987).

As sanction provisions, section 1447(c) and rule 11 seem to have had little effect in deterring attempted removal of obviously nonremovable cases. Certainly they were no deterrent to defendants in *Lamprecht*. Both rule 11 and section 1447(c) sanctions were available at the time of the *Lamprecht* removal, yet neither was sufficient to prevent the disruption of the state court trial. As illustrated above, the defendants' attempted removal was either a willful attempt to mislead the courts or the result of "appalling ignorance."[266] If the former, then attorney fees could properly have been awarded under section 1447(c) because of the defendants' bad faith. If the latter, the same statute would have authorized assessment of costs. Applying section 1447(c) as amended, attorney fees could have been imposed in either case. Similarly, rule 11 sanctions would have been appropriate in either case because it appears that the removal petition was interposed for improper purposes. Further, defendants' counsel could not have made a reasonable inquiry into the law of removal and still have concluded that the action was properly removable at the time the attempt was made.

It cannot be known if the federal court would have ordered sanctions for defendants' actions because no sanctions were sought. It is obvious, however, from the very fact of the purported removal, that the threat of sanctions did not prevent the abuse. This indicates that the use of sanctions, unless made more prevalent, more publicized and more painful, is not an effective solution to the problem presented.

D. *Criminal System*

Another potential solution is to apply elements of removal law for criminal cases to civil cases. The removal laws afford different treatment of civil and criminal cases the removal laws in at least one important respect—the time for filing the removal petition. Section 1446(c)(1) provides:

> [A] petition for removal of a criminal prosecution shall be filed not later than thirty days after the arraignment in the State court, or at any time *before trial*, whichever is earlier, except that for good cause shown the

266. *See* McLaughlin v. Western Casualty & Sur. Co., 603 F. Supp. 978, 979-80 (S.D. Ala. 1985)(willful attempt to mislead or appalling ignorance). Like *Lamprecht*, defendant in *McLaughlin* attempted to remove the action after the jury had been chosen and the state trial was about to proceed. *Id.* at 979-80. The federal court found that the removal was not timely and that it was filed purely for the improper purpose of delaying the trial. *Id.* at 981.

> United States district court may enter an order granting the petitioner leave to file the petition at a later time.[267]

The thirty-day time requirement for filing the petition in a civil case does not include any such limitation.[268] The petition for removal may be filed on the eve of trial or, as occurred in *Lamprecht*, in the middle of trial.[269] If the criminal time specification requiring removal *before* trial had applied to *Lamprecht*, then the defendants would have had no colorable argument that the action was removable at the close of the plaintiff's case, and the state trial could not have been disrupted. The defendants would have had to apply to the federal court for a waiver of the "before trial" provision, and this request would certainly have been denied.

The flaw in this potential solution is that the *Lamprecht* defendants had no colorable argument that the action was removable during trial even under the civil time provision, yet they sought removal and, possibly, would have succeeded in disrupting the state trial. Application of the criminal requirement of filing before trial would have to be accompanied by more strict application of the time for filing and a conviction by the courts that the time element is jurisdictional. Under such a plan, untimely removal would be improper and it could not be accomplished. Defendants would have no incentive to try to disrupt state trials or force a mistrial with abrupt removals because the tools would no longer be at their disposal.

Another potential cause for concern with mandating that all removal petitions be filed before trial is that while it might solve the specific problem addressed in *Lamprecht*, there are occasions when a civil case does properly become removable during trial, and defendants in such cases should not be deprived of their right to be heard in

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267. 28 U.S.C. § 1446(c)(1) (1982)(emphasis added). Interestingly, the removal law contained in the Act of 1875, which applied to civil cases, also contained a requirement that the removal petition be filed before trial. *See* Act of March 3, 1875, ch. 137, 18 (pt. 3) Stat. 470, 471. In discussing this provision, the United States Supreme Court stated that a party could not be allowed to experiment on its case in state court and then, if it met unexpected difficulties, stop the proceedings and take the suit to another tribunal. *In re* Removal Cases, 100 U.S. 457, 473 (1879). The statute barred the right to remove if the trial had actually begun and was "in progress in the orderly course of proceeding." *Id.*

268. *See* 28 U.S.C. § 1446(b) (1982)(no language limiting removal to period "before trial").

269. This is proper, of course, only when the removal during trial occurs within thirty days of the case having become removable. *See id.* (thirty-day limitation).

federal court.[270] This situation is answered by also incorporating the provision which allows exceptions to be granted by the district court "for good cause shown"[271] and by providing for prompt rulings on any application for waiver of the "before trial" requirement. [272]

The statute providing for removal of criminal cases contains other interesting provisions which would have alleviated the problem occurring in *Lamprecht* by removing the desired effect of the late removal—bringing state court proceedings to a halt and, perhaps, forcing a mistrial. Section 1446(c)(3) states that "[t]he filing of a petition for removal of a criminal prosecution shall not prevent the State court in which such prosecution is pending from proceeding further, except that a judgment of conviction shall not be entered unless the petition is first denied."[273] The statute further provides that the district court is to examine the removal petition promptly, and "[i]f it clearly appears on the face of the petition and any exhibits annexed thereto that the petition for removal should not be granted, the court shall make an order for its summary dismissal."[274] If the petition is granted, the state court is notified and only then is it prohibited from proceeding.[275]

The combined effect of these provisions is that removal is not automatic, and until the federal court determines removability, the state court is not ousted of jurisdiction except for the limited purpose of entering a judgment adverse to defendant. As applied to *Lamprecht*, these provisions certainly would have prevented the disruptive effect of the defendants' purported removal and would possibly have prevented the attempt at removal itself because the defendants would have had nothing to gain. Assuming that the petition for removal was filed at the close of the plaintiff's case, the state court would still have been free to proceed to verdict. The defendants would have been at

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270. The plaintiff may name a resident defendant for the purpose of destroying diversity and avoiding federal court, and then dismiss that defendant on the eve of or during trial. The plaintiff should not be allowed to benefit by such manipulation just as defendants should not benefit by manipulation of removal.

271. *Id.* § 1446(c)(1).

272. U.S.C. § 1446(c)(1) (1982).

273. *Id.* § 1446(c)(3). The legislature did not amend the civil removal statute to include this provision. This omission indicates that the legislature approves of the courts' interpretation of the 1948 revision that all state court action is invalid following removal, even when the case is remanded.

274. *Id.* § 1446(c)(4).

275. *Id.* § 1446(c)(5).

tremendous risk in leaving the courtroom while the trial continued because the court was well within its continuing jurisdiction until it received notification by the federal court to halt. As has been discussed previously, the defendants' removal petition was defective in a variety of ways and certainly the federal court would have denied it summarily. The only possible disruption to the state proceedings would have been a potential delay in entering the judgment against defendant. While this may be of some benefit to defendants in terms of the amount of interest accruing between judgment and payment,[276] most likely it would not be as powerful an incentive as the possibility of previewing the plaintiff's case, obtaining a mistrial, and getting a second opportunity to defend the case. Defendants' only real incentive for filing a removal petition under this system would be a desire to be heard in federal court coupled with a sincere and supportable belief that removal is proper. Obviously, this is the purpose to which removal should be put and demonstrates that application of the removal procedure in criminal cases is a workable solution.

E. *American Law Institute Proposal*

The American Law Institute (hereinafter "ALI") has addressed the problem of removal during trial and concluded that if the removal is timely and proper then no problem is presented.[277] The ALI acknowledged, however, that untimely removal or removal of an unremovable case can be used as a device to force a new trial.[278] "Even an unjustified petition for removal may be used to achieve this result where the party feels that the state trial has gone badly for him."[279] It is unsatisfactory to simply advise the state court to delay further proceedings until the federal court determines the propriety of the removal because a federal judge may not be available or propriety may be a close question precluding an immediate decision.[280] The ALI also is concerned that under the present law state courts could lose jurisdiction before having been given notice, which is the effect if fed-

276. *See* Davis v. Veslan Enters., 765 F.2d 494, 496 (5th Cir. 1985)(delayed entry of judgment benefits defendant because interest accrues from entry of judgment).

277. American Law Institute, Study of the Division of Jurisdiction Between State and Federal Courts at 358 (official draft 1969).

278. *Id.*

279. *Id.*

280. *Id.* at 359.

eral jurisdiction attaches retroactively.[281] "It is unseemly to have state courts passing on matters, only to learn later that they had no jurisdiction."[282]

In an effort to resolve these difficulties, the ALI proposed a new removal law designed to give more protection to the jurisdiction of the state courts. The proposal specifically states that removal is not effective until *all* of the required steps are completed.[283] After the removal is effected, the state court shall proceed no further unless the action is remanded; however, if removal is effected while a trial is in progress, the state court may complete the trial and, thereafter, enter judgment if the case is remanded.[284] This provision is similar in effect to section 1446(c)(3), as discussed above, because it allows the state court to proceed while the federal court determines removability, but the state court may not enter a judgment. Similar to the effect of the law before 1948, if the removal is valid then the state court loses jurisdiction when the statutory steps are completed, and its verdict is a nullity. If the removal is improper then the verdict, or any other action by the state court in the interim, is valid.[285] The state court has the option to complete the trial but is not required to do so.[286] Factors to be considered include: the probability that the removal is proper, the ability to adjourn trial and resume after remand,[287] and the promptness with which the federal court is apt to decide the matter.

Application of this proposal to *Lamprecht* illustrates its similarity in effect to the criminal provision discussed above. Had the ALI rule been in effect, the *Lamprecht* defendants would have had no incentive to file a meritless removal petition during trial because such action would not have served to disrupt or delay the proceedings. The court would have statutory authority to proceed except that it could not

281. American Law Institute, Study of the Division of Jurisdiction Between State and Federal Courts at 357 (official draft 1969).

282. *Id.*

283. *Id.* at 356, 360-61.

284. *Id.* at 359-60. The ALI proposal also contains a provision allowing removal by only one defendant in a case where federal jurisdiction is based on diversity. *Id.* at 359. The object of this provision is to eliminate the most common ground for removal during trial—dropping of the resident defendant. *Id.*

285. American Law Institute, Study of the Division of Jurisdiction Between State and Federal Courts at 357 (official draft 1969).

286. *Id.*

287. *Id.*

enter judgment until remand was procured. Knowing the likelihood of remand, the defendants would have been forced to remain in the courtroom and defend the action. Indeed, assuming that the defendants recognized that the removal petition would have failed, they likely would not have filed the petition at all.

While the ALI proposal would have prevented the specific abuse which occurred in *Lamprecht*, it may be too limited in effect. A meritless petition filed during trial would have no effect on the proceedings unless the judge chooses to delay the suit. An equally meritless petition filed the day before trial, however, would automatically oust jurisdiction and cause delay until remand. Because of crowded dockets, even a quick review and remand by the federal court could cause enough delay that the state courtroom would be reassigned to a different case, and the plaintiff would be forced to wait days or weeks for the next available courtroom. Although this delay would not enable a defendant to preview the plaintiff's evidence, as is the case in removal during trial, it would enable defendant to obtain a continuance to further prepare its own defense. In either case, defendant would enjoy an unfair and undeserved advantage. For this reason, the ALI proposal allowing the state court to proceed only if removal is effected during trial is not sufficient and would allow continued abuse of removal privileges.

VII. CONCLUSION

Abuse of removal and the accompanying abuse of the state courts is a serious and continuing problem. It demonstrates a lack of respect for the state court judges, a lack of concern over wasted time and resources of both state and federal courts, and a lack of regard for the federal legislation which creates the right to remove. Unfortunately, a sense of ethics and fair play, even when enforced by the threat of sanctions, is not sufficient to ensure proper use of removal. Further intervention by the courts or the legislature is required. The best solution is a statutory amendment incorporating aspects of the ALI proposal, the criminal removal law, and pre-1948 law. Removal must be defined as being effected only by completion of *all* of the statutory steps. To eliminate confusion and inconsistency, these steps must be strictly construed and applied. Except for good cause shown, these steps

must be completed before the trial begins.[288] To protect the state court even in cases where removal is effected on the eve of trial rather than during trial, the court may proceed with the action, in all cases, except the court may not enter judgment until the case is remanded. The state court must be provided a copy of the removal petition or notice in order to exercise its option to proceed or to stay its hand. If the court proceeds, and the removal is proper, then its actions are void. If the removal is improper, either because of procedural deficiencies or lack of jurisdiction, then the state court's interim actions are valid. "Any other course adds to and encourages unnecessary delays and dilatory tactics."[289] The risk of failing to participate in the state proceedings will properly fall on the removing parties. This risk should encourage filing of only those removal petitions with arguable merit.

One final recommendation is to eliminate the automatic nature of removal. Less confusion and disruption would result if the statute required prompt review and determination by a federal court on whether the case were properly removable and whether the removal process had been properly performed. The federal court would exercise limited jurisdiction over the case for the purpose of making this determination, but it would not have authority to take substantive action in the case until it entered an order granting the removal. By the same token, the state court would not be compelled to surrender jurisdiction until entry of such an order. This provision would clearly delineate jurisdiction and reduce conflicts between the courts. It would also eliminate the problem of duplication of efforts and the burdensome expense of litigating in two forums such as occurred under the old law.

Statutory reform and less leniancy by the courts in cases of meritless removal will resolve many of the problems discussed above. Even if the removal issue is resolved, however, the same type of problems will continue to occur in other areas of the law because at the heart of these problems is a belief that one must win at all costs, no matter

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288. Good cause would include voluntary dismissal of resident defendants by plaintiff. Use of the good cause exception would require an affirmative finding of good cause by the federal court and an order waiving the "before trial" requirement.

289. Minus v. Grote, 154 S.W.2d 140, 142 (Tex. Civ. App.—El Paso 1941, no writ); *see also* South Carolina v. Moore, 447 F.2d 1067, 1072 (4th Cir. 1971) ("deterrent to the filing of frivolous removal petitions at the last minute for the purpose of delaying or disrupting judicial proceedings in a state court").

how unethical. We can and must make the removal system, and all legal systems, work to their full potential by ensuring that we only use the rights and privileges they afford for their intended purposes and do not distort and abuse them in the name of "strategy."