

In-House

DEFENSE QUARTERLY

DRI
THE NATIONAL DEFENSE INSTITUTE

For Today's

Corporate

Defense

Practitioner

Fall 2008

A Defendant's Guide through the Removal and Remand Maze

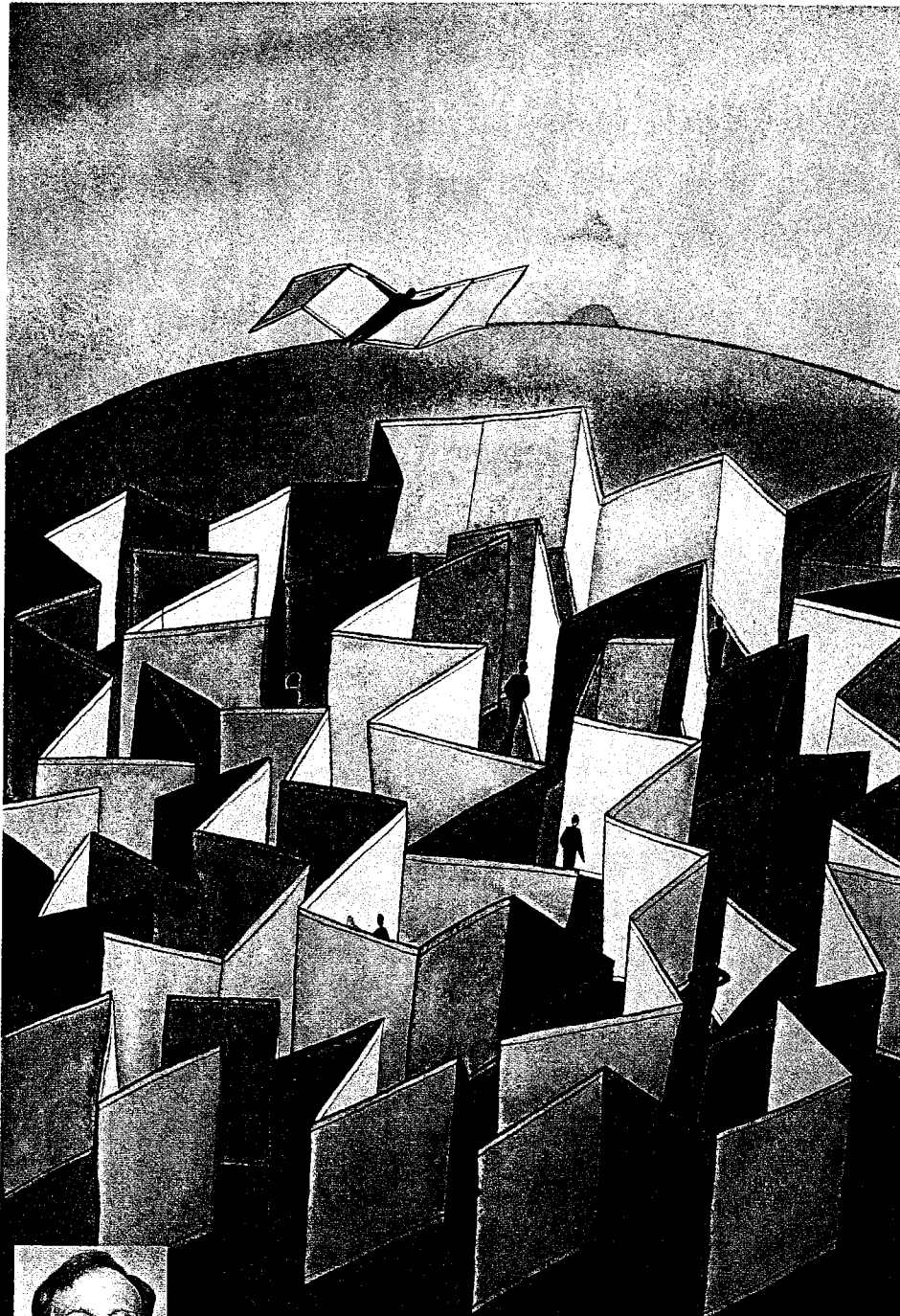
and
Managing Discovery Demands in Complex Litigation

ALSO IN THIS ISSUE:

- Risk Mitigation and Management
- Trucking Law: Health and Wellness Programs
- The In-House and Local Counsel Team Approach
- AND MORE

PSRT STD
US POSTAGE
PAID
ST JOSEPH, MI
PERMIT #335

A Defendant's Guide through the Removal and Remand Maze



The subjects of removal of an action commenced in a state court to a federal court and remand from the federal court

to the state court traverse a vastly uneven and challenging landscape. As one court stated, "...there is no other phase of American jurisprudence with so many refinements and subtleties..." *Hagerla v. Mississippi River Power Co.*, 202 F. 771, 773 (S.D. Iowa 1912). Moreover, removal has been described as the "most peculiar and difficult of the three" ways of invoking federal jurisdiction. The other two are filing a complaint in the federal court and seeking federal court review of a state court judgment. 16 *Moore's Federal Practice* §107.03 (3rd 2003) (*Moore*).

Removal and remand implicate issues of federal court subject matter jurisdiction (*i.e.*, 28 U.S.C. §§1331 and 1332), constitutional limits on the power of federal courts, statutory interpretation of the removal statutes, 28 U.S.C. §§1441-1447, and about a century of case law with a healthy number of conflicting decisions, *e.g.*, whether a defect in removal papers is jurisdictional, and thus nonwaivable, or procedural, and thus waivable, and whether the 28 U.S.C. §1446(b) one-year limit applies to cases originally removable, only those removable later, or both.

This article is but a "beginning" on the topics of removal and remand. It is geared particularly to assist in-house attorneys monitoring litigation in federal court.

Summary of Limits on Removal and Grounds for Remand

To decide whether a petition to remove should be filed, an attorney should determine the principal requirements for a proper removal. The requirements of a proper removal should be carefully exam-



■ George E. Lieberman is a partner with Vetter & White in Providence, Rhode Island. His practice focus is litigation of complex commercial disputes and significant personal injury/product liability matters. He is a member of DRI's Commercial Litigation and Trial Tactics Committees.

ined and observed to determine how to best ensure a removal petition will not be defeated. If one or more of the requirements cannot be met, and if jurisdictional in nature, or if procedural and *timely* challenged, and thus not waived, a remand motion will likely succeed.

The principal, but not exclusive, requirements are:

- Does original federal court subject matter jurisdiction apply?
- Will the case be removed from a proper tribunal?
- Is the removal motion timely? Will it be filed within 30 days?
- Does the one-year bar apply?
- Have all necessary parties been properly joined in the removal motion?
- Has compliance with statutory removal provisions been met?
- If not, is noncompliance a jurisdictional or procedural defect?
- If procedural, has a timely objection or remand motion been filed and served?

Presumption against Removal and Removal Statute Strict Construction

Initially, in considering whether to file a removal petition, defendant(s) should recall that the federal courts are strongly disinclined to welcome removal petitions with open arms. Although a federal court must accept a properly based and procedurally sound notice of removal, *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 351 (1976), there is a strong presumption against removal, *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992), and removal statutes are strictly construed. *Meritcare, Inc. v. St. Paul Mercury Ins. Co.*, 166 F.3d 214, 217-18 (3d Cir. 1999). Further, uncertainties are to be resolved in favor of remand, *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 10-11 (1983), *Burns v. Windsor Ins. Co.*, 31 F.3d 1092, 1095 (11th Cir. 1994), because federal courts are of limited jurisdiction and removal deprives a plaintiff of his or her chosen forum.

A removing defendant bears the burden of proof of establishing federal court jurisdiction, *Gaitor v. Peninsular & Occidental S.S. Co.*, 287 F.2d 252 (5th Cir. 1961), and the burden of compliance with removal procedures. *Moore* §107.11[3], 107.14[2][g]ii. In evaluating the chance of a remand

motion's success, it is helpful to consider the reasons underlying removal.

The main rationales for removal are (1) to protect a nonresident defendant against a "home court disadvantage" (diversity jurisdiction) and (2) to remove a case to the tribunal best informed in the applicable areas of federal law (federal question ju-

■

Federal courts are strongly disinclined to welcome removal petitions with open arms.

■

risdiction). Consequently, under most circumstances, only a noncitizen defendant can remove actions based on diversity jurisdiction because a citizen defendant will not face "home court" prejudice. §1441(b); *Moore* §107.03. Additionally, certain types of cases that might otherwise seem to satisfy the statutory basis of federal jurisdiction are improper candidates for removal, e.g., domestic relations. *Moore* §107.14[2][a][iii]. These exceptions are consistent with the overriding principles of federalism and the limited purposes of removal. *Long v. Bando Mfg. of Am., Inc.*, 201 F.3d 754, 757 (6th Cir. 2000).

Actions Removable Generally: 28 U.S.C. §1441

State Court Action

Only an action brought in a state court may be removed. Thus, a defendant desiring removal to a federal court must answer the question, "What is a state court for purposes of removal?" The courts employ the functional test to answer this question. In applying this test, courts examine the judicial functions, powers and procedures of the state tribunal in question. *Sun Buick, Inc. v. Saab Cars USA, Inc.*, 26 F.3d 1259 (3d Cir. 1994). Thus, a justice of the peace, *Capetta v. Atlantic Refining Co.*, 12 F. Supp. 89 (D. Conn. 1935), and a labor board, *Volkswagon de Peurto Rico, Inc. v. Puerto Rico Lab. Rel. Bd.*, 454 F.2d 38 (1st Cir. 1972), have been found to be state courts for the purposes of §1441(a). Where the tribunal or agency is engaged in rule making or lacks authority to

hear evidence, administer oaths or affirmations, and issue subpoenas, it is likely that such a tribunal will be ruled a non-§1441(a) state court. *Sun Buick, Inc. v. Saab Cars USA, Inc.*, 26 F.3d 1259 (3d Cir. 1994); *Committee of Ten v. Board of Ed.*, 874 F. Supp. 200 (N.D. Ill. 1995).

A state court action, however, has been broadly construed and is not necessarily limited to a proceeding initiated by the filing of a complaint. *Passa v. Derderian*, 308 F. Supp. 2d 43 (D. R.I. 2004) (removal of state court action initiated by miscellaneous petition).

Who Can Remove?

In most situations, only a nonresident defendant can remove an action based upon diversity jurisdiction. However, if an in-state defendant removes and a plaintiff fails to move to remand, most courts consider the ban on removal by such a defendant as procedural and, thus, waivable, and permit removal. *Compare Farm Const. Servs., Inc. v. Fudge*, 831 F.2d 18 (1st Cir. 1987); *Moore* 107.14 [2][e][ii]; see *Hurt v. Dow Chem. Co.*, 963 F.2d 1142, 1144-45 (8th Cir. 1992). Consequently, a plaintiff's failure to file a remand motion or filing late may defeat his or her attempt to achieve remand. Further, any properly named and served defendant can remove an action based on federal question jurisdiction without regard to the citizenship or residence of the parties. §1441(b).

Consistent with the purpose of permitting removal in diversity cases to avoid "home court" advantage, Section 1441(b) normally prohibits removal when an in-state defendant is a party defendant because it is assumed that potential unfair prejudice does not exist. But there is one important exception for defendants.

Section 1441(b)'s prohibition applies if an in-state defendant has been "properly joined and served." Consequently, if an in-state defendant has not been served at the time of removal, courts have held that the existence of the in-state defendant does not bar removal of the action. Courts have applied the exception particularly when removal efforts are instituted after the removing defendant has been served, but the in-forum defendant has not been served. *McCall v. Scott*, 239 F.3d 808 (6th Cir. 2001); *Stan Winston Creatures, Inc. v.*

Toys "R" Us, Inc., 314 F. Supp. 177 (S.D.N.Y. 2003). At this point in a lawsuit, the real possibility of manipulative plaintiff conduct exists in the form of undue delay in serving a complaint to the in-forum defendant to exhaust the 30-day or one-year time period, §1446(b), and to unfairly prevent removal. However, another issue arises when an in-state defendant removes or a non-forum defendant removes *before* any defendant is served.

A trial court was confronted with this factual situation in *Thomson v. Novartis Pharmaceuticals Corporation*, 2007 WL1521138 (D.N.J. May 22, 2007) (slip op.), a wrongful death action, wherein the plaintiffs alleged a child had contracted cancer as a result of the use of a defective drug manufactured and distributed by the defendants. The plaintiffs attempted several times to serve the in-state defendant—on December 22, 26, 27, 28 and 29—but because the office of that defendant was closed for the holiday season, the plaintiffs were unable to effect service until January 2, 2007.

The in-state defendant learned of the filing of the complaint on the date of filing (December 19, 2006) and obtained a copy of that pleading on December 28. The next day, December 29, the in-forum defendant filed its removal papers. None of the defendants had been served as of December 29.

The plaintiffs filed a motion to remand, explaining that: (a) they had, in good faith, attempted to make service; (b) the state court was as qualified to interpret state law as the federal court; (c) the "joined and served" requirement does not apply when a defendant has not been served; and (d) large corporate entities could easily monitor state court dockets and promptly remove diversity cases prior to service, thereby preventing any plaintiff from pursuing a state court action.

Despite recognizing that the plaintiff presented a reasonable position, the federal district court denied the remand motion because it concluded that "a plain reading of §1441(b), supported by substantial authority, established that so long as the... [nonserved, in-state defendant] removed [the]... case prior to being served process, removal was proper." *Id.* at *3. See also *Waldon v. Novartis Pharmaceuticals Corp.*, No. 07-1988, 2007 WL 1747128 (N.D. Cal.)

June 18, 2007 (slip op.); *Massey v. Cassens & Sons, Inc.*, No. 05598, 2006 (WL 381943), 2006 U.S. Dist. LEXIS 9675 (S.D. Ill. Feb. 16, 2006).

This interpretation of the removal statute has been employed in cases in which the removing defendant was a nonforum defendant, *Massey v. Cassens & Sons, Inc.*,

■

Removal has even been
approved when the
sole defendant was an
in-forum defendant.

■

or was an in-forum defendant. *Jaegen v. Schering Corp.*, No. 07-3465, 2007 U.S. Dist. LEXIS 79510 (D.N.J. Oct. 25, 2007) (slip op.). Removal has even been approved when the sole defendant was an in-forum defendant and was, thus, the removing defendant. *Yocham v. Novartis Pharmaceuticals Corp.*, No. 06-6280, 2006 U.S. Dist. LEXIS 58938 (D.N.J. Aug. 13, 2007) (unpublished op.); *Frick v. Novartis Pharmaceuticals, Corp.*, 2006 WL 454360 (D.N.J. Feb. 23, 2006) (unpublished op.).

Other courts, focusing on the underlying rationales for §1441(b), particularly in the absence of inequitable plaintiff conduct—undue delay in serving the in-forum defendant to frustrate a defendant's ability to remove—do not permit removal when an in-forum party defendant exists. *Holmstrom v. Harad*, No. 05-2714, 2005 U.S. Dist. LEXIS 16694 (N.D. Ill. Aug. 11, 2005) (removal by a non-forum defendant is improper); *Vivas v. Boeing Company*, 486 F. Supp. 2d 726 (N.D. Ill. 2007) (in-forum defendant removal is improper, expressing concern that sophisticated defendants could monitor state court filings and act to remove before service). In *Fields v. Organon USA Inc.*, No. 07-2922 WL 4365312 (D. N.J. Dec. 12, 2007) (slip op.), the court, declining to "blindly apply [] the plain... language of §1441(b) [because such interpretation]... eviscerate[s] the purpose of the forum defendant rule," affording an

"opportunity for gameship by defendants," *Id.* at *5, ruled that a forum defendant can never remove an action based on diversity subject matter jurisdiction.

Currently, the majority of courts follow the plain language of the statute rationale, thus permitting removal in cases where an in-state defendant exists. Accordingly, defendants have an opportunity to remove such cases as long as they act promptly to file their removal papers before the in-state defendant is served.

Although the identification of who can remove—a defendant—is easy to state, its application to the facts of a case are less certain. Courts do, of course, examine the defendant(s) named by a plaintiff in the original complaint and the asserted claim, *Moore* §107.11, in determining who is a defendant, but that inquiry can be inconclusive. In concluding who is a "defendant" for the purposes of removal, courts employ a functional test to identify "real" defendants and, in doing so, determine the so-called "main spring" of the action. Thus, in *General Motors Corp. v. Gunn*, 752 F. Supp. 729 (N.D. Miss. 1990), wherein the defendant filed a wrongful death counterclaim against the plaintiff General Motors, who had initiated the action for purposes of obtaining discovery, the court found that the plaintiff General Motors was a §1441(a) defendant and could remove the action. The functional test provides a nominal plaintiff, but a real defendant, with a basis for filing a removal petition.

Views conflict about whether a third-party defendant can remove. Some courts permit removal. Others permit removal of a third-party claim if it is a separate, independent claim entitled to removal. Yet other courts permit removal only if the main claim is removable, and still other courts permit removal only if the original defendant sought removal. *Moore* §107.11[1][b][ii]. As a defending party, but not a named defendant, counsel will need to research the rulings in the applicable jurisdiction to determine if a third-party claim can be removed.

**Jurisdiction—28 U.S.C.
§1441(a) and (b)
Federal Question**

In determining original federal subject matter, diversity or federal question juris-

diction, courts tend to defer to a plaintiff's choice of forum; courts examine the plaintiff's "well-pleaded complaint" to determine if it contains state or federal claims or both. *Rivet v. Regions Bank of La.*, 522 U.S. 470, 475 (1998). If only state claims are pleaded, federal question jurisdiction is not usually conferred on the federal courts, even if a "federal question" defense or counterclaim is made. *Id.*; *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 10 (1983); *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149 (1908). However, if a counterclaim establishes federal jurisdiction and a plaintiff does not object to removal, some authority exists to support federal jurisdiction; in such cases, the court does not on its own inquire into the propriety of removal and will retain the case. *Fax Telecommunications, Inc. v. AT&T*, 138 F.3d 479, 486-88 (2d Cir. 1998). Moreover, a plaintiff cannot employ "artful pleading" to disguise a federal law claim as a state claim. *Franchise*, 463 U.S. at 2; *Moore* §107.14[4][b].

In determining whether federal question jurisdiction exists, courts are sensitive to the relationship and apportionment of the powers between the state and federal governments, as well as to the presumption against removal. First, the courts examine whether Congress intended to extend federal jurisdiction, or authorized a federal claim, *e.g.*, has a private right of action been provided in federal statute, *Merrill Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804 (1986). However, the absence of a private right of action can be indeterminative of federal question jurisdiction. *U.S. Express Lines, Ltd. v. Higgins*, 281 F.3d 383, 389 (3d Cir. 2002), *Mulcahey v. Columbia Organic Chem. Co.*, 29 F.2d 148, 152 (4th Cir. 1994). This is particularly so, regardless of statutory authority, if the claim raises a substantial interest of a federal nature. *Meinders v. Refco Sec., Inc.*, 865 F. Supp. 721 (D. Colo. 1994).

Lastly, if Congress has completely preempted the area, *e.g.*, ERISA, Labor Management Relations Act, National Bank Act, a claim falling within that area is removable regardless of the "artful pleading" of a plaintiff. *Moore* §107.14[4][f]. *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 65-67 (1987).

Diversity

As for diversity jurisdiction, the burden belongs to the removing defendant to prove the original jurisdiction of the court. *Gaitor*

v. Peninsular & Occidental S.S. Co., 287 F.2d 252 (5th Cir. 1961); *Tylka v. Gerber Prods. Co.*, 211 F.3d 445, 448-49 (7th Cir. 2000), *cert. denied*, 531 U.S. 1002 (2000); *Moore*

**DETERMINED.
DISTINCTIVE.
FEARLESS.™**

Plunkett Cooney's appellate attorneys work to achieve the right result for their clients...one appeal at a time. Their distinctive expertise includes four decades of dedicated appellate practice, over 116 years of combined appellate experience and 1,500 appellate decisions.

When accepting bad law is not an option for your company, contact

Mary Massaron Ross
Appellate Practice Group Leader
(313) 983-4801
mmassaron@plunkettcooney.com

PLUNKETT  COONEY
ATTORNEYS & COUNSELORS AT LAW

www.plunkettcooney.com

107.14[2][f][iii]. Jurisdiction is determined when the removal notice is filed. *Leonard v. Enterprise Rent A Car*, 279 F.3d 967, 972 (11th Cir. 2002); *Hayes v. Equitable Energy Res. Co.*, 266 F.3d 560, 572-73 (6th Cir. 2001). A very narrow exception to the general rule of ascertaining diversity jurisdiction when removal is initiated was set forth by the U.S. Supreme Court in *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 73-77 (1996). In *Caterpillar Inc.*, the Court approved retaining a "defectively" removed case that had spanned several years of litigation and a six-day trial as long as federal jurisdictional requirements were satisfied by the time of judgment for reasons of "finality, efficiency and economy," all three of which were found to be "overwhelming" in *Caterpillar*.

If a plaintiff has fraudulently joined a defendant, a defendant can remove an action even if a nondiverse defendant is named. *Badon v. RJR Nabisco, Inc.*, 224 F.3d 382 (5th Cir. 2000); *Lawrence Builders, Inc. v. Koldner*, 414 F. Supp. 134 (D.R.I. 2006). Nonmeritorious claims asserted against a nondiverse defendant may constitute a "fraudulent joinder." Defense counsel will want to be aware of the "possibility of recovery" test, by which the courts determine whether a defendant has been fraudulently joined. The question for the court is simply whether there is any possibility that the plaintiff will be able to establish liability against the nondiverse defendant. *Dodson v. Spilada Maritime Corp.*, 951 F.2d 40, 42 (5th Cir. 1992); *Lewis v. Time, Inc.*, 83 F.R.D. 455, 460 (D. Cal. 1979), *aff'd*, 710 F.2d 549 (9th Cir. 1983). One example of a fraudulent joinder is where a plaintiff names a local insurance agent or broker in an action for breach of an insurance agreement. Unless a colorable claim exists against the agent or broker, the court will likely disregard the nondiverse agent or broker for removal purposes. *Griggs v. State Farm Lloyds*, 181 F.3d 694 (5th Cir. 1999); *Anderson v. The Home Ins. Co.*, 724 F.2d 82, 84 (8th Cir. 1983).

Analyzing the removal proof standard in the requisite jurisdictional amount context in most cases is somewhat complex. If a complaint expressly seeks less than \$75,000, some courts impose a "legal certainty" burden on defendant. *Burns v.*

Windsor Ins. Co., 31 F.3d 1092, 1094 (11th Cir. 1994). The standard articulated is that "if, from the face of the pleadings, it is apparent, to a legal certainty, that the plaintiff cannot recover the amount claimed or if, from the proofs, the court is satisfied to a like certainty that the plaintiff never was entitled to recover that amount... the suit

■

Counsel will need to
research the rulings in the
applicable jurisdiction to
determine if a third-party
claim can be removed.

■

will be dismissed." *Spielman v. Genzyme Corp.*, 251 F.3d 1, 5 (1st Cir. 2001) (quoting *St. Paul Mercury Indemnity Co. v. Red Lab Co.*, 303 U.S. 283, 289 (1938)).

When no clear amount is demanded in a complaint, a preponderance of the evidence standard has been used. *St. Paul Reinsurance Co. v. Greenberg*, 134 F.3d 1250 (5th Cir. 1998). However, the burden of proof varies from jurisdiction to jurisdiction. The preponderance standard is gaining more support. *Moore* §107-14[2][g][v].

A majority of courts permit consideration of postremoval evidence relevant to the amount *at the time of removal* in deciding the removal issue, including a stipulation by a plaintiff that the amount is less than \$75,000. *Sirminski v. Transouth Fin. Corp.*, 216 F.3d 945, 49 (11th Cir. 2000); *Asociacion Nacional de Pescadores (ANPAC) v. Dow Quimica de Colombia*, 988 F.3d 945 (11th Cir. 1993) (viewing affidavit only as a "clarification" of an indeterminate complaint); *Contra Laughlin v. Kmart Corp.*, 50 F.3d 871 (10th Cir. 1995). But defense counsel must beware and be ready to argue that a postremoval stipulation that does not bear on the amount of damages *at the time of removal* is irrelevant. *Werwinski v. Ford Motor Co.*, 286 F.3d 661, 666-68 (3d Cir. 2002).

Preremoval, voluntary plaintiff acts are

another basis for making an action removable. *In re Iowa Mfg. Co.*, 747 F.2d 462, 463-64 (8th Cir. 1984); *Greco v. Beccia*, 2001 WL 121887 (D. Pa. 2001). If a plaintiff settles with a nondiverse defendant, amends the complaint to increase the damage demand, or moves to another state, removal will be permitted. *Moore* §§107.14[2][h][i], 107.30[3][a][ii][B]. However, if state law prohibits a plaintiff from pleading specific damages, a plaintiff can file a stipulation or affidavit before removal limiting its damage relief and, if enforceable under state law, such a filing will defeat removal. *Moore* §107.14[2][g], at 107-86.1. A defendant cannot by a voluntary act create diversity, e.g., by moving to another state. *Kilpatrick v. Arrow Co.*, 425 F. Supp. 1378, 1380 (D. La. 1977).

Involuntary acts creating diversity, e.g., dismissal of a nondiverse defendant on the basis of the lack of merits of a claim, do not convert a nonremovable action to a removable action. *Weems v. Louis Dreyfus Corp.*, 380 F.2d 545, 546-49 (5th Cir. 1967); *Greco*. However, the involuntary act rule is limited. It does not apply to dismissal of a nondiverse defendant based upon lack of personal jurisdiction, fraudulent joinder or sovereign immunity because, as the courts explain, such a defendant was improperly named and not properly brought before a court. *Insinga v. LaBella*, 845 F.2d 249, 253 (11th Cir. 1988); *Guagnini v. Prudential Sec., Inc.*, 872 F. Supp. 361, 363-64 (D. Tex. 1994); *Moore* §107.30[3][a].

Although postremoval acts do not render a nonremovable action removable, in a removal context—as distinguished from an initially filed federal court case—a plaintiff can undertake postremoval activities in the action, such as joining a nondiverse party, which will cause the court to remand the action to the state court. *Yniques v. Cabral*, 985 F.2d 1031, 1035-36 (9th Cir. 1993) (need to maintain diversity throughout proceeding); *Moore* §107.14[2][d], at 107.71.

Procedure for Removal and Remand—28 U.S.C. §1446 Must State Grounds for Removal—§1446(a)

Section 1446(a) provides that the notice of removal must contain "a short and plain statement of the grounds for removal." As

noted, the burden is on the removing defendant to establish original federal court jurisdiction. The statement's sufficiency is measured in the same way as a FED. R. CIV. P. 8(a) statement. *Rachel v. Georgia*, 342 F.2d 336, 340 (5th Cir. 1965), *aff'd*, 384 U.S. 780 (1966). Thus, a defendant seeking removal should plead with precision the basis of the original jurisdiction of the federal court, e.g., pleading the citizenship of the parties, not their residency, and the states of citizenship of a corporation, both the state of incorporation and principal place of business. *Tylka v. Gerber Prods. Co.*, 211 F.3d 445 (7th Cir. 2000).

Signing and Copies of Documents—§1446(a)

The requirements that the removal notice be signed and certified copies of certain documents provided are considered procedural, particularly in the absence of prejudice, and not a bar to removal. *Riehl v. National Mut. Ins. Co.*, 374 F.2d 739, 742 (7th Cir. 1967); *Wilkinson v. U.S.*, 724 F. Supp. 1200, 1204–05 (W.D. N.C. 1989). However, it behooves a removing defendant to comply with these requirements to avoid giving a plaintiff a basis to have the case remanded.

Time for Removal—§1446(b)

The time limit for filing for removal is 30 days from receipt of an initial pleading or summons, if an initial pleading has been filed, or 30 days from receipt of a paper from which it is ascertainable that the action can be removed. There is a one-year limit for removal after commencement of a §1332 case. These seemingly straightforward and simple provisions have spawned a significant number of cases with surprisingly different outcomes and statutory interpretations. A removing defendant must exhibit timeliness and caution in submitting removal motions.

30 Days from Receipt of Initial Pleading

Receipt of courtesy copies before service does not trigger the 30-day period *Murphy Bros., Inc. v. Michette Pipe Stringing, Inc.*, 526 U.S. 344 (1999). FED. R. CIV. P. 6(a) governs computation of time. *Johnson v. Harper*, 66 F.R.D. 103, 104–05 (D. Tenn. 1975).

Authority is split as to whether the 30-day period commences with service on a statutory agent. *Ortiz v. Biscanin*, 190 F. Supp. 2d 1237 (D. Kan. 2002) (yes); *Monterey Mushrooms, Inc. v. Hall*, 14 F. Supp. 2d 988, 991 (D. Tex. 1998) (receipt by defendant starts period); *Calderon v. Pathmark Stores, Inc.*, 101 F. Supp. 2d 246 (D. N.Y. 2000) (30 days

■

A defendant seeking removal should plead with precision the basis of the original jurisdiction of the federal court.

■

begins upon receipt of notice of service upon Secretary of State).

30 Days from Receipt of Amended Pleading, Motion Order or Other Paper

Assuming the initial pleading did not provide sufficient information upon which to make a good faith determination as to removability, and a subsequent document provides that information, when does the 30-day period start? Once again, views differ. There are decisions holding that the clock starts ticking from the date of (1) the service of a motion to amend, *Webster v. Sunnyside Corp.* 836 F. Supp. 629, 631 (D. Iowa 1993); (2) the court order granting a plaintiff's motion; *Sullivan v. Conway*, 157 F.3d 1092, 1094 (7th Cir. 1998); (3) receipt by the defendant of the proposed grant order; *Hamilton v. Hertz Corp.*, 607 F. Supp. 1371, 1373–74 (S.D. N.Y. 1985); and (4) receipt of amended complaint. *Miller v. Stauffer Chem. Co.*, 527 F. Supp. 775, 777–78 (D. Kan. 1981).

Other papers triggering the 30-day time limit period include discovery documents, such as depositions, memoranda, offers of judgment, correspondence, stipulations and pleadings. *Huffman v. Saul Holdings Ltd. Partn.*, 194 F.3d 1072, 1078–79 (10th Cir. 1999) (deposition); *Miller*, 527 F. Supp. at 777–78 (interrogatory answers); *Essenson v. Coale*, 848 F. Supp. 987 (D. Fla. 1994) (settlement offer); *Lior v. Sit*, 913 F.

Supp. 868, 877–78 (D. N.J. 1996) (stipulation). Once again, as soon as a defendant is aware of a basis for removal, prudence dictates that removal activities be undertaken promptly.

Multiple Defendants—First Versus Last Served Defendant

Section 1446(b) has no express language covering situations involving multiple defendants. Does the 30-day time limit period begin with service of the first or last defendant? If it starts with service on the first defendant, the subsequently served defendant can be barred from a removal, if the first defendant has waived the removal right. *Moore* §107.30[3][a][i]. A growing number of courts calculate the 30-day period from service upon the last defendant. *Marano Enterp. v. Z-Teca Restaurants, L.P.*, 245 F.3d 753 (8th Cir. 2001); *Brierly v. Alusuisse Flexible Packaging, Inc.*, 184 F.3d 527, 533 (6th Cir. 1999), *cert. denied*, 528 U.S. 1076 (2000); *McKinney v. Bd. of Trustees of Maryland Community College*, 955 F.2d 924, 927–28 (4th Cir. 1992); *Garside by Garside v. Osco Drug, Inc.*, 702 F. Supp. 19, 21 (D. Mass. 1988); *Contra New York Life Ins. Co. v. Deshotel*, 142 F.3d 873, 887 n.4 (5th Cir. 1998).

All Defendants Must Join Removal—Unanimity Rule

An important requirement for a proper removal is that all served defendants in a state court action must join in the notice of removal. *Moore* §107.11[1][c]. Failure of one or more defendants to join renders the removal notice defective. *Id.* Further, the joinder or consent to the removal should be in writing and timely filed. *Ballard's Serv. Ctr., Inc. v. Transue*, 865 F.2d 447 (1st Cir. 1989); *Snasome*, 188 F. Supp. 2d at 185. However, authority exists for sustaining a removal even when these requirements—failure of all defendants to join the removal notice, provide consent in writing, and timely filing of it—have not been met. *See, e.g., Parrino v. FHP, Inc.*, 146 F.3d 699, 703 (9th Cir. 1998) *cert. denied*, 525 U.S. 1001 (1998) (following U.S. Supreme Court opinions *Grubbs v. General Elec. Credit Corp.*, 405 U.S. 699, 702 (1972) and *Caterpillar*, refusing remand because late joinder in removal, cured before entry of

judgment); *McMahon v. Bunn-O-Matic Corp.*, 150 F.3d 651, 653–54 (7th Cir. 1998) (untimely objection held to have resulted in waiver of joinder defect and amendment of notice on appeal cured defective diversity allegations). *But see Prize Frize, Inc. v. Matrix, Inc.*, 167 F.3d 1261, 1265–67 (9th Cir. 1999) (remand based upon defective joinder after appellate reversal of judgment despite presence of federal subject matter jurisdiction at time of judgment).

Removing defendants need be aware that a mere recital of joinder of other *non signing* defendants in one defendant's removal notice is insufficient to satisfy the requirement of written joinder and consent.

There are exceptions to the removal rule requiring unanimity of defendants in the removal action. Fraudulently joined and nominal or formal parties need not join. Also, the growing view is that nonserved defendants need not join. *Moore* §107.1[1][d]; *The National Law Journal* at B-11 (Oct. 8, 2002) (Professor Georgene Valero).

To be clear, joinder on the basis of federal question jurisdiction or specific statutory authorization requires only relevant defendants to sign the removal notice.

Again, if a plaintiff fails to object or move to remand timely, defense counsel will have a basis for arguing that the plaintiff has waived the joinder defect. *McMahon*, 150 F.3d at 653–54; *Parrino*, 146 F.3d at 703.

One-Year Rule §1446(b)

Section 1446(b) provides that no §1332 action may be removed “more than one (1) year after commencement of the action.” Many questions remain open concerning this deceptively simple requirement. First, some courts hold the one-year limit applicable only to originally irremovable actions. *Brown v. Tokio Marine and Fire Ins. Co.*, 284 F.3d 871, 873 (8th Cir. 2002); *Brierly v. Alusuisse Flexible Packing, Inc.*, 184 F.3d 527, 534–35 (6th Cir. 1999). While other courts apply the time limit to all diversity cases. *Foiles by Foiles v. Merrell Nat'l Laboratories*, 730 F. Supp. 108, 116 (D. Ill. 1989). Courts concerned with forum manipulation by a plaintiff, e.g., dismissal of a nondiverse defendant after time begins to run to remove, have adopted an “equitable tolling” exception. *Tedford v. War-*

ner-Lambert Co., 327 F.3d 423, 426–28 (5th Cir. 2003).

On the one hand, the courts' application of the one-year limit does not support expanding federal jurisdiction and instead, respects the comity between state and federal courts, and, on the other, does support strict statutory construction and fairness.

■

An important requirement
for a proper removal is that
all served defendants in a
state court action must join
in the notice of removal.

■

Moore §107.30[3][a].

Another issue to consider is whether the one-year time limit is a nonwaivable jurisdictional bar, *Foiles*, 730 F. Supp. at 110; *Price v. Messer*, 872 F. Supp. 317 (D. W. Va. 1995), or a procedural, and therefore, waivable, defect. *Barnes v. Westinghouse Elec. Corp.*, 962 F.2d 513, 516 (5th Cir. 1992); *In re Uniroyal Goodrich Tire Co.*, 104 F.3d 322, 324 (11th Cir. 1997). *Cf. Caterpillar*, 519 U.S. at 75 n.13. The “waiver” position is considered the stronger view. *Moore* §107.41[c][iv].

Postremoval Procedures:

28 U.S.C. §1447

30 Days to Remand

Section 1447(c) provides that a motion to remand on the basis other than “subject matter jurisdiction must be made within 30 days after the filing” of the §1446(a) removal notice. The 30-day limit is strictly construed. *Moore* §107.41[1][s][i]. The time limit commences upon filing, not service of the removal notice. *Id.*; *Fax Telecommunications, Inc.*, 138 F.3d. at 486–88. If a plaintiff does not file a motion to remand within the 30 days as required, and defense counsel fails to be timely in raising the plaintiff's deficiency, a court may find that this failure constitutes a waiver. *Moore* §107.41[1][d][iii].

Further, a plaintiff's active participation in federal court proceedings may constitute a waiver of the 30-day defect, even if the plaintiff files timely a remand motion. *Koehnen v. Herald Fire Ins. Co.*, 89 F.3d 525, 528–29 (8th Cir. 1996).

Grounds for Remand

A removal procedural defect is grounds for remand. For example, the following removal procedural defects would provide grounds for remand: motion not timely, not all required defendants joined, no timely written joinder of required defendants filed, defective pleading of jurisdiction in the removal petition, removal prohibited—as would be with a state workers' compensation claim—in-state defendant removal.

Authority is split on whether a court may independently remand on the basis of a procedural defect absent timely action by a plaintiff, with most courts holding in the negative. If a court chooses to remand, an open issue is whether it must do so within 30 days. *Moore* §107.41[1][a][ii]. Other bases for remand are joinder of a nondiverse defendant and dismissal of federal claims, and permitting discretionary remand of state law claims. *Moore* §107.41[1][e][iii][B].

Lack of subject matter jurisdiction is, of course, nonwaivable and requires remand. A court may do so *sua sponte*. *Moore* §107.41[1][a][1].

Procedure

As mentioned above, in a remand proceeding, the defendant bears the burden of proving the grounds for removal, and also in satisfying procedural requirements. The court examines the complaint at the time of removal. In a fraudulent joinder context, summary judgment type material is examined, although a full evidentiary hearing is not required. *Ritchey v. Upjohn Drug Co.*, 139 F.3d 1313, 1318 (9th Cir. 1998); *Moore* §107.41[1][e].

Post Removal Activities and Events

If a federal question claim is dismissed after removal, the court exercises its discretion to retain, remand or dismiss the state claims. *Moore* §107.41[2][a]. Settlement of
Removal and Remand, ► page 54

Removal and Remand, ◀ page 16
a federal question or diversity claim does not require remand. *Id.* at [b].

A minority of courts hold that post-removal actions of a plaintiff, for example, stipulation that the amount in controversy is below \$75,000, support remand. The majority view is the opposite. *Id.* at [c]. If a joinder motion adding a nondiverse party is granted, the court must remand the case, absent other jurisdictional grounds. A court, however, may deny a joinder motion, if the proposed party to be joined is not indispensable, and then retain jurisdiction over the civil action. §1447(e); *Moore* §107.41[2][d].

In the exercise of its remand discretion, a court considers a number of factors referred to as the *Hensgens* factors, which are based on the analysis of the Fifth Circuit in *Hensgens v. Deere & Co.*, 833 F.2d 1179 (5th Cir. 1987). These factors include (1) the purpose of the amendment, (2) the merit of the proposed claim, and (3) the diligence of the plaintiff in seeking the amendment.

A binding settlement with a nondiverse defendant after removal supports the court retaining, or in other words, permitting removal of the case. *Id.* at [e]. Activities undertaken by a plaintiff after removal, such as adding a federal claim, have been found to constitute a waiver of the right to seek remand, although filing a timely

objection to removal and undertaking such activities after a denial of a remand motion have persuaded courts that there was no waiver. *Id.* at [g].

Waiver of Right to Remand or Remove

A plaintiff who fails to file a timely motion to remand may lose his or her right to remand. Further, a plaintiff who engages in postremoval activities may be found to have waived his or her right to remand.

Defendants who wish to remove need to be aware that undertaking certain activities in the state forum has been found to waive a defendant's right to remove a state court action to the federal court. Clear and unequivocal action by a defendant manifesting submission to state court jurisdiction and abandonment of the right to remove at the time a case is removable supports a finding of a waiver. *Brown v. Demco, Inc.*, 792 F.2d 478, 481 (5th Cir. 1986). In determining the activities a defendant may safely undertake, courts have viewed activities such as filing an answer or initiating discovery as preliminary or defensive and not the type of conduct justifying a finding of waiver. *Brown v. Sasser*, 128 F. Supp. 2d 1345, 1347-50 (D. Ala. 2000).

However, filing pleadings, such as a permissive counterclaim or cross-claim seeking affirmative relief, or an injunction—but not papers opposing temporary restraining orders or injunctions—and filing motions


seeking a decision on the merits have been viewed as supporting a finding of a waiver. *Issacs v. Group Health, Inc.*, 668 F. Supp. 306, 309 (D. N.Y. 1987); *Zbranek v. Hofheinz*, 717 F. Supp. 324, 325 (D. Tex. 1989).

Filing a motion to dismiss coupled with participating in a hearing or awaiting a ruling by a state court before removing, has been found to support a waiver, even if the filing of the motion, in and of itself, would not. *Estate of Krasnow v. Texaco, Inc.*, 773 F. Supp. 806, 808 (D. Va. 1991). Dispositive motions, generally have not been found to support a waiver. *Akin v. Ashland Chem. Co.*, 156 F.3d 1030, 1036 (10th Cir. 1998) (motions filed before removal, no waiver); *Wolfe v. Wal-Mart Corp.*, 133 F. Supp. 2d 889, 894 (D.W. Va. 2001) (motions filed after removal, waiver).

Conclusion

A defendant interested in removing a civil action from a state court to a federal court and defeating a remand motion should study (1) the requirements set forth in 28 U.S.C. §§1441 and 1447, (2) the local rules of the court in which the action is pending, and (3) the case law interpreting those statutory sections. Further, defendants should determine (1) the time limits within which to remove an action, (2) which parties need to join the removal, (3) what would constitute a proper joinder, and (4) which activities may be undertaken by a defendant in the state court without waiving the right to remove.

A defendant should also examine whether the plaintiff has complied with the remand requirements, and, if he or she has not, the defendant should object properly and in a timely manner to the remand papers.

A defendant must also be alert to tactics employed by plaintiffs to impede removal—for example, fraudulent joinder, artful pleading and waiting to dismiss a nondiverse defendant for a year. A defendant should also seize opportunities for removal, for example if a claim raises a substantial interest of a federal nature or preemption issues, or if discovery responses or settlement demands raise federal issues, or if dismissal of nondiverse defendant support federal court jurisdiction. 

The DRI Defense Library Series

NEW! Essential resource for all in-house and outside counsel.

Table of Contents

The Corporate Attorney-Client Privilege
The Work-Product Doctrine—Protecting Corporate Counsel
The Joint Defense Doctrine—Cohesion Among Traditional Adversaries
Critically Challenged—The Recognition and Scope of the Self-Critical Analysis Privilege
The Bank Examination Privilege
The Trade Secret Privilege

Evidentiary Privileges for Corporate Counsel

The Accountant-Client Privilege—Considerations for Corporate Counsel
Protecting and Preserving the Peer Review Privilege—Solutions for Corporate Counsel Representing Hospitals, Health Care Corporations, and Health Care Providers
Waiver of Evidentiary Privileges—Protecting Corporate Confidential Information

The Application of Conflict of Laws to Evidentiary Privileges
Depositions of In-House Counsel—Maintaining and Protecting Evidentiary Privileges



Visit the Bookstore at www.dri.org to order or call 312.795.1101 for more information.