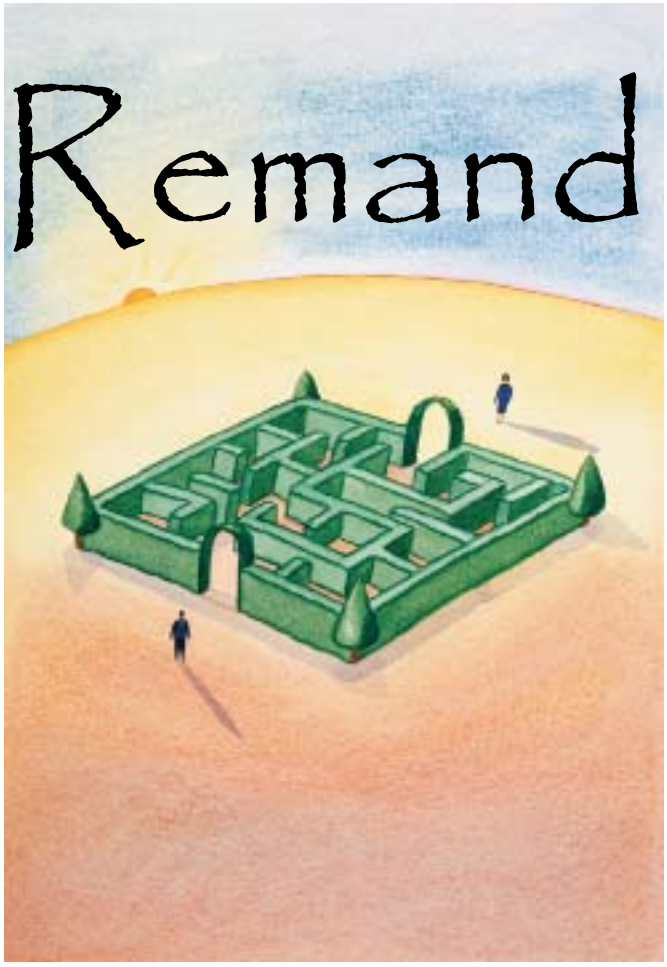
A Guide to Removal Remand



The removal/remand statutory scheme presents a deceptively, complex maze with many hidden dangers. This article gives practitioners a "map" that shows the correct and safe route through that maze.

By George Lieberman

Removal/remand implicates issues of federal courts' jurisdiction over subject matter, *see*, for example, 28 U.S.C. §§ 1331 and 1332; constitutional limits on the power of federal courts; and statutory interpretation of the removal statutes, 28 U.S.C. §§ 1441–1447. About a century of case law shows a healthy number of conflicting decisions on these issues—for example, whether a defect in removal papers is jurisdictional (and thus not waivable) or procedural (and thus waivable) and whether the one-year limit provided by § 1446(b) applies to cases that were originally removable or only to cases that were later removable, or both.

Summary of Limits on Removal and Grounds for Remand

If one or more of the following requirements are not met and if the grounds are jurisdictional in nature, or if they are procedural and *timely* challenged (and thus not considered waived), a remand motion will succeed:

- The federal court has original subject matter jurisdiction.[1]
- The case has been removed from a proper tribunal.
- The removal motion was made on time.
- All necessary parties properly joined in the removal motion.
- The motion complies with statutory provisions for removal (jurisdictional defect).
- If the grounds are procedural, an objection or remand motion was filed or served in a timely manner.

Disfavor of Removal and Strict Construction of Removal Statute

There is a strong presumption against removal, *Gaus v. Miles Inc.*, 980 F.2d 564, 566 (9th Cir. 1992); removal statutes are strictly construed, *Meritcare Inc. v. St. Paul Mercury Ins. Co.*, 166 F.3d 214, 217–218 (3d Cir. 1999); and 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, in major part, federal courts have limited jurisdiction and removal deprives plaintiffs of their 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 its compliance with removal procedures. 16 Moore's *Federal Practice* § 107.11(3), 107.14(2)(g)(ii) (3rd ed. 2003) (Moore).

Section 1441: Who May Remove, From Which Court, and on What Jurisdictional Bases?

State Court Action

If an action is not brought in a state court, it may not be removed. Courts employ a "functional test" to determine whether the action was brought in a state court and, in applying this test, they 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); *Capetta v. Atlantic Refining Co.*, 12 F. Supp. 89 (D. Conn. 1935); *Volkswagen de Puerto Rico Inc. v. Puerto Rico Lab. Rel. Bd.*, 454 F.2d 38 (1st Cir. 1972). Where the tribunal or agency is engaged in rulemaking or lacks authority to hear evidence, administer oaths/affirmations, and issue subpoenas, it is likely that such a tribunal will not be ruled

a state court under § 1441(a). *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).

Who May Remove?

In most situations, only a *nonresident* defendant may remove an action based upon diversity jurisdiction. However, if an in-state defendant removes the action, a plaintiff should move to remand because most courts consider the ban on removal by such defendant as procedural and, thus waivable. *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, 1144–1145 (8th Cir. 1992). Under § 1441(b), any properly named and served defendant may remove an action based on federal question jurisdiction without regard to the citizenship of the parties.

Section 1441(b) normally prohibits removal when an in-state defendant is a party defendant. But there is an important exception of which a plaintiff should be mindful. The prohibition set forth in § 1441(b) applies if an in-state defendant has been "properly joined and served." Consequently, if there is an in-state defendant who 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. This is particularly the case 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. 2d 177 (S.D.N.Y. 2003). At this point in the lawsuit, defendants warn of the possibility of manipulative conduct by a plaintiff in the form of undue delay in serving the in-forum defendant so as to run out the 30-day or one-year time period, as established in § 1446(b), in order to prevent removal. However, an issue arises when an in-state defendant removes an action or a nonforum defendant removes it before any defendant is served.

The U.S. District Court for the District of New Jersey was confronted with this factual situation in *Thomson v. Novartis Pharmaceuticals Corp.*, No. 06-6280, 2007 WL1521138 (D.N.J. May 22, 2007) (slip op.), a wrongful death action, wherein the plaintiffs alleged that a child contracted cancer as a result of the use of a defective drug that had been manufactured and distributed by the defendants. The plaintiffs repeatedly attempted to serve the in-state defendant (on Dec. 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 Jan. 2, 2007. The in-state defendant learned that the complaint had been filed on the date of filing (Dec. 19, 2006) and obtained a copy of that pleading on Dec. 28. The in-forum defendant then filed removal papers the following day. As of Dec. 29, none of the defendants had been served.

The plaintiffs filed a motion to remand, explaining that—

- They had attempted to serve the notice in good faith;
- The state court was as qualified to interpret state law as the federal court;
- The "joined and served" requirement does not apply when no defendant has been served; and
- 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 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 … [in-state defendant] removed [the] … case prior to being served process, removal was proper." *Id.* at n.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 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 is a nonforum defendant, *Massey v. Cassens & Sons Inc.*, or is 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 been approved even when the sole defendant is an in-forum defendant and is thus the removing defendant. *Yocham v. Norvartis 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).

Other courts, focusing on the policy reasons underlying § 1441(b)—particularly in the absence of inequitable conduct by a plaintiff (undue delay in serving the in-forum defendant with the intention of frustrating a defendant's ability to remove)—do not permit removal when there is an in-forum party defendant. *Holmstrom v. Harad*, No. 05-2714, 2005 U.S. Dist. LEXIS 16694 (N.D. Ill. Aug. 11, 2005) (removal by a nonforum defendant is improper); *Vivas v. Boeing Company*, 486 F. Supp. 2d 726 (N.D. Ill. 2007) (removal by an in-forum defendant is improper, expressing concern that sophisticated defendants could monitor state court filings and act to remove before service). In *Fields v. Organan USA Inc.*, No. 07-2922, 2007 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" and affords an "opportunity for gameship by defendants," *id.* at n.5, ruled that a forum defendant may never remove an action based on diversity subject matter jurisdiction. Currently, the majority of courts are following the "plain language of the statute" rationale, thus permitting removal in cases with an in-state defendant.

Jurisdiction

Federal Question

Courts examine if the "well-pleaded complaint" sets forth state or federal claims—or both. *Rivet v. Regions Bank of La.*, 522 U.S. 470, 475 (1998). If only state claims are pleaded, there is no federal question jurisdiction even if there were a "federal question" defense or counterclaim. *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). A cautionary note should be provided for plaintiffs: There is authority to support the position that, if a counterclaim establishes federal jurisdiction and the plaintiff does *not* object to removal, 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, 486–488 (2d Cir. 1998).

In determining whether there is federal question jurisdiction, courts are sensitive to the relationship of the powers between state governments and the federal government and the presumption against removal. In deciding this serious question, courts examine whether Congress intended that there has been a federal claim—for example, a private right of action provided in the federal statute by Congress. *Merrill Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804 (1986). However, the absence of such a private right of action is not necessarily determinative. *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 if the claim raises a substantial interest of a federal nature. *Meinders v. Refco Sec. Inc.*, 865 F. Supp. 721 (D. Colo. 1994).

Finally, if Congress has completely pre-empted the area—as it did in ERISA, the Labor Management Relations Act, and the National Bank Act, for example—a claim falling within that area is removable. *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 65–67 (1987); Moore § 107.14(4)(f).

Diversity

The removing defendant has the burden 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, 448–449 (7th Cir. 2000); Moore § 107.14(2)(f)(iii). Jurisdiction is determined *at the time* 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, 572–573 (6th Cir. 2001).

An analysis of proof and burden as to the requisite jurisdictional amount in the removal context is somewhat complex. If the complaint expressly seeks less than $75,000, some courts impose a "legal certainty" burden on the defendant. *Burns v. Windsor Ins. Co.*, 31 F.3d 1092, 1094 (11th Cir. 1994). For example, according to one court ruling, "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 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 there is no clear amount 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 to be satisfied varies from jurisdiction to jurisdiction, with the preponderance standard gaining more support. Moore § 107-14(2)(g)(v).

If there is uncertainty as to the amount in controversy, a majority of courts permits plaintiffs to offer post-removal evidence relevant to the amount *at the time of removal* to be considered in deciding the removal issue, including a stipulation by the 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 an affidavit only as a "clarification" of an indeterminate complaint); *Contra Laughlin v. Kmart Corp.*, 50 F.3d 871 (10th Cir. 1995). Plaintiffs need to be aware that a post-removal stipulation that has no bearing on the amount of damages *at the time of removal* is not relevant. *Werwinski v. Ford Motor Co.*, 286 F.3d 661, 666–668 (3d Cir. 2002).

Another rule of which plaintiffs should be aware is that involuntary acts creating diversity—such as dismissal of a nondiverse defendant on the basis of a claim of lack of merits—do not convert a nonremovable action into a removable one. *Weems v. Louis Dreyfus Corp.*, 380 F.2d 545, 546–549 (5th Cir. 1967); *Greco v. Beccia*, No. 99-2136, 2001 WL 1218877 (M.D. Pa. Feb. 13, 2001). However, the "involuntary act" rule is limited and does not apply to dismissal of a nondiverse defendant based on lack of personal jurisdiction, fraudulent joinder, or sovereign immunity because, as the courts explain, such a defendant was improperly named and never properly before the court. *Insinga v. LaBella*, 845 F.2d 249, 253 (11th Cir. 1988); *Guagnini v. Prudential Sec. Inc.*, 872 F. Supp. 361, 363–364 (W.D. Tex. 1994); Moore § 107.30(3)(a).

In addition, post-removal activities do not render a nonremovable action a removable one. However, in the removal context (as distinguished from an initially filed federal court case), a plaintiff can undertake post-removal 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, 1035–1036 (9th Cir. 1993) (need to maintain diversity throughout proceeding); Moore § 107.14(2)(d), at § 107.71.

Section 1446: Removal and Remand Procedure

Time for Removal

According to § 1446(b), the time for removal is 30 days from receipt of the initial pleading or summons, if an initial pleading has not been filed, or 30 days from receipt of a *paper* from which it is ascertainable that the action may 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 amount of cases with a surprising number of different interpretations.

Thirty 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). There is a split of authority as to whether service on a statutory agent commences the 30-day period. *Ortiz v. Biscanin*, 190 F. Supp. 2d 1237 (D. Kan., 2002); *Monterey Mushrooms Inc. v. Hall*, 14 F. Supp. 2d 988, 991 (S.D. Tex., 1998) (receipt by defendant starts the period); *Calderon v. Pathmark Stores Inc.*, 101 F. Supp.

2d 246 (S.D.N.Y. 2000) (the 30-day period begins upon receipt of notice of service upon the secretary of state).

Thirty 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, there are different views. Several decisions hold that the clock starts ticking from the date of service of a motion to amend, *Webster v. Sunnyside Corp.* 836 F. Supp. 629, 631 (S.D. Iowa, 1993); from the date of the court order granting motion, *Sullivan v. Conway*, 157 F.3d 1092, 1094 (7th Cir. 1998); from the date the defendant received the proposed grant order, *Hamilton v. Hertz Corp.*, 607 F. Supp. 1371, 1373–1374 (S.D.N.Y. 1985); and from the date of receipt of the amended complaint. *Miller v. Stauffer Chem. Co.*, 527 F. Supp. 775, 777–778 (D. Kan. 1981). Other papers triggering the 30-day 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, 1078–1079 (10th Cir. 1999) (deposition); *Miller*, 527 F. Supp. 777–778 (interrogatory answers); *Essenson v. Coale*, 848 F. Supp. 987 (M.D. Fla. 1994) (settlement offer); *Lior v. Sit*, 913 F. Supp. 868, 877–878 (D.N.J. 1996) (stipulation).

Multiple Defendants: First v. Last Served Defendant

Section 1446(b) contains no express language concerning the situation in which there are multiple defendants. Does the 30-day period start to run from service on the first defendant or the last defendant? If the period starts when the first defendant is served, the defendants who are served later may be barred from removing if the first defendant has waived the right to remove. Moore § 107.30(3)(a)(i). A growing number of courts calculate the 30-day period from the date the last defendant is served. *Marano Enterp. v. A-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, 927–928 (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).

Rule of Unanimity: All Defendants Need to Join Removal

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.* Furthermore, 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 185.[2] Again, the plaintiff's failure to object or move to remand in a timely manner provides a basis for arguing that the plaintiff has waived the joinder defect. *McMahon*, 150 F.3d 653–654; *Parrino v. FHP Inc.*, 146 F.3d 699, 703 (9th Cir. 1998).

One-Year Rule

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 that the limit is applicable only to actions that were not removable originally. *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, 534–535 (6th Cir. 1999); other courts apply the time limit to all diversity cases. *Foiles by Foiles v. Merrell Nat'l Laboratories*, 730 F. Supp. 108, 116 (N.D. Ill. 1989). Courts concerned with what they perceive as forum manipulation by a plaintiff—for example, dismissal of a nondiverse defendant after time to remove has run out—have adopted an "equitable tolling" exception. *Tedford v. Warner-Lambert Co.*, 327 F.3d 423, 426–428 (5th Cir. 2003). The tension in the application of the one-year limitation is, on the one hand, the disfavor of expanding federal jurisdiction and respecting comity between state and federal courts and, on the other, statutory construction and fairness. Moore § 107.30(3)(a). Another issue is whether the limitation is a jurisdictional bar, which is nonwaivable, *Foiles*, 730 F. Supp. 110; *Price v. Messer*, 872 F. Supp. 317 (S.D.W. Va. 1995), or a procedural defect, which is waivable, *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); *compare. Caterpillar v. Lewis*, 519 U.S. 61, 75 n.13 (1996). The "waiver" position is considered the better view. Moore § 107.41(c)(iv).

Section 1447: Post-Removal Procedures Affecting Remand

Thirty-Day Rule

Section 1447(c) provides that a motion to remand that is based on a claim other than subject matter jurisdiction "must be made within 30 days after the filing" of the removal notice set forth in § 1446(a). The 30-day limit is strictly construed. Moore § 107.41(1)(s)(i). The time limit commences upon filing, not on service of the removal notice. *Id.*; *Fax Telecommunications Inc.*, 138 F.3d 486–488. If a defendant fails to raise in a timely manner a plaintiff's failure to move to remand within 30 days, the plaintiff may argue that the defendant has waived that right. Moore § 107.41(1)(d)(iii).

However, a plaintiff's active participation in federal court proceedings may constitute waiver by a plaintiff 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

Grounds for remand can be a procedural defect in the removal procedure—for example, the motion was not timely, not all required defendants joined in the removal, a written joinder of required defendants was not filed in the time required, pleading of jurisdiction in the removal petition was defective, removal was prohibited (as in the case of a state worker's compensation claim), or removal by an in-state defendant. Other bases for remand are joinder

of a nondiverse defendant and dismissal of federal claims, 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. Moore § 1074.41(1)(a)(1).

Procedure

In a remand proceeding, the defendant bears the burden of proving the grounds for removal, including 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 as to whether to retain, remand, or dismiss the state claims. Moore § 107.41(2)(a). Settlement of a federal question or diversity claim does not require remand. *Id* at (b).

A minority of courts holds that a plaintiff's post-removal actions—for example, stipulation that the amount in controversy is below $75,000—support remand. The majority view is to the contrary. *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 the court can then retain jurisdiction over the civil action. § 1447(e); Moore § 107.41(2)(d). In the exercise of their discretion as to whether or not to remand, courts consider a number of factors (the *Hensgens* factors) based on the analysis of the Fifth Circuit in *Hensgens v. Deere & Co.*, 833 F.2d 1179 (5th Cir. 1987): (1) the purpose of amendment, (2) the merit of the proposed claim, and (3) the plaintiff's diligence in seeking amendment.

A binding settlement with a nondiverse defendant after (or before) removal supports the court's retaining (or permitting removal of) the case. Moore § 107.41(2)(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 timely objection to removal and undertaking such activities after a denial of a motion to remand have persuaded some courts to rule that no waiver existed. *Id* at (g).

Waiver of the Right to Remand

A plaintiff who fails to object or move to remand in the time required may lose the right to remand. In addition, a plaintiff who engages in post-removal activities may be found to have waived the right to remand.

Defendants have been found to have waived their rights to remove a state court action to the federal court by undertaking certain activities in the state forum. 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 will support a finding of waiver. *Brown v. Demco Inc.*, 792 F.2d 478, 481 (5th Cir. 1986). Courts have viewed activities such as filing an answer or initiating a discovery procedure as a preliminary or defensive action, not the type of conduct that would justify a finding of waiver. *Brown v. Sasser*, 128 F. Supp. 2d 1345, 1347–1350 (M.D. Ala. 2000). However, filing pleadings such as a permissive counterclaim or cross-claim seeking affirmative relief, motions for an injunction (but not papers opposing temporary restraining orders or injunctions), and filing motions seeking a decision on the merits are viewed as proceedings that support a finding of waiver. *Issacs v. Group Health Inc.*, 668 F. Supp. 306, 309 (S.D.N.Y. 1987); *Zbranek v. Hofheinz*, 717 F. Supp. 324, 325 (E.D. Tex. 1989). Filing a motion to dismiss coupled with participating in a hearing or awaiting a ruling by a state court before removing supports 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 (E.D. Va. 1991). Dispositive motions filed *before* a case becomes removable are generally not considered to support waiver. *Akin v. Ashland Chem. Co.*, 156 F.3d 1030, 1036 (10th Cir. 1998) (before, no waiver); *Wolfe v. Wal-Mart Corp.*, 133 F. Supp. 2d 889, 894 (N.D.W. Va. 2001) (after, waiver).

Conclusion

The journey through the removal-remand maze is a challenging exercise. Caution, attentiveness, and a thorough understanding of the controlling rules are a must in order to complete that journey successfully. **TFL**

George E. Lieberman is an attorney with Vetter and White in Providence, R.I., and handles complex commercial disputes and significant personal injury and product liability matters. He also serves as a FBA vice president for the First Circuit. *A version of the article was previously published in the Fall 2008 issue of* In-House Defense Quarterly, *published by DRI (www.dri.org).*

Endnotes

[1]There are federal statutes providing for concurrent jurisdiction over actions that are not removable; for example, the Jones Act, 46 U.S.C. § 688. Section 1445(c) bars removal of a state civil action arising under a state's workers' compensation law. However, a plaintiff's failure to move to remand such an action constitutes waiver because that statutory provision is considered procedural. *See Cook v. Shell Chem. Co.*, 730 F. Supp. 1381 (M.D. La. 1990).

[2]There are exceptions to the Rule of Unanimity. Fraudulently joined and nominal or formal parties do not need to join the action. Also, the better reasoned and growing view is that defendants who have not been served do not need to join. 16 Moore's Federal Practice § 107.1(1)(d) (3rd ed., 2003); Georgene Valero, National Law Journal at B-11 (Oct. 8, 2002).