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Removal and Remand: A Guide to Navigating between the State and Federal Courts

Deborah Pearce Reggio

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REMOVAL AND REMAND: A GUIDE TO NAVIGATING BETWEEN THE STATE AND FEDERAL COURTS

Deborah Pearce Reggio[1]

It has been said that "there is no other phase of American jurisprudence with so many refinements and subtleties"[2] as removal and remand.[3] Congress has enacted complex substantive and procedural rules to govern this legal area, and the courts have developed and applied their own judicial gloss. Filing suit in state court does not guarantee that the case will stay there, nor does removing the case to federal court guarantee a federal forum. Practitioners must navigate between the courts with care. If the substantive precepts for removal are not satisfied or the procedural rules for removal or remand are not met, a party can easily find its case being tried in a different forum and before a different judge than originally thought. "Choice of forum can mean joyous victory or depressing defeat. A wrong selection and it's enemy territory . . . . A correct choice and . . . '[your enemy] will fear you.'"[4]

I. STATUTORY AUTHORITY AND PRACTICAL CONSIDERATIONS GUIDING REMOVAL

Removal is a "judicial curiosity" that allows defendants to remove a case from state to federal court.[5] In federal question cases, it ensures that the better-informed tribunal adjudicates questions of federal law. In the diversity context, it quells nonresident defendants' fears of prejudice or preference by a state court for its local citizen.

Title 28 U.S.C. § 1441 provides the basic ground for removal to federal court:

> (a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.[6]

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1. Deborah Pearce Reggio handles federal appeals in the Fourth, Fifth, and Eleventh Circuits, including many appeals involving remand and removal. She is on the Board of Governors for the Fifth Circuit Bar Association, for which she serves as president for the 2004-2006 term. Reggio is also the Chairperson of the Appellate Section of the Federal Bar Association, and is the Reporter of Appellate Jurisdiction, Procedure and Standards of Review for the *Fifth Circuit Reporter*. She also serves as an adjunct professor for the Tulane School of Law, teaching classes in appellate practice and procedure. This article builds upon her prior remand and removal scholarship. *See* Sidney Powell & Deborah Pearce Reggio, *The Ins and Outs of Federal Court: A Practitioner's Guide to Removal and Remand*, 17 MISS. C. L. REV. 227 (1997).

Deborah Pearce Reggio can be reached at 700 Camp Street, New Orleans, La. 70130, (504) 528-9500, federalappeals@cox.net.

2. Hagerla v. Miss. River Power Co., 202 F. 771, 773 (S.D. Iowa 1912).

3. Removal has become an increasingly larger part of the federal courts' case load. In the last decade, approximately 12% of all federal cases were cases removed from state court to federal court. 1991 DIR. ADMIN. OFF. U.S. CTS. TABLE S-4, 138 (1991).

4. *Gita F. Rothschild, Forum Shopping*, 24 LITIGATION 40 (ABA Section of Litigation, Spring 1998).

5. Tinney v. McClain, 76 F. Supp. 694, 698 (N.D. Tex. 1948),

6. 28 U.S.C. § 1441(a).

In essence, § 1441(a) says that a case may be removed from state to federal court only when it could have been brought in federal court in the first instance.[7] With the exception of specific statutory mandates and prohibitions, the test for determining removal jurisdiction is the same as that applied for determining original federal question or diversity jurisdiction. Paragraph (b) of § 1441 confirms this, stating:

> (b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.[8]

Section 1441(a) further provides that only defendants may remove a case from state to federal court. Thus, "the right to remove a case from state to federal court is vested exclusively in the defendant."[9] Before embarking on this process, however, the prudent defendant will consider several practical issues. While fear of local prejudice and the notion that state judges are not competent to adjudicate federal questions originally drove defendants to remove cases, in modern times, removal is driven more by strategic concerns. Defendants assess things such as jury verdicts, trial rules and procedure, and the availability, caseload and personality of federal judges in making the decision of whether to remove a case to federal court. In particular, a defendant should carefully consider three factors:

> With regard to juries, the geographic scope of the pools, the number of jurors required to reach a verdict, and the rules governing jury demand in each forum;
>
> With regard to procedure, familiarity with the respective procedural rules, the time frame and production requirements of each court, each court's general treatment of motion practice, and the various disclosure and discovery rules;
>
> With regard to judges, the case load of each judge, his or her general degree of familiarity with files, the manner in which the judge took the bench, *i.e.*, by election or appointment, and the methods by which the judge may be removed.[10]

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

8. 28 U.S.C. § 1441(b).

9. HON. WILLIAM W. SCHWARZER, ET AL., FEDERAL CIVIL PROCEDURE BEFORE TRIAL [2:610; 2:615] (1996) (citing 28 U.S.C. § 1441) ("[the] plaintiff who has chosen to commence the action in state court cannot later remove to federal court")

10. *Id.* at [2:576-87.1, 2:597].

In short, before invoking federal jurisdiction, the defendant should consider whether removal is in its best interest. The plaintiff will likely have considered the same basic factors, and given the plaintiff's choice of the state forum, the defendant may very well find that the federal forum better advances its concerns. Indeed, statistics show that defendants have a far better chance of prevailing in removed cases than in cases filed in federal court in the first place.[11] Assuming this to be the case, the defendant must move swiftly and carefully. Delayed or misguided steps along the removal path may jeopardize the defendant's chance of having its case heard in federal court. A defendant's wrongful removal may also result in the imposition of attorneys' fees and costs.[12]

II. THE REMOVAL ROADMAP

Five basic considerations govern the proper removal of a case from state to federal court: Who, What, Where, When, and How. "Who" determines which party may remove a case to federal court, and "what" dictates which sorts of cases may be removed. "Where" governs the place to which the case may be removed, while "when" governs the timing of that removal. Finally, "how" regulates the method by which a case may be removed. Each of these considerations is addressed below. Before expounding upon them, however, two basic tenets of removal jurisdiction must be recognized: first, removal statutes are strictly construed, and all doubts regarding removability are resolved in favor of remand to state court.[13] Second, the burden of establishing removal jurisdiction rests with the defendant, and this burden applies both to establishing federal jurisdiction and to following appropriate removal procedures.[14]

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

As stated, only defendants may remove a case from state to federal court.[15] There is much more to this "defendants-only" rule, however. In cases involving multiple defendants, all defendants properly joined and served must agree to the notice of removal.[16] This rule, in turn, triggers several corollary rules. First, if a properly joined defendant who has been served with notice of the state action

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11. 1991 DIR. ADMIN. OFF. U.S. CTS. Table S-4, 138 (1991).

12. Avitts v. Amoco, 111 F.3d 30, 32 (5th Cir. 1997).

13. Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 108-09 (1941); Acuna v. Brown & Root, Inc., 200 F.3d 335, 339 (5th Cir. 2000); Gaus v. Miles, Inc., 980 F.2d 564, 566 (9th Cir. 1992).

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

15. 28 U.S.C. § 1441(a).

16. Smilgin v. New York Life Ins. Co., 854 F. Supp. 464 (S.D. Tex. 1994). As discussed in further detail *infra,* see text and accompanying notes at pp. 99-101, all defendants must concur in removal and file their notice of removal within thirty days from when the first defendant was served with state court process. A defendant who does not initially join in the removal may do so, but only if done within the thirty days allotted for removal. Getty Oil Corp. v. Ins. Co. of N. Am., 841 F.2d 1254, 1262-1263 (5th Cir. 1988); McKinney v. Bd. of Trs., 955 F.2d 924, 927 (4th Cir. 1992) (allowing each defendant thirty days from time of service); *but see* Doe v. Kerwood, 969 F.2d 165, 169 n.15 (5th Cir. 1992) (noting exceptions to rule may be recognized based on equitable concerns and on a case-by-case basis).

refuses to join in the notice of removal, the case may not be removed.[17] Second, a defendant who has not been served by the plaintiff in the state action need not join in the notice of removal.[18] Finally, federal law determines which parties are "defendants" for removal purposes, and simply because a party is aligned as a defendant by the plaintiff does not mean that the court will treat it as a defendant for removal.[19] Instead, federal courts apply a functional test of party status, assessing which parties are attempting to achieve a particular result and which parties are resisting that effort.[20] It is on this basis that the "plaintiffs" and the "defendants" are aligned.

A few other principles also guide the courts in analyzing "defendants" for removal purposes. When faced with the removal of separate and independent claims under 28 U.S.C. § 1441(c), the courts consider only those defendants implicated by the removed claims in assessing removal jurisdiction.[21] Similarly, the presence of certain defendants is disregarded by federal courts in reviewing removal jurisdiction, such as defendants only nominally or formally joined,[22] defendants fraudulently joined,[23] and defendants whose identities are unknown.[24] Finally, federal circuit courts are split over whether a third-party defendant may remove a case from state to federal court.[25] While the Fifth and Eleventh Circuits have held that a third-party defendant may remove a case, assuming federal jurisdiction exists,[26] other circuits have refused to allow third-party defendants to remove cases where the original defendants have refused to do so.[27] Notably, the Fifth Circuit has extended this principle to newly added counter-

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17. *Doe*, 969 F.2d at 167; Acme Brick Co. v. Agrupacion Exportadora De Maquinaria Ceramica, 855 F. Supp. 163, 165 (N.D. Tex. 1994).

18. Pullman Co. v. Jenkins, 305 U.S. 534, 540 (1939). Wesley v. Miss. Transp. Comm'n, 857 F. Supp. 523, 526 (S.D. Miss. 1994).

19. Chi. v. Stude, 346 U.S. 574, 580 (1954).

20. OPNAD Fund, Inc. v. Watson, 863 F. Supp. 328, 333-34 (S.D. Miss. 1994).

21. *See Acme Brick Co.*, 855 F. Supp. at 165-66.

22. Tri-Cities Newspapers, Inc. v. Tri-Cities Printing Pressman Local 349, 427 F.2d 325, 326-27 (5th Cir. 1970); Farias v. Bexar County Bd. of Trs., 925 F.2d 866, 871-72 (5th Cir. 1991); *compare* Summit Mach. Tool Mfg. Corp. v. Great N. Ins. Co., 883 F. Supp. 1529, 1530 (S.D. Tex. 1994) (insurance broker not merely nominal party where plaintiff could assert claim against insurance broker and his company for damage to property).

23. *See* Travis v. Irby, 326 F.3d 644 (5th Cir. 2003); *see also* Hart v. Bayer, 199 F.3d 239, 246-47 (5th Cir. 2000); Dodson v. Spiliada Maritime Corp., 951 F.2d 40, 42-43 (5th Cir. 1992); B., Inc. v. Miller Brewing Co., 663 F.2d 545, 549-51 (5th Cir. 1981).

24. *Farias*, 925 F.2d at 871 (5th Cir. 1991). *Compare* Tompkins v. Lowe's Home Ctr., Inc., 847 F. Supp. 462 (E.D. La. 1994) (suit naming diverse employer and fictitious employee remanded for lack of complete diversity when it was discovered that employee was domiciled in same state as plaintiff, only one employee was implicated in plaintiff's action, and employee's citizenship was established at commencement of action).

25. Regardless of the split among circuits regarding whether a third-party defendant may remove, it must be remembered that the original defendant/third-party plaintiff may *not* remove by the assertion of a federal claim against the third-party defendant. Rather, in this instance, the defendant/third-party plaintiff is treated as any other plaintiff and has no removal right. *See* Metro Ford Truck Sales v. Ford Motor Co., 145 F.3d 320, 326-27 (5th Cir. 1998), *cert. denied* 525 U.S. 1068 (1999).

26. Tex. v. Walker, 142 F.3d 813, 816 (5th Cir. 1998), *cert. denied* Walker v. Tex., 525 U.S. 1102 (1999); Carl Heck Eng'rs, Inc. v. LaFourche Parish Police Jury, 622 F.2d 133, 135-36 (5th Cir. 1980); *In re* Surinam Airways Holding Co., 974 F.2d 1255, 1259-60 (11th Cir. 1992).

27. *See, e.g.*, Lewis v. Windsor Door Co., 926 F.2d 729, 732-33 (8th Cir. 1991); Thomas v. Shelton, 740 F.2d 478, 486 (7th Cir. 1984).

defendants, allowing those parties to remove as well.[28] Further, while many circuits require that the third-party defendant seeking removal be actually and properly joined in the action, the Fifth Circuit has held otherwise.[29] In *Delgado*, the court allowed a third-party defendant to remove a case prior to the state court having granted leave to allow the third-party defendant to be "served," explaining that "service of process is not an absolute prerequisite to removal [under Section 1446(b)]."[30]

Finally, because the power of removal is vested exclusively in the defendant, a plaintiff may not remove its case to federal court after it has filed suit in state court. This is true even if the defendant asserts a counter-claim against the plaintiff and the plaintiff believes that the counter-claim triggers federal jurisdiction.[31] At least one circuit has noted a quasi-exception to this rule, holding that in arbitration enforcement proceedings, the first party to invoke court assistance is deemed the plaintiff for removal purposes. Thus, the opposing party is deemed the defendant and may seek removal of the state case, and it is immaterial that this party may actually have been the party to initiate the arbitration proceedings.[32]

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

The bulk of reported removal cases deal with whether federal jurisdiction existed in the first place to support the removal. Because federal courts are Article III courts of limited jurisdiction,[33] the removed case must be one which, at the time of the removal, could have been brought in federal court pursuant to the Constitution or federal statutes.[34] There are several bases on which a court may rest federal removal jurisdiction. The first two—and the primary two—are diversity and federal question jurisdiction.[35]

Governed by 28 U.S.C. § 1332, diversity jurisdiction exists when

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

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28. *Walker*, 142 F.3d at 816-18.
29. Delgado v. Shell Oil Co., 231 F.3d 165, 177 (5th Cir. 2000).
30. *Id.*
31. *See, e.g., Shamrock Oil & Gas Corp.*, 313 U.S. at 108; Ballards' Serv. Ctr., Inc. v. Transue, 865 F.2d 447, 449 (1st Cir. 1989).
32. Oppenheimer & Co., Inc. v. Neidhardt, 56 F.3d 352, 356 (2d Cir. 1995). The Fifth Circuit does not appear to have addressed this quasi-exception.
33. Coury v. Prot, 85 F.3d 244, 248 (5th Cir. 1996).
34. *Cervantez*, 99 F.3d at 733 (5th Cir. 1996).
35. *See, e.g.*, Robert F. Daley, Jr., *Basic Removal Practice and Procedure*, 6 S.C. LAWYER 25 (Mar./Apr. 1995) (two basic grounds for removal are federal question and diversity jurisdiction).

> (4) a foreign state . . . as plaintiff and citizens of a State or of different States.[36]

Federal question jurisdiction exists over "all civil actions arising under the Constitution, laws, or treaties of the United States."[37]

There are also several special statutes that directly confer federal jurisdiction.[38] These statutes include: claims against federal officers and members of the armed forces, certain civil rights claims, foreclosure actions against the United States, removal of actions by the RTC and FDIC, claims related to bankruptcy cases, cases concerning federal regulation of international and foreign banking, arbitration agreements or awards falling under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, actions involving the International Monetary Fund or the International Bank for Reconstruction and Development, actions in which the postal service is a party, and actions against foreign states.[39] Conversely, several special statutes prohibit[40] the removal of certain types of claims. Among these are: state court actions based on the Securities Act of 1933, state court actions against a railroad arising under FELA, certain state court actions against common carriers, state court actions arising under states' workers' compensation laws, state court Jones Act claims, certain admiralty actions arising under the "saving to suitors" clause, state court actions under the Death on the High Seas Act, state court actions arising under the Interstate Land Sales Full Disclosure Act, state court actions under the Condominium and Cooperative Abuse Relief Act, and certain state court domestic violence actions.[41]

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36. 28 U.S.C. § 1332(a). Other diversity jurisdiction statutes include 28 U.S.C. § 1330(a) (actions against foreign states); 28 U.S.C. § 1350 (alien's action for tort); and 28 U.S.C. § 1354 (land grants from different states).

37. 28 U.S.C. § 1331.

38. Importantly, the Supreme Court has recently clarified that the All Writs Act, 28 U.S.C. § 1651, is not one of them. Removal instead must be based on another valid ground for federal removal jurisdiction. *See* Syngenta Crop Prot., Inc. v. Henson, 537 U.S. 28, 34 (2002); *see also* Morris v. T. E. Marine Corp., 344 F.3d 439, 443 (5th Cir. 2003).

39. *See* 28 U.S.C. § 1442 (federal officers sued or prosecuted); 28 U.S.C. § 1442(a) (members of armed forces sued or prosecuted); 28 U.S.C. § 1443 (civil rights cases); 28 U.S.C. § 1444 (foreclosure actions against the United States); 12 U.S.C. §§ 1441(a)(1)(3) - 1819(b)(2)(B) (removal of actions by the RTC and FDIC); 28 U.S.C. § 1452 (claims related to bankruptcy cases); 12 U.S.C. § 632 (cases concerning federal regulation of international and foreign banking); 9 U.S.C. § 205 (arbitration agreement or award falling under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards); 22 U.S.C. § 286(g) (actions involving International Monetary Fund or International Bank for Reconstruction and Development); 39 U.S.C. § 409 (actions in which postal service is a party); 28 U.S.C. § 1441(d) (actions against a foreign state); *but see* Dole Food Co. v. Patrickson, 538 U.S. 468, 473-74 (2003) (a foreign state must own majority share in corporation for it to be considered an instrumentality of the state under FSIA).

40. As explained in *Breuer v. Jim's Concrete of Brevard, Inc.*, 538 U.S. 691 (2003), the prohibition must be express.

41. *See* 15 U.S.C. § 77v(a) (actions based on Securities Act of 1933); 28 U.S.C. § 1445(a) (actions against a railroad arising under FELA); 28 U.S.C. § 1445(b) (actions against common carriers); 28 U.S.C. § 1445(c) (actions arising under states' workers' compensation laws); 46 U.S.C. app. § 688 (Jones Act claims); 28 U.S.C. § 1333 (admiralty actions under "saving to suitors" clause); 46 U.S.C. app. § 761 (actions under Death on the High Seas Act); 15 U.S.C. § 1719 (Interstate Land Sales Disclosure Act claims); 15 U.S.C. § 3612 (claims under Condominium and Cooperative Abuse Relief Act of 1980); 28 U.S.C. § 1445(d) (domestic violence actions).

Because the bulk of removal disputes involve diversity or federal question jurisdiction,[42] this Article will concentrate on these two grounds.[43]

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

Statutory diversity jurisdiction exists over controversies between citizens of different states, and between a state or its citizen and a foreign state or its citizens, provided the amount in controversy exceeds $75,000, exclusive of interest and costs.[44] For diversity jurisdiction to exist, diversity must be complete.[45] That is, all plaintiffs must be diverse in citizenship from all defendants, and no plaintiff may have the same citizenship as any defendant.[46] Even assuming complete diversity, the defendants still may not invoke diversity jurisdiction if any defendant is a citizen of the state where the suit was filed.[47] Thus, if a defendant is sued in his home state, there is no removal jurisdiction, even if good diversity exists.

The test for diversity jurisdiction applies both at the time the suit was filed and the time the removal was noticed.[48] Thus, a change in a party's citizenship after removal will not affect diversity.[49] This temporal limitation does not apply, however, in cases where a nondiverse party has been voluntarily dropped from the case by the plaintiff after filing but before removal. In that case, the citizen-

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42. Gordon D. Polozola, Note, *The Battle of Removal—Is Delay the Ultimate Weapon?: A Note on* Martine v. National Tea Company, 54 LA. L. REV. 1419, 1423 (1994) (parties attempting removal rely primarily on diversity and federal question jurisdiction).

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

44. 28 U.S.C. § 1332.

45. *See* Vasquez v. Alto Bonito Gravel Plant Corp., 56 F.3d 689, 694 (5th Cir. 1995), *Rev'd on other grounds by* Estate of Martineau v. ARCO Chem. Co., 203 F.23d 904, 911 (5th Cir. 2000); Bankston v. Burch, 27 F.3d 164, 168 (5th Cir. 1994). In contrast to the rules requiring only served defendants to join in the notice of removal, both served and unserved defendants must satisfy the diversity of citizenship requirement. *See, e.g.*, Zaini v. Shell Oil Co., 853 F. Supp. 960, 963-64 (S.D. Tex. 1994).

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

47. 28 U.S.C. § 1441(b). Most courts hold that this rule is not jurisdictional; thus, if a plaintiff fails to challenge the removal by a timely motion to remand, the defect will be waived. *See In re* Shell Oil Co., 932 F.2d 1518, 1523 (5th Cir. 1991); Korea Exch. Bank v. Trackwise Sales Corp., 66 F.3d 46, 50 (3d Cir. 1995); *but see* Hurt v. Dow Chem. Co., 963 F.2d 1142, 1146 (8th Cir. 1992) (holding the no-local-defendants rule is jurisdictional in nature). By contrast, lack of complete diversity has been held to be a jurisdictional defect, and thus incapable of waiver. Horton v. Scripto-Tokai Corp., 878 F. Supp. 902, 904-06 (S.D. Miss. 1995); Metroplex Infusion Care, Inc. v. Lone Star Container Corp., 855 F. Supp. 897, 899 (N.D. Tex. 1994).

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

49. St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 294-95 (1938); *Coury*, 85 F.3d at 248. However, if a party manages to change his citizenship before the action is filed, diversity jurisdiction can be created. Minn. Mining & Mfg. v. Kirkevold, 87 F.R.D. 317, 320-21 (D. Minn. 1980).

ship of the nondiverse party will be disregarded and diversity jurisdiction will exist, assuming complete diversity of all other parties.[50] Moreover, if a nondiverse party exists at the time of removal but the defect is cured before it is noticed, the federal court will have diversity jurisdiction. Indeed, pursuant to recent Supreme Court precedent, even if a case should not have been removed because of lack of subject matter jurisdiction—for whatever reason,[51] judgment still may be validly entered and upheld if the defect was cured prior to the entry of final judgment.[52]

a. Determination of Citizenship

Several detailed rules govern the determination of a party's citizenship. First, the citizenship of an individual, for diversity purposes, is determined by "domicile" and not mere residence. Domicile is a question of federal law and is said to be the place of a party's fixed and permanent home or the place where the party intends to return whenever he or she is absent.[53] This rule applies to United States citizens[54] as well as to permanent resident aliens.[55] In cases of doubt about an individual's domicile, federal courts look to factors such as where the party pays taxes, owns a home, votes, banks, registers cars, spends time, and the like.[56] A change in domicile only occurs if an individual begins to reside physically in a new state and evinces a desire to remain there indefinite-

50. *See* S.W.S. Erectors, Inc. v. Infax, Inc., 72 F.3d 489 (5th Cir. 1996); Weems v. Louis Dreyfus Corp., 380 F.2d 545 (5th Cir. 1967). This exception does not apply when the nondiverse party is involuntarily dismissed, as, for example, on summary judgment motion. Canova v. C.R.C., Inc., 602 F. Supp. 817 (M.D. La. 1985). Moreover, the nondiverse defendant must actually have been dismissed by the time the removal notice is filed for the voluntary dismissal rule to apply. *See, e.g., Vasquez* , 56 F.3d at 693-94 (settlement not yet approved by court as required by Texas law and thus settling, nondiverse defendant was not yet dismissed), *overruled by Estate of Martineau* 203 F.3d 904 (signed settlement agreement effectively dismissed non-diverse defendant despite absence of court approval as such approval was no longer required by Texas law to be binding).

51. *See, e.g.*, Waste Control Specialists v. Envirocare of Tex., 199 F.3d 781, 785 (5th Cir. 2000) (reaffirming *Caterpillar*'s rule for cured improvidently removed case), superceded in part on rehearing, 207 F.3d 225 (5th Cir. 2000); Barbara v. N.Y. Stock Exch., Inc., 99 F.3d 49, 55-56 (2d Cir. 1996) (plaintiff amended complaint after improper removal to add federal claim). *But see* Herrick Co. v. SCS Communications, Inc., 251 F.3d 315, 329-33 (2d Cir. 2001) (expressing concern about this rule when it prejudices a party).

52. *See* Tex. Beef Group v. Winfrey, 201 F.3d 680, 687 (5th Cir. 2000) (diversity did not exist at time of removal because non-diverse party probably had been joined by state court, but plaintiffs' failure to re-join the non-diverse plaintiff in federal court cured defect, granting jurisdiction existed at time of judgment). *See also* Caterpillar, Inc. v. Lewis, 519 U.S. 61, 75-77 (1996).

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

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

55. 28 U.S.C. § 1332(a). By contrast, true "aliens," or persons who are citizens of another country and not residing in the United States permanently, are diverse from United States citizens due to "alienage." That is, suits involving these parties would trigger 28 U.S.C. § 1332 dealing with suits between a citizen of the United States and a citizen of a foreign country.

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

ly.[57] Usually a party who has a domicile will not lose it until he or she acts affirmatively to acquire a new one.[58]

By contrast, a corporation may have more than one place of citizenship. A corporation is deemed a citizen of any state in which it is incorporated as well as the one state in which it has its principle place of business.[59] A corporation's principle place of business is where the bulk of its total corporate activity takes place.[60] No matter how far-flung the corporation's activities, it is not a citizen of each and every state in which it operates. Rather, citizenship attaches only in those states of incorporation and the one state in which the corporation most heavily operates.

Finally, the citizenship of unincorporated associations like partnerships, joint ventures, unions, and the like reflects the citizenship of its individual members.[61] With regard to limited partnerships, this includes both general and limited partners.[62] In situations involving representative parties, generally the citizenship of the one who has the legal right to sue and who represents those with beneficial interests will control. Thus, for example, a trust is a citizen of the state of citizenship of each of its individual trustees,[63] and in a class action, diversity is determined based solely on the citizenship of the named plaintiffs representing the class.[64] There are exceptions to this general rule for estates of decedents, infants, and incompetents. The legal representative of an estate is considered a citizen of the decedent's state of citizenship,[65] and the legal representative of an infant or incompetent is considered a citizen of the infant or incompetent's state of citizenship.[66]

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57. *Id.*

58. *Id.* It is possible for an individual to have no domicile. For instance, suppose X is a citizen of the United States but is domiciled in England. X would not satisfy diversity requirements as to Y, a citizen of Louisiana, because X would not be a citizen of any "state" for diversity purposes. *See, e.g., id.* (to be a citizen of a state, individual must be citizen of the United States and be domiciled in a state); *see also* Smith v. Carter, 545 F.2d 909, 911 (5th Cir. 1977), *cert. denied*, 431 U.S. 955 (1977).

59. 28 U.S.C. § 1332(c)(1). A similar rule applies to insurers sued pursuant to a direct action statute. Title 28 U.S.C. § 1332(c)(1) provides that "in any direct action against the insurer of a policy or contract of liability, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principle place of business." This proviso does not apply, however, unless the suit is against the insurer; it does not apply to suits by the insurer. Northbrook Nat'l Ins. Co. v. Brewer, 493 U.S. 6, 9 (1989).

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

61. United Steelworkers of Am. v. R.H. Bouligny, Inc., 382 U.S. 145, 147-53 (1965); Bankston v. Burch, 27 F.3d 164, 168-69 (5th Cir. 1994). It should be noted that states and their alter ego agencies elude diversity jurisdiction because they are not considered to be citizens at all for diversity purposes. *See* Tex. Dep't of Housing & Cmty. Affairs v. Verex Assurance, Inc., 68 F.3d 922 (5th Cir. 1995).

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

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

64. FED. R. CIV. P. 23.

65. 28 U.S.C. § 1332(c)(2).

66. *Id.*

Finally, special rules exist to control certain specific litigation settings. As mentioned, a general rule of diversity jurisdiction is that complete diversity must exist for diversity to attach. However, the courts have carved out several exceptions to this rule when the circumstances so demand. First, if between the time suit is filed and removal is noticed, a nondiverse party is voluntarily dismissed, then that party's citizenship will be disregarded at the time diversity jurisdiction is assessed. Second, diversity of citizenship need not exist as to third-party claims, either between the plaintiff and the third-party defendant, or the third-party plaintiff and the third-party defendant.[67] Third, the citizenship of parties merely nominally or formally joined will be disregarded by the courts. Fourth, parties subsequently joined to a suit, such as parties joined as part of a compulsory counter-claim[68] or parties who join as intervenors of right,[69] generally do not affect diversity jurisdiction. Finally, parties fraudulently joined by a plaintiff in an effort to defeat diversity jurisdiction will be ignored by the federal courts in ascertaining whether diversity exists.[70]

Fraudulent joinder has spawned a hotbed of litigation in the Fifth Circuit and other circuits. It can be proved in two ways: (1) actual fraud in the pleading of jurisdictional facts; *or* (2) inability of the plaintiff to establish a cause of action against the non-diverse defendant. The former rarely occurs. The latter standard of proof is akin to Rule 12(b)(6) analysis, except that it is a bit broader and also considers summary-judgment types of evidence.[71] The test is whether, resolving

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67. *See, e.g.*, Smith v. Philadelphia Transp. Co., 173 F.2d 721, 724 n.2 (3d Cir. 1949) (plaintiff and third-party defendant); Southern Milling Co. v. United States, 270 F.2d 80 (5th Cir. 1959) (third-party plaintiff and third-party defendant); Huggins v. Graves, 337 F.2d 486, 489 (6th Cir. 1964); Stemler v. Burke, 344 F.2d 393, 395-96 (6th Cir. 1965).

68. *See, e.g.*, H.L. Peterson Co. v. Applewhite, 383 F.2d 430, 433 (5th Cir. 1967). In the case of the permissive counter-claim, however, diversity of citizenship must exist. Reynolds v. Maples, 214 F.2d 395, 399 (5th Cir. 1954). Moreover, a party who is found to be an indispensable party and who destroys diversity may be joined only at the court's discretion and, if joined, necessitates remand of the case to state court. *Bankston,* 27 F.3d at 167-68; Hensgens v. Deere & Co., 833 F.2d 1179 (5th Cir. 1987). Correlatively, the court may, in its discretion, choose to dismiss a nondiverse, indispensable party, if such dismissal will not prejudice the remaining defendants. Elliott v. Tilton, 69 F.3d 35 (5th Cir. 1995), *opinion withdrawn and superceded on rehearing by* 89 F.3d 260 (5th Cir. 1996).

69. *See, e.g.*, Phelps v. Oaks, 117 U.S. 236, 241 (1886); Smith Petroleum Serv., Inc. v. Monsanto Chem. Co., 420 F.2d 1103, 1113 (5th Cir. 1970).

70. *See Farias*, 925 F.2d at 866; Dodson v. Spiliada Mar. Corp., 951 F.2d 40, 42-43 (5th Cir. 1992); *B., Inc.*, 663 F.2d at 549-51; *see, e.g.*, LeJeune v. Shell Oil Co., 950 F.2d 267, 271 (5th Cir. 1992) (state law does not impose vicarious liability on plant manager unless he owed a personal duty to plaintiff); Carriere v. Sears, Roebuck & Co., 893 F.2d 98, 100-02 (5th Cir.), *cert. denied* 498 U.S. 817 (1990) (co-worker was immune from suit unless he committed intentional misconduct, which was not alleged).

A similar rule applies to fraudulent assignments. *See, e.g.*, Smilgin v. N.Y. Life Ins. Co., 854 F. Supp. 464, 465 (S.D. Tex. 1994) (assignment of one percent of interest in order to defeat diversity jurisdiction). *But see Delgado*, 231 F.3d at 173, 182 (no fraudulent joinder by defendant of third-party defendant foreign state which required removal, despite agreement that third-party defendant's liability would not exceed 2.5%). Notably, the fraudulent joinder doctrine does not apply to post-removal joinders, as the defendant and/or the court would not consent to add a party against whom recovery was not possible. Cobb v. Delta Exp., Inc., 186 F.3d 675, 677 (5th Cir. 1999).

71. Ross v. Citifinancial, Inc., 344 F.3d 458, 461-63 (5th Cir. 2003). In assessing fraudulent joinder, the court must not embark on a merits determination, however. All ambiguities must be resolved in favor of the plaintiff. Especially where the plaintiff alleges colorable claims against both diverse and nondiverse defendants, the court may not find that the nondiverse defendants were fraudulently joined based on the merits. *Id.*

all doubt and ambiguity in favor of the plaintiff, the plaintiff has a possibility of recovering against the nondiverse defendant. Thus a possible cause of action is enough. A defendant need not show that there is "absolutely no possibility" of recovery (which is too harsh), but the plaintiff's claim may not stand on a "mere theoretical possibility" of recovery (which is too weak). The burden rests with the defendant to prove the defendant was fraudulently joined.[72]

b. Calculating the Amount in Controversy

Once it is determined that diverse citizenship exists, the court next investigates the amount in controversy. Section 1332 provides that the amount in controversy must exceed $75,000, exclusive of interest and costs.[73] Unlike the citizenship requirement, the jurisdictional amount element need only be satisfied at the time of removal.[74] At that point, the court will look to the face of the complaint to determine whether the amount exists.[75] If the answer is not apparent from the face of the complaint, or if a party challenges the damages amount ascribed, then the court will proceed by way of one of two possible tests: (1) the preponderance of the evidence test, or (2) the legal certainty test.[76]

The preponderance of the evidence test applies in cases where the plaintiff has failed to plead a set or determined amount of damages.[77] In certain states, such as Louisiana and Texas,[78] this will virtually always be the case, as the state procedural rules expressly prohibit plaintiffs from pleading a sum certain in

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72. *Travis*, 326 F.3d at 647-50.

73. Interest and costs should not be considered. Nor should the value of any counter-claims filed by the defendant be used to increase the amount in controversy. State Farm Mut. Auto. Ins. Co. v. Narvaez, 149 F.3d 1269, 1271 (10th Cir. 1998); *but see* Spectacor Mgmt. Group v. Brown, 131 F.3d 120, 121 (3d Cir. 1997), *cert. denied*, 523 U.S. 1120 (1998) (counting value of compulsory counter-claim).

74. 28 U.S.C. § 1332. *See* Richard Schilffarth & Assocs. v. Commonwealth Equity Servs., 715 F. Supp. 246, 247 (E.D. Wis. 1989).

75. St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 291-92 (1938); S.W.S. Erectors v. Infax, Inc., 72 F.3d 489, 492 (5th Cir. 1996).

76. For a thorough exposition of the various standards applicable in determining the amount in controversy, see Jack E. Karns, *Removal to Federal Court and the Jurisdictional Amount in Controversy Pursuant to State Statutory Limitations on Pleading Damage Claims*, 29 CREIGHTON L. REV. 1091 (1996). Karns carefully traces the case law of each circuit, noting that a circuit split exists as to the standard applicable in determining jurisdictional amount when the plaintiff has failed or is precluded from alleging a particular sum of damages. Karns concludes that the Fifth and Eleventh Circuits still apply the "legal certainty" test in such a situation, that the Sixth Circuit applies the "more likely than not" test, and that the Third and Seventh Circuits apply the "reasonable probability" test. Since the publication of the article, the Fifth Circuit has relaxed its jurisdictional amount standard, and now applies the preponderance of the evidence test whenever the complaint in issue does not contain an allegation of a damage amount. *See* Allen v. R & H Oil & Gas Co., 63 F.3d 1326, 1335 (5th Cir. 1995).

For a more general recount of diversity and the requirement of jurisdictional amount, see Charles A. Carlson, *Trial Lawyers Forum: Removal to Federal Court on the Basis of Diversity Jurisdiction: The "Amount in Controversy" Controversy*, 69 FLA. BAR J. 77 (OCT. 1995).

77. H & D Tire & Auto. Hardware v. Pitney Bowes, Inc., 227 F.3d 326, 328 (5th Cir. 2000); *Allen*, 63 F.3d at 1335; De Aguilar v. Boeing Co., 11 F.3d 55, 58 (5th Cir. 1993).

78. *See, e.g.*, LA. CODE CIV. P. art. 893 (West 2004); TEX. R. CIV. P. 47 (Vernon 2004).

damages. In applying the preponderance of the evidence test, the court allows submission of summary judgment type of evidence.[79] The defendant need only prove by a preponderance of such evidence that the plaintiff's claim exceeds the $75,000 jurisdictional amount.[80] The court will look first to the face of the complaint,[81] and if the jurisdictional amount is not apparent there, it will then consider the facts set forth in the removing party's petition, any affidavits submitted, the parties' discovery responses, and other summary-judgment type evidence.[82] Mere conclusory allegations about removal jurisdiction by either party are not sufficient to satisfy the preponderance of the evidence test.[83] The plaintiff may avoid removal jurisdiction, however, by filing a binding stipulation or affidavit with its complaint or prior to removal that conclusively limits its damages to less than $75,000.[84] Even if the plaintiff's statement does not conclusively limit its damages, moreover, the court will still find removal jurisdiction lacking if the defendant fails to rebut the plaintiff's statement with other evidence.[85] The preponderance of the evidence test is applied at the time of removal, and any post-removal activity reducing the amount in controversy to less than $75,000 generally does not divest the court of jurisdiction.[86]

The legal certainty test, by contrast, applies in those cases where the plaintiff has pleaded a set amount of damages in excess of the jurisdictional amount.[87] This usually only occurs in cases where the plaintiff has invoked the jurisdiction of the federal court.[88] If the damage amount pled appears to have been pled in good faith, then the federal court will accept the stated amount as presumptively correct. Only if it appears "'to a legal certainty, that the claim is really for less than the jurisdictional amount'" will the court dismiss the claim for lack of diversity jurisdiction.[89]

In those cases where the plaintiff has pleaded a set amount of damages that is less than the jurisdictional amount, then a combination of the preponderance

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79. *S.W.S. Erectors*, 72 F.3d at 492.

80. *See De Aguilar*, 11 F.3d at 58.

81. Looking at the face of plaintiff's complaint, it was apparent that damages would exceed $75,000 where complaint alleged injuries to plaintiff's wrist, knee and back, and sought damages for medical expenses, pain and suffering, mental anguish, loss of enjoyment of life, loss of wages and permanent disability. Gebbia v. Wal-Mart Stores, 233 F.3d 880, 883-84 (5th Cir. 2000); *see also* White v. FCI USA, Inc., 319 F.3d 672, 675-76 (5th Cir. 2003) (jurisdictional amount was apparently met, as demonstrated by claims in complaint and defendant's astute use of interrogatories and requests for admission).

82. *Pitney Bowes*, 227 F.3d at 329 (evaluating discovery responses); *Allen*, 63 F.3d at 1335. Notably, the court must use care not to embark on a merits determination in assessing diversity jurisdiction. Instead, the court should simplify the inquiry and give the plaintiff the benefit of the doubt. Pratt Cent. Park Ltd. v. Dames & Moore, Inc., 60 F.3d 350, 351-52 (7th Cir. 1995).

83. *Pratt Cent. Park Ltd.*, 60 F.3d at 351-52; *see also* Gaus v. Miles, Inc., 980 F.2d 564 (9th Cir. 1992).

84. *De Aguilar*, 47 F.3d at 1412.

85. *See* Asociacion Nacional de Pescadores v. Dow Quimica de Colombia S.A., 988 F.2d 559, 565 (5th Cir. 1993).

86. *Gebbia*, 233 F.3d at 883.

87. *St. Paul Mercury Indem. Co.*, 303 U.S. at 289.

88. *See De Aguilar*, 47 F.3d at 1409.

89. *Id.* (quoting *St. Paul Mercury Indem. Co.*, 303 U.S. at 289).

of the evidence and the legal certainty tests applies.[90] In such cases, the plaintiff's damages allegation is accepted as presumptively correct, unless the defendant can show that it was made in bad faith.[91] The defendant may do this by way of the preponderance of the evidence test—it need only show by a preponderance of summary-judgment type evidence that the amount in controversy actually exceeds the jurisdictional amount.[92] If the defendant succeeds in this endeavor, then the plaintiff must come forward with proof that, to a legal certainty, it will not recover more than the stated amount. The plaintiff may carry this burden by pointing to state law precluding recovery in excess of that amount or, if the plaintiff has been insightful enough, by relying on a binding stipulation or affidavit filed with its complaint that limits recovery to less than the jurisdictional amount.[93]

Finally, in calculating the jurisdictional amount, the court must also take into account the types of damages alleged and the number of parties in the case. Section 1332 clearly states that interest and costs[94] are not counted in determining whether the $75,000 amount is met.[95] An exception exists, however, for interest claims which form part of the underlying obligation, such as a promissory note, or which are an essential ingredient of the underlying claim.[96] Attorneys' fees, unlike interest and costs, are not statutorily excluded from the calculation of the jurisdictional amount, and if provided for by contract or statute, they are included in determining the jurisdictional amount.[97] Similarly, claims for punitive damages may be cumulated with compensatory damage claims to achieve the required $75,000 amount.[98]

In cases involving action-specific claims, such as claims for injunctive or declaratory relief, the amount in controversy equates to the value of the right sought to be protected or the extent of the injury sought to be prevented.[99] Suits to compel arbitration similarly look to the amount of the potential underlying award to determine the jurisdictional amount in controversy.

The number of parties in the case and the method of their joinder also influences the jurisdictional amount. In general, a single plaintiff may aggregate all

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90. *Id.* at 1410-12.

91. *Id.* at 1410 (noting a plaintiff may abuse system by pleading a damage amount below the jurisdictional amount, all along knowing that state laws allow it to recover in excess of that amount).

92. *Id.* at 1412.

93. *Id.*

94. The costs incurred by a defendant in performing an accounting required by a lawsuit may not be included in the jurisdictional amount as damages. Garcia v. Koch Oil Co., 351 F.3d 636, 639-40 (5th Cir. 2003).

95. 28 U.S.C. § 1332

96. *See, e.g.*, Brown v. Webster, 156 U.S. 328 (1895).

97. For a thorough exposition of the various standards applicable in determining the amount in controversy, see *supra* note 76.

98. *See* Bell v. Preferred Life Assurance Soc'y, 320 U.S. 238, 240-41 (1943); *Allen*, 63 F.3d at 1333-34.

99. Webb v. Investacorp., 89 F.3d 252, 256 (5th Cir. 1996).

of its damage claims against a particular defendant, regardless of whether those claims are related to each other.[100] Likewise, the claims of two or more plaintiffs against a particular defendant may be aggregated, provided they seek to enforce a single title or right that emanates from a common and undivided interest.[101] If the plaintiffs' claims are separate and distinct, however, then their damage demands may not be cumulated.[102] By the same respect, the claims of a single plaintiff against multiple and unrelated defendants may not be cumulated to meet the jurisdictional amount.[103]

In class action cases, special rules apply in testing the requirement of jurisdictional amount. The Fifth Circuit has held that, at least in Mississippi, the class members' claims for punitive damages may be aggregated and then attributed, *in toto*, to the compensatory damage claims in satisfaction of the $75,000 amount. In *Allen*, the Fifth Circuit interpreted Mississippi law and determined that the sum total of all punitive damage claims may be attributed as a whole to each individual class plaintiff's jurisdictional amount requirement. The test is whether the punitive damage award involves a single collective right or a common undivided right to a pot of punitive damages (in which case aggregation is allowed),[104] or a joint and several right to only a portion of punitive damages (in which case aggregation is not allowed).[105]

Courts have reached similar decisions regarding attorneys' fees in other cases. In *In re Abbott Lab.*, the court applied Louisiana law, which provided that the sum total of all class plaintiffs' attorneys' fees claims could be aggregated and attributed to each *named* plaintiff in satisfaction of their jurisdictional amounts.[106] The court then noted that the Judicial Improvements Act of 1990[107] overruled *Zahn*[108] and held that the doctrine of supplemental jurisdiction under § 1367 provides a hook for the exercise of subject matter jurisdiction over the

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100. *See* Jones Motor Co. v. Teledyne, Inc., 690 F. Supp. 310, 317 (D. Del. 1988). Although this was clearly the rule under the pre-1988 amendment law, the amended version of 28 U.S.C. § 1367 casts the viability of this rule into doubt. Supplemental jurisdiction now requires that all of the claims form part of the same case or controversy. 28 U.S.C. § 1367.

101. Troy Bank v. G.A. Whitehead & Co., 222 U.S. 39, 41 (1911); *Allen*, 63 F.3d at 1332-34 (defining a common, undivided right as one which contemplates only one, versus separate, rights of recovery).

102. *Allen*, 63 F.3d at 1331.

103. Jewell v. Grain Dealers Mut. Ins. Co., 290 F.2d 11, 13 (5th Cir. 1961).

104. *Allen*, 63 F.3d 1326; *compare* Ard v. Transcontinental Gas Pipe Line Corp., 138 F.3d 596, 602 (5th Cir. 1998) (refusing to aggregate punitive damages claims under Louisiana law); H & D Tire & Auto. Hardware, Inc., 227 F.3d at 329-30 (also refusing to aggregate under Texas law); Tapscott v. MS Dealer Corp., 77 F.3d 1353, 1358-1359 (11th Cir. 1996) (applying Alabama law).

105. *See* Gibson v. Chrysler Corp., 261 F.3d 927, 943-45 (9th Cir. 2001); Martin v. Franklin Capital Corp., 251 F.3d 1284, 1292-93 (10th Cir. 2001); Cohen v. Office Depot, Inc., 184 F.3d 1292 (11th Cir. 1999).

106. *In re* Abbott Lab., 51 F.3d 524, 526 (5th Cir. 1995); *see also* Louque v. Allstate Ins. Co., 314, F.3d 776, 778-82 (5th Cir. 2002); Grant v. Chevron Phillips Chem. Co., 309 F.3d 864, 876-77 (5th Cir. 2002).

107. 28 U.S.C. § 1367 (providing for supplemental jurisdiction over related claims).

108. Zahn v. Int'l Paper Co., 414 U.S. 291 (1973).

unnamed plaintiffs' claims.[109] Conversely, in *Pitney Bowes*, the court looked to Connecticut law, which provided only that the court may award attorneys' fees "to the plaintiff."[110] There, the court held that the use of the word "plaintiff" did not specifically provide for attorneys' fees to be awarded *solely* to the class representative(s), and therefore declined to aggregate the fees to the named plaintiffs in support of the jurisdictional amount. [111]

2. Federal Question Jurisdiction Grounding Removal Jurisdiction

A second popular basis for invoking removal jurisdiction is grounded on federal question jurisdiction. Title 28 U.S.C. § 1441(b) provides that federal district courts have federal jurisdiction over cases "arising under the Constitution, treaties or laws of the United States."[112] A case is deemed to "arise under" federal law for § 1331 purposes whenever federal law, either expressly[113] or impliedly,[114] creates the cause of action upon which the plaintiff is suing.[115] A case may also "arise under" federal law even if state law creates the actionable right, provided it is necessary for the plaintiff to plead and prove a substantial proposition of federal law in making its case. [116] Generally, no cases other than those falling within these two enumerated categories will be considered to "arise under" federal question jurisdiction in satisfaction of § 1331. Removal based on federal question jurisdiction is tested at the time the removal notice is filed.[117]

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109. *In re Abbott Lab.*, 51 F.3d at 527-29. However, a circuit split exists regarding whether this is the proper interpretation of § 1367. The Ninth, Fourth, and Seventh Circuits agree with the Fifth; *see Gibson*, 261 F.3d 927 (9th Cir.); Rosmer v. Pfizer, Inc., 263 F.3d 110 (4th Cir. 2001); and Stromberg Metal Works, Inc. v. Press Mech., Inc., 77 F.3d 928, 930-33 (7th Cir. 1996). The Eighth, Third, and Tenth Circuits disagree; *see* Trimble v. Asarco, Inc., 232 F.3d 946 (8th Cir. 2000); Meritcare, Inc. v. St. Paul Mercury Ins. Co., 166 F.3d 214 (3d Cir. 1999); Leonhardt v. W. Sugar Co., 160 F.3d 631, 638-641 (10th Cir. 1998).

100. *Pitney Bowes*, 227 F.3d at 330-31.

111. *See also* Spielman v. Genzyme Corp., 251 F.3d 1, 8-10 (1st Cir. 2001) (not aggregated); Darden v. Ford Consumer Fin. Co., 200 F.3d 753, 757-59 (11th Cir. 2000) (not aggregated).

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

113. *See* Feibelman v. Packard, 109 U.S. 421, 424 (1883).

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

115. *See* Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1 (1983). The suit must "really and substantially" involve a dispute regarding the "validity, construction or effect" of the law "upon the determination of which the result depends." Shulthis v. McDougal, 225 U.S. 561, 569 (1912); *see also* Gully v. First Nat'l. Bank, 299 U.S. 109, 112 (1936) (federal question jurisdiction requires that the federal issue "be an element, and an essential one, of the plaintiff's cause of action").

116. Even federal common law principles give rise to federal question jurisdiction. *See* Sam L. Majors Jewelers v. ABX, Inc., 117 F.3d 922 (5th Cir. 1997) (plaintiff's claims against air carrier for lost good are removable as the court had jurisdiction under federal common law); Frank v. Bear Stearns & Co., 128 F.3d 919 (5th Cir. 1997).

117. *Cervantez*, 99 F.3d at 732-33; Coker v. Amoco Oil Co., 709 F.2d 1433 (11th Cir. 1983); Libhart v. Santa Monica Dairy Co., 592 F.2d 1062, 1065 (9th Cir. 1979). Thus, even if a plaintiff amends its complaint to drop a federal claim, removal jurisdiction will still exist. In such cases, the federal court has discretion, however, to dismiss the remaining state law claims or to remand the action back to state court. Similarly, a post-removal amendment to the plaintiff's petition to add a federal claim will not cure lack of removal jurisdiction. However, in such cases, the defendant may try to remove again based upon the newly alleged federal question jurisdiction. *See, e.g., S.W.S. Erectors*, 72 F.3d at 492-94.

In determining federal question jurisdiction, courts generally look to the face of the plaintiff's "well-pleaded complaint."[118] If, on the face of the plaintiff's complaint, no federal question is apparent, then federal removal jurisdiction does not exist.[119] A plaintiff need not expressly plead a federal claim because courts will look to the nature of the claims pled to determine whether a federal question is there.[120]

The mere fact that a complaint may give rise to a federal *defense*, however, does not satisfy the federal question requirement.[121] The plaintiff is the master of its complaint, and the plaintiff ultimately decides what law to rely on and in which court to file suit. By filing in state court and refusing to include a federal claim, the plaintiff may therefore preclude the defendant from removing to federal court, even if a federal claim might also have been alleged in the complaint, but was intentionally omitted by the plaintiff.[122]

Of course, like all general rules, there are exceptions to the "well-pleaded complaint" principle. A plaintiff may not defeat federal question jurisdiction by "artfully casting" a "purely" federal cause of action as a state law claim.[123] This becomes an issue most often in the area of preemption. Some areas of federal law so pervade a particular field of law that they completely preempt state law, thereby rendering the cause of action completely federal in nature and thus removable to federal court.[124] For successful preemption removal to occur, however, the claim must fall within the category of "complete preemption" versus

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118. *Gully*, 299 U.S. at 113; Kramer v. Smith Barney, 80 F.3d 1080, 1082 (5th Cir. 1996).

119. Caterpillar v. Williams, 482 U.S. 386, 392 (1987).

120. *See, e.g.*, Jefferson County, Ala. v. Acker, 527 U.S. 423, 431 (1999); Scherbatskoy v. Halliburton, 125 F.3d 288, 291 (5th Cir. 1997); Eitmann v. New Orleans Pub. Serv., Inc., 730 F.2d 359, 365-66 (5th Cir. 1984) (failure to plead federal claim was in bad faith and mere attempt to defeat jurisdiction); *but compare* Willy v. Coastal Corp., 855 F.2d 1160, 1167-71 (5th Cir. 1988) (plaintiff's complaint not subject to "artful pleading" limitation where plaintiff had alternative state law claim).

121. Okla. Tax Comm'n v. Graham, 489 U.S. 838, 840-41 (1989). *See also* Rivet v. Regions Bank of La., 522 U.S. 470, 474-76 (1998) (defendant's claim of claim preclusion based on prior federal judgment does not raise a federal question); Hoskins v, Bekins Van Lines, 343 F.3d 769, 772 (5th Cir. 2003); Gaar v. Quirk, 86 F.3d 451, 454 (5th Cir. 1996); *Kramer*, 80 F.3d at 1082. This is true even if the plaintiff concedes that the federal question is the only true issue in the case. *See, e.g., Caterpillar*, 482 U.S. at 393.

122. *See* Great N. Ry. v. Alexander, 246 U.S. 276, 281 (1918); *see also* Carpenter v. Wichita Falls Indep. Sch. Dist., 44 F.3d 362, 366 (5th Cir. 1995); *Willy*, 855 F.2d at 1167; Aaron v. Nat'l Union Fire Ins. Co., 876 F.2d 1157, 1161 n.7 (5th Cir. 1989).

123. *See* Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 397 n.2 (1981); *see also Gaar*, 86 F.3d at 454.

124. *See, e.g.*, Beneficial Nat'l Bank v. Anderson, 539 U.S. 1 (2003) (NBA); El Paso Natural Gas Co. v. Neztsosie, 526 U.S. 473, 485 (1999) (PAA); Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 65-66 (1987) (ERISA); *Kramer*, 80 F.3d at 1082-83 (same); Avco Corp. v. Aero Lodge No. 735, 390 U.S. 557, 560 (1968) (LMRA); Smith v. Houston Oilers, Inc., 87 F.3d 717, 720 (5th Cir. 1996) (same); Kollar v. United Transp. Union, 83 F.3d 124, 126 (5th Cir. 1996) (RLA); *see also* Masters v. Swiftships Freeport, Inc., 867 F. Supp. 555, 558 (S.D. Tex. 1994) (for complete preemption to occur, federal statute must include civil enforcement provision that creates federal cause of action and protects same interest protected by the preempted state law, provides a specific jurisdictional grant to federal courts over such action, and shows a clear congressional intent to preempt state law).

merely "ordinary" or "conflict" preemption.[125] For example, contrary to popular belief, not all claims involving ERISA are completely preempted and automatically removable.[126] Further, in those instances in which Congress has expressly provided by statute for removal of a particular type of action, the plaintiff may not avoid the federal forum by filing in state court.[127] Removal, in such cases, is a matter of statutory right, and the defendant therefore has the right to remove the case.[128]

Exceptions similarly exist in the opposite direction. In instances where a complaint appears to raise a federal claim, these exceptions preclude recognition of federal question jurisdiction. A suit may be dismissed for lack of federal question jurisdiction where the alleged federal claim clearly appears to be "immaterial and made solely for the purpose of obtaining jurisdiction."[129] A suit also may be dismissed for lack of jurisdiction where the federal question proves to be "wholly insubstantial and frivolous" in nature.[130] Finally, and as previously discussed, certain federal claims may not be removed based on congressional mandates against removal. In such cases, removal is prohibited by statute.[131]

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125. Arana v. Ochsner Health Plan, 338 F.3d 433, 439-40 (5th Cir. 2003) (en banc); Waste Control Specialists, LLC v. Envirocare of Tex., Inc., 199 F.3d 781, 783-84 (5th Cir. 2000); Copling v. Container Store, 174 F.3d 590 (5th Cir. 1999). *See also* Heimann v. Nat'l Elevator Indus. Pension Fund, 187 F.3d 493 (5th Cir. 1999). In *Heimann*, the court explained the difference between "conflict" or "ordinary" preemption, versus complete preemption:

> Ordinarily, the term federal preemption refers to ordinary preemption, which is a federal defense to the plaintiff's suit . . . . Being a defense, it does not appear on the face of a well-pleaded complaint, and, thus, does not authorize removal to a federal court. By way of contrast, complete preemption is jurisdictional in nature rather than an affirmative defense to a claim under state law. . . .
>
> In general . . . [to establish complete preemption,] a petitioner must show (1) the statute contains a civil enforcement provision that creates a cause of action that both replaces and protects the analogous area of state law (2) there is a specific jurisdictional grant to the federal courts for enforcement of the right and (3) there is clear Congressional intent that claims brought under the federal law be removable.

Id. at 500 (internal citations omitted). *But see Arana*, 338 F.3d at 439 (overruling *McClelland, Heimann,* and *Copling* only to the extent they conflict with the en banc court's holding that complete preemption is required for removal). The interaction between federal preemption and federal law as a defense is a gray one. Complete preemption occurs only when federal law occupies the entire field of liability, thus rendering state relief impermissible. In such cases, the plaintiff's claim must be recharacterized as a federal one. *Avco Corp.*, 390 U.S. at 559. If, however, federal law merely provides that a particular remedy under state law would violate federal law, and the field is not completely preempted, then the plaintiff may still press his claim in state court. In the latter case, federal preemption is merely a defense to the state claim, and thus does not trigger removal jurisdiction. *See Franchise Tax Bd.*, 463 U.S. at 12; *see also* Hartle v. Packard Elec., 877 F.2d 354 (5th Cir. 1989), *overruled in part by Arana*, 338 F.3d at 439; Carway v. Progressive County Mut. Ins. Co., 183 B.R. 769, 773-74 (S.D. Tex. 1995).

126. *Arana*, 338 F.3d at 439; Giles v. NYLCare Health Plans, 172 F.3d 332, 338 (5th Cir. 1999) (recognizing that "we mistakenly held, contrary to Supreme Court precedent . . . that conflict preemption [involving ERISA], rather than serving as merely a defense, transforms the cause of action into a 'federal law claim'"). *See also Hoskins*, 343 F.3d at 773 (Carmack Amendment preemptive); Hart v. Bayer Corp., 199 F.3d 239 (5th Cir. 2000) (FIFRA not preempted); Johnson v. Baylor Univ., 214 F.3d 630, 634 (5th Cir. 2000) (PRSA not preempted).

127. *Beneficial Nat'l Bank*, 539 U.S. at 6-8.

128. *See also supra* text and accompanying notes at 8-9 (listing federal statutes conferring federal jurisdiction for removal purposes).

129. Bell v. Hood, 327 U.S. 678, 681-82 (1946); *see also Cervantez*, 99 F.3d at 734.

130. *Id.*

131. *See supra* text and accompanying notes at 8-9.

Thus, with some exceptions, federal question jurisdiction generally will exist if the complaint contains a claim "arising under" federal law. In such cases, the entirety of the case may be removed to federal court.[132] This is true even if non-federal issues must also be determined, because supplemental jurisdiction provides a jurisdictional hook.[133] The doctrine of supplemental jurisdiction states: "[S]upplemental jurisdiction [shall attach to] all [additional] claims that are so related to claims in the action within [the district court's federal jurisdiction] that they form part of the same case or controversy."[134] Pursuant to § 1367, state law claims forming part of the same case or controversy as the federal claims may also be tried by the federal court. If the federal claims are eliminated from the case prior to trial, however, many courts will then decline to exercise supplemental jurisdiction over any remaining state law claims and will remand the case to state court for further proceedings.[135]

3. Separate and Independent Claims

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

> Whenever a separate and independent claim or cause of action within [federal question] jurisdiction . . . is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.[136]

By definition, removal under § 1441(c) is limited to cases in which the removable "separate and independent" claim arises under federal question jurisdiction. It should be noted, moreover, that §1441(c) need not be invoked when

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132. *See* New Orleans, Mobile & Tex. R.R. Co. v. Miss., 102 U.S. 135 (1880).

133. City of Chicago v. Int'l Coll. of Surgeons, 522 U.S. 156, 164-68 (1997); *Copling*, 174 F.3d at 595.

134. 28 U.S.C. § 1367.

135. *See, e.g.*, McClelland v. Gronwaldt, 155 F.3d 507, 519 (5th Cir. 1998) (remanding suit to state court after federal claims eliminated, noting that 28 U.S.C. § 1367(c) provides reasons when a district court may decline to exercise supplemental jurisdiction). In making the decision whether to keep or remand the claims, however, the court should "exercise [its] discretion in a way that best serves the principles of economy, convenience, fairness, and comity." Doddy v. Oxy USA, Inc., 101 F.3d 448, 456 (5th Cir. 1996). If the federal claim is eliminated early in the federal proceeding, the court has a "powerful reason" to remand the state law claims to state court. *Id.* Similarly, supplemental jurisdiction allows the federal court to continue to hear the case even after the claims over which it had subject matter jurisdiction have dropped out. *Id.* at 455-56. Once subject matter jurisdiction has attached, the court has the discretion to keep or remand the state law claims. *Id.; see also* Smith v. Tex. Children's Hosp., 84 F.3d 152, 154 (5th Cir. 1996).

136. 28 U.S.C. § 1441(c).

the claims sought to be removed are related, as supplemental jurisdiction under § 1367 provides the jurisdictional hook in that case.[137]

Section 1441(c) comes into play only when unrelated claims are joined in a state court suit. When this occurs, the law allows the defendant to remove the entire case to federal court, provided one or more claims satisfy federal question jurisdiction. Such removal is subject to the court's "broad" discretion to remand the "separate and independent" claims back to state court if those claims are governed predominantly by state law.[138] For a remand order to be proper in this context, the claims remanded must be: (1) separate and independent from the federal claims; (2) joined in the suit with a federal claim; (3) otherwise or independently nonremovable; and (4) involve a matter over which state law predominates.[139]

The Supreme Court has defined "separate and independent" claims as claims arising from different sets of acts and different wrongs inflicted upon the plaintiff. "Where there is a single wrong to plaintiff, for which relief is sought, arising from an interlocked series of transactions, there is no separate and independent claim."[140] The Fifth Circuit has further explained that "[a] federal claim is separate and independent if it involves an obligation distinct from the nonremovable claims in the case."[141] In making this determination, the allegations of the complaint control.[142] Thus, in *Eastus,* the Fifth Circuit found that an employee's claim for intentional infliction of emotional distress emanating from the employee's termination was not separate and independent from an FMLA claim, but the employee's claim for tortious interference with a prospective employment contract was separate and independent and, accordingly, could be remanded.[143]

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137. *Id.*

138. *Id. See also* Anderson v. Red River Waterway, 231 F.3d 211, 214 (5th Cir. 2000).

139. Smith v. Amedisys, Inc., 298 F.3d 434, 439-40 (5th Cir. 2002); Eastus v. Blue Bell Creameries, 97 F.3d 100, 104 (5th Cir. 1996). In many circuits, it is unclear whether § 1441(c) allows the federal court to remand the entire case or only those claims governed by state law. Some courts have allowed remand of cases in their entirety, while others refuse to do so, holding once subject jurisdiction attaches the federal court may not remand the claim. For a thorough analysis of the power of federal courts to remand pursuant to § 1441(c), *see* Edward Hartnett, *A New Trick from an Old and Abused Dog: Section 1441(c) Lives and Now Permits the Remand of Federal Question Cases*, 63 FORDHAM L. REV. 1099 (1995). Notably, as demonstrated by *Eastus*, the Fifth Circuit has refused to extend § 1441(c) to allow remand of the entire case, stating instead that a district court has no discretion to remand a case over which it has subject matter jurisdiction. *Eastus*, 97 F.3d at 106; *see also* Buchner v. FDIC, 981 F.2d 816 (5th Cir. 1993).

140. Am. Fire & Cas. Co. v. Finn, 341 U.S. 6, 14 (1951); *see also Eastus*, 97 F.3d at 104. Notably, while federal law supplies the test for what is a "separate and independent" claim, state law must be applied to determine the character of the plaintiff's claim. That is, state law is employed to determine whether the claim partakes of federal jurisdiction under federal question or diversity jurisdiction. *See* Bentley v. Halliburton Oil Well Cementing Co., 174 F.2d 788, 790 (5th Cir. 1949).

141. Tex. v. Walker, 142 F.3d 813, 817 (5th Cir. 1998), *cert. denied* 525 U.S. 1102 (1999) (holding that university's claims against professor for breach of teaching contract in failing to remit professional fees was a separate and distinct claim from professor's claim of improper termination). *See also Eastus,* 97 F.3d at 104.

142. Eastus, 97 F.3d at 104-05.

143. *Id.* at 105-06; *but see Smith*, 298 F.3d at 439-40 (if plaintiff seeks relief for single wrong, arising from interlocked series of transaction, there is no separate and independent claim).

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

Once it is determined that a case is removable, the next question is to "where?" The obvious answer is "to federal court," but a not-so-obvious venue rule governs the exact federal court.[144] Section 1441 states that a case removable from state to federal court should be removed "to the district court for the United States for the district and division embracing the place where such action is pending."[145] In simpler terms, the state case should be removed to the federal court presiding over the same geographic area. Venue in the federal court will be proper if venue in the sister state court was proper.[146] If the case is removed to the wrong federal court, the plaintiff must promptly raise this procedural defect by a timely-filed motion to remand; otherwise the defect is waived.[147] If such a challenge is timely made, however, the remedy is to transfer the case to the appropriate federal district court, assuming subject matter jurisdiction is not in question.[148]

Once a case has been removed to federal court, either party may move to transfer the case to the appropriate venue pursuant to 28 U.S.C. § 1404(a). This is true even if venue is proper in the transferring district.[149] Moreover, a party may also move to dismiss the federal case under § 1404(a) pursuant to forum non conveniens.[150] The Fifth Circuit just upheld such a transfer, determining that a wrongful death suit premised on the crash of a Mexican airplane in Mexico would be more appropriately tried in Mexico, not the United States federal court.[151]

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

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

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

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144. 28 U.S.C. § 1441; in determining the appropriate venue, the removal statute, not the federal venue statutes, controls. *See* Tamminga v. Suter, 213 F. Supp. 488, 493 (N.D. Iowa 1962).

145. 28 U.S.C. § 1441(a); *see also* 28 U.S.C. § 1446 (notice of removal must be filed in "district and division within which [state] action is pending").

146. Venue in the federal court may even be proper if venue in the state court was not proper, as some courts construe the removal to a particular federal court as a waiver of any venue challenges. *See, e.g.*, Seaboard Rice Milling Co. v. Chi. R.I. & P.R. Co., 270 U.S. 363 (1926). The Supreme Court has also recently held that a state's removal of a case to federal court may constitute a waiver of its right to claim Eleventh Amendment immunity. Lapides v. Bd. of Regents of Univ. Sys. of Ga., 535 U.S. 613, 619 (2002).

147. Cook v. Shell Chem. Co., 730 F. Supp. 1381, 1382 (M.D. La. 1990).

148. *S.W.S. Erectors*, 72 F.3d at 493 n.3.

149. St. Cyr v. Greyhound Lines, Inc., 486 F. Supp. 724, 727-28 (E.D. N.Y. 1980).

150. *See, e.g.*, De Aguilar v. Boeing, Inc., 11 F.3d 55, 58-59 (5th Cir. 1993); *In re* Disaster at Riyadh Airport, 540 F. Supp. 1141, 1144-46 (D.D.C. 1982).

151. *De Aguilar*, 11 F.3d at 58-59.

> (b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.[152]

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

For years, the circuits had been split over whether the time for filing the removal notice runs from mere receipt of the pleading, regardless of whether it has been served, or only from the time of formal service. In 1999, the U.S. Supreme Court resolved this issue, holding that the thirty-day removal period is triggered only upon formal service on the defendant.[153] Prior to this decision, some courts had adhered to the strict wording of the statute, holding that the thirty-day removal period was triggered whenever the defendant "received" the pleading, whether or not formally served.[154] But, this often led to harsh results.[155] Now, in accordance with the Supreme Court's decision in *Murphy*, the "proper service rule" applies. The thirty-day time delay in which a notice of removal must be filed is triggered only upon proper service of process of the pleading containing the claim supporting the removal.[156]

A subpart of the "when" inquiry involves "who" must receive the removable petition for the thirty-day delay to begin running. In the business context, service upon an authorized agent is sufficient to start the clock ticking.[157] When

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152. 28 U.S.C. §§ 1446 (a) and (b). The notice of removal in criminal prosecutions must be filed within thirty days of arraignment, if arraignment occurs, or any time before trial, if arraignment does not occur. 28 U.S.C. § 1446(c).

153. Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc., 526 U.S. 344, 353-56 (1999). Prior to the Supreme Court's decision in *Murphy Brothers, Inc.*, an excellent review of this subject matter was written by Robert P. Faulkner, *The Courtesy Copy Trap: Untimely Removal from State to Federal Court*, 52 MD. L. REV. 374 (1993). Faulkner surmises that the receipt rule, not the proper service rule, is the rule required by the wording of the statute. Faulkner recognized the unfairness inherent in this rule and called for congressional reform.

154. *See, e.g.*, Reece v. Wal-Mart, 98 F. 3d 839, 844 (5th Cir. 1996); Roe v. O'Donohue, 38 F.3d 298, 302 (7th Cir. 1994); Tech-Hills II Assoc.v. Phoenix Home Life Mut. Ins. Co., 5 F.3d 963, 968 (6th Cir. 1993).

155. Thus, despite this "mandatory" thirty-day removal period, courts began to recognize a narrow, judicially created "revival" exception with respect to the thirty-day period. If the complaint is amended such to substantially alter the character of the action and constitute essentially a new lawsuit, a defendant's right to remove is "revived" at this point. Upon such an amendment the defendant has thirty days to remove, regardless of when the action was originally filed. Johnson v. Heublein, 227 F.3d 236, 242 (5th Cir. 2000) (allowing removal of suit more than nineteen months after filing, where plaintiff's amended complaint stated "an entirely and different new cause of action").

156. *Murphy Bros., Inc.*, 526 U.S. at 353-55.

157. *See Tech-Hills*, 5 F.3d at 968; Getty Oil Corp. v. Ins. Co. of N. Am., 841 F.2d 1254, 1263 n.12 (5th Cir. 1988).

service has been made upon an unauthorized agent, some courts have held that this is insufficient to trigger the thirty-day period.[158]

In cases involving multiple defendants, courts are split over whether the thirty-day period begins with service upon the first defendant or the last defendant. The Fifth Circuit has held that all defendants must join in the notice of removal within thirty days of receipt of the petition by the first defendant.[159] Other courts have held that this rule unfairly penalizes later-served defendants, however, and thus allow each defendant to join in the notice of removal within thirty days of service of its petition.[160]

Finally, if by chance the above rules are violated and the defendant fails to file its removal notice timely, most courts hold that they lack the discretion to extend the thirty-day time delay.[161] At least one court has also held that the period may not even be extended under Federal Rule of Civil Procedure 6(e), which adds an additional three days to take action following service by mail.[162] The defendant's failure to file a timely notice of removal will be of no consequence, however, if the plaintiff also fails to file a timely motion to remand. Failure to file a timely notice of removal is a "procedural" removal defect,[163] and thus it is waived if not timely challenged by the nonremoving party.[164]

1. Removability Not Ascertainable from Original Petition

Application of the thirty-day rule for removing state court actions becomes trickier when the petition does not clearly evidence a removable claim. The thirty-day period begins to run only once the defendant receives a "paper from which it may first be ascertained that the case . . . is removable."[165] If it is not

158. *See, e.g., Reece,* 98 F.3d at 843-44 (noting that corporation is not deemed to have received petition just because anyone in company is served, but declining to establish a bright-line test for determining whose receipt is sufficient to start the delay period running; in *Reece,* however, the petition was received by the CEO of the company, and this was sufficient to trigger the removal delay period). *Compare* TEX. BUS. CORP. ART. 2.11 (permitting service on selected officers) *with* LA. CODE CIV. PRO. art. 1261 (permitting service on corporation's designated agent or, if not, on any officer) *and* MISS. R. CIV. P. 4(d)(4) (permitting service on any officer).

159. *Getty Oil Corp.*, 841 F.2d at 1262-63.

160. McKinney v. Bd. of Trs., 955 F.2d 924, 928 (4th Cir. 1992). Even the Fifth Circuit has suggested it may create exceptions to its joinder within thirty days of receipt by the first defendant rule, when the equities so demand. Doe v. Kerwood, 969 F.2d 165, 169 n.15 (5th Cir. 1992).

161. *See, e.g.*, Buchner v. FDIC, 981 F.2d 816, 819-20 (5th Cir. 1993); Ortiz v. Gen. Motors Acceptance Corp., 583 F. Supp. 526 (N.D. Ill. 1984).

162. *See* Ross v. Barrett Centrifugals, 580 F. Supp. 1510, 1512-13 (D. Me. 1984); *but see* Student A v. Metcho, 710 F. Supp. 267, 268-69 (N.D. Ca. 1989) (granting three day extension). Obviously, the Federal Rule of Civil Procedure 6(e) extension is only applicable in those circuits following the "proper service" rule for computing the delay period.

163. Cook v. Shell Chem. Co., 730 F. Supp. 1381, 1382 (M.D. La. 1990).

164. In the Fifth Circuit, the parties themselves may affirmatively waive the right to remove by contract. *See* Dixon v. TSE Int'l, Inc., 330 F.3d 396, 398 (5th Cir. 2003) (contractual agreement to litigate disputes in "Courts of Texas" interpreted to mean state courts of Texas only, and thus defendant could not remove); Waters v. Browning-Ferris Indus., 252 F.3d 796, 797 (5th Cir. 2001) (upholding remand based on contractual forum selection clause giving plaintiff right to choose forum). Mere action in the state court will not "waive" the right to remove, however. *See* Tedford v. Warner-Lambert Co., 327 F.3d 423, 428 (5th Cir. 2003) (waiver of right to remove is not lost by active participation in state court proceedings short of seeking an adjudication on the merits).

165. 28 U.S.C. § 1446(b). *See S.W.S. Erectors,* 72 F.3d at 494; Burks v. Amerada Hess Corp., 8 F.3d 301, 305 (5th Cir. 1993), *overruled in part by Giles,* 172 F.3d at 338 ("notice of removal must be filed within thirty days of receipt of document from which it may first be ascertained removal jurisdiction exists").

apparent on the face of the initial petition that any claim is removable, the time period for filing a notice of removal will not begin to run until receipt of a "pleading, motion, order or other paper" from which removability can be ascertained.[166]

Significantly, a defendant need not be served with this "paper" to trigger the thirty-day removal period. Once the defendant is properly served with the initial complaint, receipt thereafter by any means of the "other paper," including an amended complaint, suffices to trigger the removal period.

Most courts hold that removability must be discovered from a "paper." That is, changes in the law,[167] verbal communications[168] from opposing counsel and the like do not trigger the removal time delay.[169] The Fifth Circuit has held, moreover, that the "other paper" must somehow come about through a voluntary act of the plaintiff. Thus, while an affidavit of defense counsel attesting to the presence of a removable claim is not an "other paper" that will trigger the thirty-day delay period, a post-complaint settlement letter from the plaintiff[170] or a transcript of the plaintiff's deposition testimony, for instance, will be sufficient to start the delay.[171]

Finally, both in diversity and federal question settings, uncertainties about whether a removable claim exists may or may not render the complaint's removability uncertain. Some courts hold that for diversity purposes, a defendant is accountable not only for its own state of citizenship, but also for the state of citizenship of the plaintiff.[172] Moreover, with regard to the amount in controversy, interrogatories, requests for admission, and other discovery devices may be used

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166. 28 U.S.C. § 1446(b).

167. *See, e.g.*, Phillips v. Allstate Ins. Co, 702 F. Supp. 1466, 1468-69 (C.D. Ca. 1989) (new Act of Congress permitting removal is not a "paper" triggering thirty-day delay); *S.W.S. Erectors*, 72 F.3d at 494. *But see* Green v. R.J. Reynolds Tobacco Co., 274 F.3d 263, 266-68 (5th Cir. 2001) (recognizing narrow exception to this rule when decision in an unrelated case involving the same defendants and the same factual circumstances is determinative of the issue of removal).

168. *See, e.g.*, Chapman v. Powermatic, Inc., 969 F.2d 160, 163 (5th Cir. 1992) (delay runs only from receipt of a "paper which affirmatively reveals on its face" the presence of a removable claim); *see also* Leffall v. Dallas Indep. Sch. Dist., 28 F.3d 521, 525 (5th Cir. 1994) (same). *But see* Mielke v. Allstate Ins. Co., 472 F. Supp. 851, 853 (E.D. Mich. 1979) (mere knowledge that removable claim exists is sufficient).

169. However, at least one court has held that deposition testimony alone triggers the removal period, explaining it could see no difference between deposition testimony and a deposition transcript. *See* Poole v. W. Gas Res., 1997 WL 722958, at *2 (E.D. La Nov. 18, 1997).

170. Addo v. Globe Life & Accident Ins. Co., 230 F.3d 759, 762 (5th Cir. 2000) (defendant's removal untimely when noticed more than thirty days after receipt of settlement letter wherein plaintiff rejected defendant's offer to settle for the policy limits of $5,000 and countered with an offer of $250,000, an amount in excess of the jurisdictional requirement).

171. *S.W.S. Erectors*, 72 F.3d at 494 (deposition transcript deemed "other paper"); *see* Morrison v. Nat'l Benefit Life Ins. Co., 889 F. Supp. 945, 948 (S.D. Miss. 1995) (motion for leave to amend petition to allege amount in controversy greater than $75,000 deemed "other paper" triggering delay); Johnson v. Dillard Dep't Stores, Inc., 836 F. Supp. 390, 391 (N.D. Tex. 1993) (plaintiff's answers to requests for admission deemed "other paper"). *See generally* Bosky v. Kroger Tex., 288 F.3d 208 (5th Cir. 2002), which offers a thoughtful opinion as to what triggers the thirty-day removal rule here as opposed to removal based on the initial complaint.

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

to ferret out the true value of the plaintiff's claim. Finally, with regard to federal question jurisdiction, the federal nature of the claim generally must be ascertainable from the face of the plaintiff's complaint. Thus, if the claim is uncertain, the right to remove the action is usually triggered only once the defendant receives clear and unequivocal notice that the action is, in fact, based on a federal claim.[173] It must also be remembered that removal jurisdiction is tested, in the case of diversity jurisdiction, both at the time the complaint and the time the removal petition are filed, and in the case of federal question jurisdiction, only at the time the removal petition is filed. Thus, post-removal amendments to create or destroy removal jurisdiction generally will have no effect on removability.[174]

2. Cases That Become Removable After Filing

Section 1446(b) provides the only statutory way that later actions taken by the plaintiff may affect removability. Even if the initial petition was unremovable, it may become removable upon the filing of "an amended pleading, motion, order, or other paper."[175] As noted by the Fifth Circuit in *S.W.S. Erectors, Inc.*, this new removability must result from a voluntary act of the plaintiff.[176] This rule reflects the general rule that the plaintiff is the master of its complaint. For example, if a plaintiff chooses to voluntarily dismiss a nondiverse defendant, or to settle with such a defendant, then removal jurisdiction would exist and the thirty-day delay for removing would begin.[177] Similarly, a plaintiff's amendment to a petition alleging only state law claims to add federal law claims would trigger the thirty-day delay for removal jurisdiction.[178]

This rule allowing new-found removability is subject to one important exception, however: "a case may not be removed on the basis of [diversity] jurisdiction . . . more than 1 year after commencement of the action."[179] The

173. *See, e.g.*, *Bosky*, 288 F.3d at 210-12; Akin v. Big Three Indus., Inc., 851 F. Supp. 819, 825 (E.D. Tex. 1994); Brooks v. Solomon Co., 542 F. Supp. 1229, 1230 (N.D. Ala. 1982) (federal question became apparent upon taking of plaintiff's deposition). *But see* Sandy Creek Investors, Ltd. v. City of Jonestown, 325 F.3d 623, 626 (5th Cir. 2003) (removal based on federal question was premature because federal question was not yet ripe for review).

174. Allen v. R & H Oil & Gas Co., 63 F.3d 1326, 1336 (5th Cir. 1995) ("Once the district court found that it had jurisdiction, the jurisdiction is deemed to have vested in the court at the time of removal."). Thus, a court has discretion to retain jurisdiction over state court claims pursuant to supplemental jurisdiction, even if the claims over which it had subject matter jurisdiction have dropped out. Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 350 n.7 (1988). Similarly, a post-removal reduction of the amount in controversy in a diversity case will not affect federal court jurisdiction. St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 289-90 (1938). An exception to the rule of continuing jurisdiction exists, however, when the court is forced to add a nondiverse indispensable party to the case. There, diversity jurisdiction is destroyed and the court must remand the action back to state court. *Bankston*, 27 F.3d at 167-68. *See* 28 U.S.C. § 1447(e) (stating request for leave to join nondiverse but dispensable party subject to court's discretion; if granted the case must be remanded).

175. 28 U.S.C. § 1446(b).

176. *S.W.S. Erectors, Inc.*, 72 F.3d at 494; Self v. Gen. Motors Corp., 588 F.2d 655, 658 (9th Cir. 1978).

177. Higgins v. E.I. DuPont de Nemours & Co., 863 F.2d 1162, 1166 (4th Cir. 1988); *see* Canova v. C.R.C., Inc., 602 F. Supp. 817 (M.D. La. 1985) (stating unremovable case did not become removable based on court's dismissal of nondiverse defendant).

178. *See, e.g.*, Burks v. Amerada Hess Corp., 8 F.3d 301, 306 (5th Cir. 1993), *overruled in part by Giles*, 172 F.3d at 338 (amendment to add ERISA claim).

179. 28 U.S.C. § 1446(b).

clear wording of the statute provides that the one-year limit begins to tick with the filing of the lawsuit, as opposed to service, receipt or otherwise. Although, as discussed by commentators,[180] this rule is subject to manipulation and abuse, some courts have held that it is nonetheless mandatory in nature. Though tempted to do so, these courts have refused to carve out equitable exceptions to the one-year bar on removability in diversity cases, deeming the policy concerns[181] undergirding that rule to be weightier than the unfairness attendant to particular defendants in particular cases.[182]

Some courts have found exceptions to the strict one-year rule, however. By its terms, the one-year rule applies to actions that become removable after the initial complaint is filed.[183] Thus, if a defendant who was served after the one-year period removes based on the original complaint, the removal presumably is permissible.[184] Other courts, including the Fifth Circuit,[185] have recognized equitable exceptions, at least where they perceive purposeful manipulation and abuse by the plaintiff.[186] Moreover, because the one-year time limitation, like the thirty-day delay, is merely "procedural" in nature, failure to timely challenge a delinquent removal will result in the waiver of that rule.[187] Thus, although courts generally will not curb purposeful manipulation of the rule by the plaintiff, they will grant the defendant some much-needed reprieve when the plaintiff fails to move timely to remand the untimely-filed removal petition.[188]

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180. *See, e.g.*, Polozola, *supra* note 42, at 1421 ("By delaying service . . . for over a year, plaintiffs [can] ensure[] that [their] action [can] not be timely removed . . . to a federal forum.").

181. Congress inserted the one-year limitation to prevent removal of cases after they have progressed substantially in state court. H.R. REP. NO. 100-889 at 71-73 (1998), *reprinted in*, 1988, U.S.C.C.A.N. 5982, 6031-33. Indeed, by its 1988 Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, 102 Stat. 4642, Congress imposed three new technical requirements designed to curtail diversity jurisdiction: (1) it raised the jurisdictional amount from $50,000 to $75,000; (2) it eliminated alienage jurisdiction in cases involving permanent resident aliens; and (3) it placed a one-year limit on removing diversity cases.

182. *See, e.g.*, Martine v. Nat'l Tea Co., 841 F. Supp. 1421, 1422 (M.D. La. 1993) (although the court noted that the case in *Martine* has not progressed substantially in state court, it nonetheless found that "it is for the Congress and not this Court to rewrite the provisions of section 1446(b) to curb such abuses."); *see also* Hedges v. Hedges Gauging Serv., Inc., 837 F. Supp. 753, 755 (M.D. La. 1993).

183. N. Y. Life Ins. Co. v. Deshotel, 142 F.3d 873, 866 (5th Cir. 1998); Brierly v. Alusuisse Flexible Packaging, Inc., 184 F.3d 527, 535 (6th Cir. 1999); Ritchey v. Upjohn Drug Co., 139 F.3d 1313, 1316-18 (9th Cir. 1998), *cert. denied*, 525 U.S. 963 (1998).

184. Breese v. Hadson Petroleum, Inc., 947 F. Supp. 242, 24 (M.D. La. 1996).

185. *See* Tedford v. Warner-Lambert Co., 327 F.3d 423, 428-29 (5th Cir. 2003) (plaintiff's manipulation to prevent diversity from arising until 366 days had run warranted application of equitable exception allowing diligent defendant to remove).

186. *See, e.g.*, Saunders v. Wire Rope Corp., 777 F. Supp. 1281 (E.D. Va. 1991); Greer v. Skilcraft, 704 F. Supp. 1570, 1583 (N.D. Ala. 1989).

187. *In re* Uniroyal Goodrich Tire Co., 104 F.3d 322, 324 (11th Cir. 1997); Maniar v. FDIC, 979 F.2d 782, 784-85 (9th Cir. 1992); Barnes v. Westinghouse Elec. Corp., 962 F.2d 513, 516 (5th Cir.1992).

188. It must be remembered that the one year maximum time limit for removability only applies to cases falling within § 1446(b)—i.e., those that are "not initially removable." Piercing a plaintiff's pleadings to ignore those defendants fraudulently joined does not constitute a case "not initially removable" under § 1446(b), and therefore, suit was not subject to the one year time limit for removability. *See, e.g.*, Badon v. RJR Nabisco Inc., 224 F.3d 382, 389-90 (5th Cir. 2000) (allowing removal four years after case was filed).

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

We now come to the mechanics of removing a case from state to federal court. In a nutshell, the defendant must file a "notice of removal" with the appropriate federal court within thirty days of service of the complaint containing the removable claim. If the case involves multiple defendants, all defendants served in the state action must join in the notice of removal.[189] If the ground for removal is diversity, the defendants must file the notice of removal within one year of commencement of the action. The notice of removal, which must be signed in accordance with Rule 11,[190] should contain a short and plain statement of the grounds justifying the removal and should append a copy of all processes, pleadings, and orders served upon the removing defendants while in state court.[191]

The defendants also must file a copy of the removal papers with the state court and must give prompt notice of the removal to all adverse parties. Upon the filing of the copies with the state court, removal is complete, and the state court may no longer proceed.[192] This is true even if removal is improper as, until the case is remanded to state court, the state court is ousted of jurisdiction.[193] If the state court persists in hearing the case, it can be enjoined from doing so by the federal court.[194]

The content of the removal notice depends upon the grounds for removal as well as local rules. Many courts require by local rule that the removing party include such things as a civil cover sheet, a notice of related cases, and specific jurisdictional allegations.[195] In federal question cases, the notice of removal need only allege that removal is based on a claim "arising under" federal law, and state the federal statutory basis for that claim. If the federal claim is not obvious from the face of the plaintiff's complaint, the allegation should also explain why federal law applies. The notice of removal in diversity cases should include a statement of each party's citizenship, both at the time of the action's filing and the time of the removal, and should state that the amount in controversy exceeds $75,000, exclusive of interest and costs.[196] It should then declare that federal jurisdiction rests on diversity of citizenship and that all plaintiffs and defendants are diverse. Finally, in cases where federal jurisdiction is conferred by special statute, the removing party should allege this and should cite to the appropriate federal statute. In all instances of removal, despite the jurisdictional basis, the

189. *See supra* text and accompanying notes at pp. 99-101.

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

191. 28 U.S.C. § 1446(a) and (b).

192. *Id.* § 1446(d).

193. Murray v. Ford Motor Co., 770 F.2d 461, 463 (5th Cir. 1985); *see also* E.D. Sys. Corp. v. Southwestern Bell Tel. Co., 674 F.2d 453, 457-58 n.2 (5th Cir. 1982) (the propriety of the removal is for the federal court to decide.).

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

195. *SCHWARZER, supra* note 9.

196. Gaitor v. Peninsular & Occidental S.S. Co., 287 F.2d 252, 254 (5th Cir. 1961). If a party has more than one state of citizenship, as may be the case with a corporation, then each state of citizenship should be listed.

notice of removal should state that all defendants join in the notice of removal.[197] Although the notice of removal need only be signed by one defendant, the defendants who do not sign should submit a written notice of joinder.[198]

The notices to adverse parties and the state court are relatively simple. First, both notices must be in writing.[199] Second, the notice to adverse parties should inform them that the case has been removed and should explain why. Technically, it is not sufficient simply to serve the adverse parties with a copy of the federal notice of removal. A copy of the federal court notice, as well as the state court notice should be appended to the notice served on adverse parties. Finally, the state court notice should inform the state court of the removal and should include, in addition to a copy of the federal removal papers, a copy of the notice served on the adverse parties.[200] Once these steps are taken, removal to federal court is complete.

Title 28 U.S.C. §§ 1447 and 1448 govern federal court procedure once a case has been removed to federal court. Initially, "the federal court takes the case as it finds it," recognizing all state court orders, discovery rulings, motions for extensions and the like.[201] Upon removal, however, federal procedural rules begin to govern.[202] Thus, if a defendant has not yet answered,[203] its answer must be filed "within 20 days after the service of summons . . . or within 5 days after the filing of the petition for removal, whichever period is longest."[204] Its answer must also conform to the strictures of the Federal Rules of Civil Procedure. Further, the mere fact that a defendant has removed a case does not preclude it from making jurisdictional challenges. The defendant may still invoke Federal Rule of Civil Procedure 12 to challenge service of process[205] or personal jurisdiction, provided it did not waive these challenges in state court prior to removal.[206] Finally, the issue of jury demand can be tricky once removal has occurred. If a jury was demanded in state court prior to removal, the demand need not be renewed.[207] But, if a jury was not demanded, a formal jury demand must be filed in accordance with Federal Rule of Civil Procedure 38. The timing of the demand

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

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

199. 28 U.S.C. § 1446(d).

200. *Id.*

201. *In re* Meyerland Co., 910 F.2d 1257, 1262 (5th Cir. 1990).

202. *See* FED. R. CIV. P. 81(c) ("These rules apply to civil actions removed . . . and govern procedures after removal."); Willy v. Coastal Corp., 503 U.S. 131, 134-35 (1992).

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

204. *Id.*

205. Because the service probably will have occurred while the parties were still in state court, the validity of that service will be judged according to the state's standards. Allen v. Ferguson, 791 F.2d 611, 616 n.8 (7th Cir. 1986). Service after removal is governed by federal standards. 28 U.S.C. § 1448 (if defendant is not served or is improperly served before removal, new service or proper service should follow federal mandates).

206. A defendant may have waived these challenges in state court by, for example, making a general appearance or answering prior to removal. *See, e.g.*, Nationwide Eng'g & Control Sys. Inc. v. Thomas, 837 F.2d 345, 347 (8th Cir. 1988).

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

depends upon the status of the case at the time the case was removed:

> (1) If no answer was filed in state court prior to removal, either party may make formal demand for a jury no later than 10 days after service of the last pleading directed to a jury-triable issue.[208]
> (2) If an answer was filed prior to removal:
> (a) The defendant must file its jury demand within 10 days after filing its notice of the removal, and
> (b) The plaintiff must file its jury demand within 10 days after service of the notice of removal.[209]

Failure to file a timely jury demand constitutes a waiver of the right to trial by jury.[210]

III. THE WAY OF REMAND BACK TO STATE COURT

A. Plantiff's Motion to Remand

The plaintiff[211] may determine that removal was improper and move to remand back to state court. Title 28 U.S.C. § 1447(c) governs remand:

> A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

"In substance, the section differentiates between removals that are defective because of lack of subject-matter jurisdiction and removals that are defective for some other reason, e.g., because the removal took place after relevant time limits had expired."[212] If the removal is not based on subject-matter jurisdiction, "there must be a motion to remand filed no later than 30 days after the filing of the removal notice."[213]

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208. *Id.* 38(b).
209. *Id.* 81(c).
210. *Id.*; *but see* Farias v. Bexar County Bd. of Trs., 925 F.2d 866 (5th Cir. 1991) (court has discretion to grant relief from waiver).
211. Normally the plaintiff will be the party seeking remand. However, any party—even the removing defendant—may request remand if subject matter jurisdiction is lacking. *See generally* Am. Fire & Cas. Co. v. Finn, 341 U.S. 6 (1951). Moreover, a defendant who did not join in the notice of removal may move for remand on any ground, procedural or jurisdictional. *See* Getty Oil Corp. v. Ins. Co. of N. Am., 841 F.2d 1254, 1263 (5th Cir. 1988).
212. Wis. Dept. of Corr. v. Schacht, 524 U.S. 381, 392 (1998).
213. *Id.*

If the removal defect is based on lack of subject matter jurisdiction, any party may move at any time to have the case remanded, and the federal court may even act sua sponte to remand the case.[214] Jurisdictional defects include lack of diverse citizenship[215] and lack of a federal question.[216] By contrast, other defects include the tardy filing of the notice of removal,[217] defects in the form or content of the removal notice,[218] failure to give notice to the adverse parties or the state court,[219] violation of the "no-local-defendants" rule,[220] failure to join all necessary defendants,[221] removal of cases that are statutorily unremovable,[222] and failure to file a notice of removal within one year of commencement of a diversity action.[223]

The Fifth Circuit has held that the thirty-day period of filing for "other" defects may not be extended, not even by Federal Rule 6(e) which provides an additional three days in which to act following service of a pleading by mail.[224] This is logical, as the thirty-day delay does not run from service, but from filing.[225] This rule is also consistent with the rule requiring defendants to file their notice of removal within thirty days since that rule cannot be extended by Rule 6(e) either.

B. Court Ruling on the Motion to Remand

Section 1447(c) states that the courts "shall" remand cases that are improperly removed from state to federal court. Federal courts also have the discretion to remand cases in certain instances. If removal was based on federal question jurisdiction, and the federal question subsequently drops out, the court may choose to retain the supplemental state law claims, dismiss them, or remand them to state court.[226] Similarly, if the case contains "separate and independent"

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214. *Id.* ("remand may take place without such a motion and at any time" if it concerns subject-matter jurisdiction). *See also* Giles v. NYLCare Health Plans, Inc., 172 F.3d 332, 336 (5th Cir. 1999). Subject matter jurisdiction cannot be agreed upon or waived by the parties. *See* Coury v. Prot, 85 F.3d 244, 248 (5th Cir. 1996); IMFC Prof'l Servs. v. Latin Am. Home Health, Inc., 676 F.2d 152, 156 (5th Cir. 1982).

215. See Ragas v. Tenn. Gas Pipeline, Co., 136 F.3d 455, 456-57 (5th Cir. 1998); *Coury*, 85 F.3d at 252; Horton v. Scripto-Tokai Corp., 878 F. Supp. 902, 905 (S.D. Miss. 1995); Metroplex Infusion Care, Inc. v. Lone Star Container Corp., 855 F. Supp. 897, 899 (N.D. Tex. 1994).

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

217. *See, e.g.*, Wilson v. Gen. Motors Corp., 888 F.2d 779, 781 n.1 (11th Cir. 1989).

218. *See, e.g., In re* Allstate Ins. Co., 8 F.3d 219 (5th Cir. 1993); Harper v. Nat'l Flood Insurers Ass'n, 494 F. Supp. 234, 236 (M.D. Pa. 1980).

219. *See, e.g.*, Dukes v. S.C. Ins. Co., 770 F.2d 545, 547 (5th Cir. 1985).

220. *See, e.g.*, Denman *ex. rel* Denman v. Snapper Div., 131 F.3d 546, 548 (5th Cir. 1998); *Coury*, 85 F.3d at 252; *In re* Shell Oil Co., 932 F.2d 1518, 1522 (5th Cir. 1991).

221. *See, e.g.*, Roe v. O'Donohue, 38 F.3d 298, 302 (7th Cir. 1994); Fontenot v. Global Marine, Inc., 703 F.2d 867, 871 (5th Cir. 1983).

222. *See, e.g.*, Alberado v. S. Pac. Transp. Co., 199 F.3d 762, 764 (5th Cir. 1999) (removal of FELA claim which is prohibited from removal constituted defect in removal procedure); Sherrod v. Am. Airlines, Inc., 132 F.3d 1112, 1117 (5th Cir. 1998) (removal of state workers compensation claim is a procedural defect); Patin v. Allied Signal, Inc., 77 F.3d 782, 786 (5th Cir. 1996); Baris v. Sulpicio Lines, Inc., 932 F.2d 1540, 1544-45 (5th Cir. 1991).

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

224. Pavone v. Miss. Riverboat Amusement Corp., 52 F.3d 560, 566-67 (5th Cir. 1995).

225. *Id.* at 566.

226. Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343 (1988); Guzzino v. Felterman, 191 F.3d 588 (5th Cir. 1999); *Bogle*, 24 F.3d at 758.

claims, some of which are based on federal question jurisdiction and others of which are unremovable, the court has the discretion to retain the entire case or to remand the "separate and independent" claims if they are governed predominantly by state law.[227] Finally, in the diversity context, the federal district court has the discretion to allow the joinder of a nondiverse, dispensable party and to remand the case to state court, or to deny the request for the joinder and to retain the case in federal court.[228]

Once the federal court remands the case to state court, however, it is divested of jurisdiction. A remand order is final once a certified copy of the order is forwarded to the clerk of the state court.[229] This creates a curious anomaly in that, if the order is not forwarded, the parties may believe that federal jurisdiction has been divested, while the federal court, in reality, still has jurisdiction. Thus, the astute practitioner desiring reconsideration of the remand order will check to see whether the certified copy has been sent and, if not, file a motion for reconsideration promptly. If the certified copy has been sent, however, reconsideration of the remand order may not be granted.[230] Further, it should be noted that a remand based on lack of subject matter jurisdiction signifies that the federal court never had jurisdiction, and thus any orders, judgments, or action taken on the merits by the court prior to remand are null and void.[231]

IV. APPELLATE OVERVIEW OF EXCURSIONS BETWEEN THE COURTS

The ability to file for reconsideration is important because appellate review of orders denying or granting remand is limited. Orders denying remand are interlocutory in nature, and thus generally are not reviewable except as part of an appeal from final judgment.[232] Immediate appellate review may be sought only as part of an appeal from another appealable order or by writ of mandamus.

The former might occur, for instance, in conjunction with immediate review of the grant or denial of an injunction.[233] The latter, however, will rarely occur. Writs of mandamus are reserved for "extreme situations" and are rarely granted

227. 28 U.S.C. § 1441(c); *see also supra* text and accompanying notes 179-196.

228. 28 U.S.C. § 1447(e).

229. Trans Penn Wax Corp. v. McCandless, 50 F.3d 217, 225 (3d Cir. 1995); Seedman v. United States Dist. Court, 837 F.2d 413 (9th Cir. 1988); Browning v. Navarro, 743 F.2d 1069, 1078 (5th Cir. 1984); *see also* La. v. Sprint Communications Co., 899 F. Supp. 282, 284 (M.D. La. 1995) (when mailing of certified copy "slips through the cracks," court retains jurisdiction to reconsider remand ruling).

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

231. Heaton v. Monogram Credit Card Bank, 231 F.3d 994, 1000 (5th Cir. 2000).

232. *See* Cervantez v. Bexar County Civil Serv. Comm'n, 99 F.3d 730, 732 (5th Cir. 1996) (reviewing denial of remand as part of review of final judgment). *But see* Badon v. R J R Nabisco, Inc., 224 F.3d 382, 383 (5th Cir. 2000) (court granted interlocutory appeal on issue of denial of plaintiff's motion to remand only).

233. *See, e.g.*, Spring Garden Assocs. v. Resolution Trust Corp., 26 F.3d 412, 414 (3d Cir. 1994); Jones v. Newton, 775 F.2d 1316 (5th Cir. 1985).

by the courts.[234] A party desiring review of remand denials may request certification of the ruling for interlocutory review of course, but, even then, review rests in the discretion of the appellate court.[235]

Section 1447(d) states the general rule that an order *granting* remand "is not reviewable on appeal or otherwise."[236] This is true even if the remand order was obviously erroneous.[237] Goals of judicial economy and expediency undergird this congressional mandate.[238]

Nonetheless, the Supreme Court has recognized several exceptions to the rule against appellate review. First, the Supreme Court in *Thermtron*[239] limited the ban to remands based on the two grounds enumerated in § 1447(c): (1) timely-raised procedural error;[240] or (2) any jurisdictional error.[241] If the remand was not based on one of these enumerated grounds, the appellate court may review the propriety of the order.[242] Such reviewable remands "constitute a narrow class of cases," however, and will be reviewed only if the district court "clearly and affirmatively" relied on a non-§ 1447(c) basis.[243]

This highlights the importance of the district court's articulated reason for the remand: if the district court's reason is one of the two enumerated grounds,

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234. *See* Rohrer Hibler & Replogle, Inc. v. Perkins, 728 F.2d 860, 863 (7th Cir. 1984); *but see In re Excel Corp.*, 106 F.3d at 1201 (granting writ of mandamus to review remand order because it was entered on grounds "not authorized by 1447(c)"); *In re* Allstate Ins. Co., 8 F.3d 219, 221 (5th Cir. 1993) (noting mandamus should be granted if remand was granted on ground not permitted under § 1446(c)).

235. In fact, the party would be wise to request certification to obtain review as expediently as possible. Courts have upheld final judgments, despite erroneous denials of motions to remand, provided subject matter jurisdiction existed over the case at the time of trial. *See, e.g.*, Grubbs v. Gen. Elec. Credit Corp., 405 U.S. 699 (1972); Harris v. Provident Life & Accident Ins. Co., 26 F.3d 930 (9th Cir. 1994); O'Halloran v. Univ. of Wash., 856 F.2d 1375 (9th Cir. 1988); Gould v. Mut. Life Ins. Co., 790 F.2d 769 (9th Cir. 1986); Hartford Accident & Indem. v. Costa Lines Cargo Serv., 903 F.2d 352 (5th Cir. 1990). The request for certification presumably would preserve defects in removal procedure for appellate review. *See, e.g.*, Nishimoto v. Federman-Bachrach Assocs., 903 F.2d 709, 713 (9th Cir. 1990); *but see* Kruse v. State of Haw., 68 F.3d 331, 333 (9th Cir. 1995) (*Grubbs* rule is limited to decisions on the merits; if court otherwise disposes of case, procedural defects may be reviewed). *See also* 28 U.S.C. § 1292(b). *See, e.g.*, Ross v. Citifinancial, Inc., 344 F.3d 458 (5th Cir. 2003); Grant v. Chevron Phillips Chem. Co., 309 F.3d 864 (5th Cir. 2002).

236. 28 U.S.C. § 1447(d). *See also* Doleac *ex rel.* Doleac v. Michalson, 264 F.3d 470, 477-78 (5th Cir. 2001); Arnold v. State Farm Fire & Cas. Co., 277 F.3d 772, 777 (5th Cir. 2001).

237. Heaton, 231 F.3d at 997; Tillman v. C.S.X. Transp., Inc., 929 F.2d 1023, 1028-29 (5th Cir. 1991).

238. New v. Sports & Recreation, Inc., 114 F.3d 1092, 1095-96 (11th Cir. 1997).

239. Thermtron Prods., Inc. v. Hermansdorfer, 423 U.S. 336 (1976), *abrogated* by Quackenbush v. Allstate Ins. Co., 517 U.S. 706 (1996).

240. *In re* Shell Oil Co., 932 F.2d 1518, 1522-23 (5th Cir. 1991) (granting motion to remand based on alleged procedural defect which motion was filed after the thirty-day period for filing a remand motion was not within scope of § 1447(c), and was reviewable).

241. *See* Things Remembered, Inc. v. Petrarca, 516 U.S. 124, 128-29 (1995) (untimely removal notice unreviewable); Bogle v. Phillips Petroleum Co., 24 F.3d 758, 762 (5th Cir. 1994) (erroneous finding of no preemption unreviewable).

242. *Thermtron Prods. Inc.*, 423 U.S. at 352. However, one important statutory exception to the prohibition against appellate review of remand orders based on subject matter jurisdiction or procedural defects should be noted: 12 U.S.C. § 1819(b)(2)(c) confers upon the FDIC the right to appeal "any order of remand," even if based on lack of subject matter jurisdiction. The practitioner involved in a case with the FDIC should note this powerful tool. *See Heaton*, 297 F.3d at 425.

243. *Heaton*, 231 F.3d at 997.

its order will not be subject to appellate review.[244] In *Thermtron,* the district court's remand because its docket was too crowded was reviewable by the appellate court because this was not an enumerated ground, whereas a remand for lack of jurisdiction or a timely-raised procedural defect would not have been reviewable.[245]

Second, the Court has stated that, in certain instances, orders granting remand may be reviewed either because they effectively constitute a "final" decision or qualify for review under the collateral order doctrine. In *Quackenbush,*[246] the Court upheld appellate review of an absention-based remand order because the stated ground was not one of those enumerated in § 1147(d) *and* because the order was directly appealable. Basing its analysis on prior Supreme Court precedent,[247] the Court held that the remand order was a "final" decision that effectively put the litigants out of federal court and surrendered federal jurisdiction to a state court.[248] Alternatively, it could also be reviewed under the collateral order doctrine because it conclusively determined an issue separate from the merits which was effectively unreviewable on appeal from a final judgment, namely whether the federal court should decline to exercise jurisdiction in the interest of comity and federalism.[249] Acknowledging that this situation did not meet the traditional definition for "finality," the Court nonetheless found it sufficient to permit collateral appellate review.[250]

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244. *See Things Remembered Inc.*, 516 U.S. at 127 (so long as court articulates lack of subject matter jurisdiction or a timely raised defect in the removal procedure as its reason for granting remand, the order will be unreviewable); *see* Arnold v. Garlock, Inc., 278 F.3d 426, 437 (5th Cir. 2001) (remand based on lack of subject matter jurisdiction unreviewable); Arnold v. State Farm, 277 F.3d 772, 775 (5th Cir. 2001) (same). *But see In re* Digicon Marine, Inc., 966 F.2d 158, 160 (5th Cir. 1992); *and* McDermott Int'l, Inc. v. Lloyds Underwriters of London, 944 F.2d 1199, 1201 (5th Cir. 1991), (both suggesting that court should look beyond articulated reason to the real reason for the court's remand order).

245. *See also* Webb v. B.C. Rogers Poultry Inc., 174 F.3d 697, 700 (5th Cir. 1999), *cert. denied*, 528 U.S. 964 (1999) (review based on Buford Abstention Doctrine); *In Re* Excel Corp., 106 F.3d 1197, 1200 (5th Cir. 1997) (remand based on § 1445(c) regarding workers' compensation reviewable on appeal); *In re* Int'l Paper Co., 961 F.2d 558, 561 (5th Cir. 1992) (remand "in the spirit of federalism"); Clorox Co. v. U.S. Dist. Ct. for N.D. Cali., 779 F.2d 517 (9th Cir. 1985) (remand based on waiver of removal right); Pelleport Investors, Inc. v. Budco Quality Theatres, Inc., 741 F.2d 273, 276-77 (9th Cir. 1984) (remand based on forum selection clause).

246. Quackenbush v. Allstate Ins. Co., 517 U.S. 706 (1996).

247. *See* Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp., 460 U.S.1 (1983); *McDermott*, 944 F.2d at 1203-04 (suggesting *Cone* opened door to collateral review of remand orders).

248. *Quackenbush*, 517 U.S. at 712-13 (quoting *Moses, Cone*).

249. *Id.* at 712-15 (order appealable under collateral order doctrine because it "conclusively determine[d] a disputed question that [was] completely separate from the merits of the action, effectively unreviewable on appeal from a final judgment and too important to be denied review") (internal quotes and citation omitted).

250. *See also* Walters v. Browning-Ferris Indus., 252 F.3d 796, 797 (5th Cir. 2001) (remand under forum selection clause outside 1447(c) and reviewable); *Eastus*, 97 F.3d at 103-04 (order finding FMLA claim removable, but remanding state law claims); *Loftin*, 767 F.2d at 803 (order vacating state court judgment and remanding claims to state court); *In re* Bobroff, 766 F.2d 797, 800 (3d Cir. 1985) (order denying summary judgment to defendant in bankruptcy debtor's tort action and remanding to state court); *Pelleport Investors, Inc.*, 741 F.2d at 276-77 (remand order based on forum selection agreement); *see also* Bennett v. Liberty Nat'l Fire Ins. Co., 968 F.2d 969 (9th Cir. 1992) (order upholding arbitration agreement but remanding action to state court). *But see* Munich Am. Reinsurance Co. v. Crawford, 141 F.3d 585, 594 n.6 (5th Cir. 1998) (declining to follow *Bennett*); *Doleac ex. rel. Doleac*, 264 F.3d at 478-91 (collateral order doctrine does not create exception to allowing review of order granting amendment to add diversity-destroying defendant, leading to a remand order).

In *City of Waco v. United States Fidelity & Guaranty Company*,[251] the Court recognized a similar exception to the nonreviewability of remand orders. If, prior to entering the remand order, the district court enters another order that is separate[252] from the remand order, precedes it in logic and in fact, and is conclusive in nature,[253] the appellate court may exercise jurisdiction.[254] As in *Quackenbush*, such an order is effectively "unreviewable in state court."[255] If satisfied, however, the exception also allows appellate courts to review district court orders that lead to and logically precede the remand order.[256]

Finally, in the case of a district court's discretionary remand of state law claims, as opposed to a remand for lack of jurisdiction or a procedural defect, the appellate court may exercise jurisdiction.[257] In such a case, remand is based on the court's discretionary power, not the procedural or jurisdictional defects of § 1447(c).[258] Thus, orders granting remand may be reviewed in conjunction with discretionary remand decisions which include, for instance, the dismissal of federal claims and remand of the remaining nonfederal ones to state court under 28 U.S.C. § 1367(c) or § 1441(c).[259] The astute practitioner will take note of all of these various avenues for seeking possible appellate review in the removal and remand context.

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251. 293 U.S. 140 (1934).

252. An order is "separable if it precludes the remand in logic and in fact and is conclusive." Morris v. T.E. Marine Corp, 344 F.3d 439, 445 (5th Cir. 2003).

253. An order is "conclusive" if it "will have the preclusive effect of being functionally unreviewable in state court." *Id.*

254. *City of Waco*, 293 U.S. at 143.

255. *Morris*, 344 F.3d at 445. For a cogent opinion outlining analysis under *Waco* and *Quackenbush*, see Arnold v. State Farm, 277 F.3d 772 (5th Cir. 2001). Indeed, in the Fifth Circuit, the order must qualify for review under collateral order doctrine analysis. *Id.* at 776-77.

256. *See Morris*, 344 F.3d at 445 (finding appellate jurisdiction, the court said it "may review any aspect of a judgment containing a remand order that is distinct and separable from the remand proper"); *see, e.g.*, Beauclerc Lakes Condo. Ass'n v. City of Jacksonville, 115 F.3d 934, 935 (11th Cir. 1997) (reviewing dismissal of federal claim that led to remand); McDermott Int'l, Inc. v. Lloyd's Underwriters of London, 944 F2d 1199 (5th Cir. 1991) (reviewing construction of arbitration clause that prec eded remand); Mitchell v. Carlson, 896 F.2d 128, 132-34 (5th Cir. 1990) (reviewing dismissal of U.S. as party that triggered remand to state court); Allen v. Ferguson, 791 F.2d 611, 613 (7th Cir. 1986) (order dismissing defendant resulting in remand); Kozera v. Spirito, 723 F.2d 1003, 1005 n.1 (1st Cir. 1983) (order dismissing party and remanding); Armstrong v. Ala. Power. Co., 667 F.2d 1385, 1387 (11th Cir. 1982) (dismissal of party triggering remand). *But see Doleac ex. rel.*, 264 F.3d at 478-89 (amendment to add nondiverse defendant and triggering remand was not reviewable as a separate order implicating the collateral order doctrine).

257. Roark v. Humana, Inc., 307 F.3d 298, 311 (5th Cir. 2002); Kennedy v. Tex. Utils., 179 F.3d 258, 26-65 (5th Cir. 1999).

258. Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343 (1988) (superseded by statute on other grounds); *see* Smith v. Tex. Children's Hosp., 84 F.3d 152, 154 (5th Cir. 1996) (discretionary remand pursuant to § 1367); *Bogle*, 24 F.3d 758 (same); *Eastus*, 97 F.3d at 103-04 (discretionary remand pursuant to § 1441(s)); *In re* Surinam Airways Holding Co., 974 F.2d 1255 (11th Cir. 1992) (same).

259. *See, e.g.*, Hinson v. Norwest Fin. S.C., Inc., 239 F.3d 611, 614-15 (4th Cir. 2001) (authority to review remand others based on inherent power to decide to exercise supplemental jurisdiction); Hudson United Bank v. LiTenda Mortg. Corp., 142 F.3d 151, 155 (3d Cir. 1998) (review of § 1367(c) discretionary remand). Similarly, supplemental jurisdiction allows the federal court to continue to hear the case even after the claims over which it had subject matter jurisdiction have dropped out. *Doddy*, 101 F.3d at 456. Once subject matter jurisdiction has attached, the court has the discretion to keep or remand the state law claims. *Id.; See also Smith*, 84 F.3d at 154.

V. CONCLUSION

In sum, many considerations enter into the removal and remand of cases between state and federal courts. Parties on the road to federal court must ensure that they abide by the minuscule rules governing the type of removal sought, the nature of the removal error, and the timing of their remand application. Parties desiring removal should similarly scrutinize the timing, grounds, and procedural steps of the removal. Even if a district court's decision to remand or not to remand a case is in error, the appellate court may lack jurisdiction to take corrective action. In this regard, a party's failure to follow the appropriate removal or remand procedures may have lasting effects. Because the rules of removal and remand dictate the very court that will hear a party's case, the party seeking removal or remand should double-check its actions when moving to remove or remand its case between the courts.