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BOOK

FEDERAL JURISDICTION BASED ON REMOVAL:

A 50-STATE SURVEY

A Report of the Pharmaceutical Subcommittee of the Products Liability Committee

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INTRODUCTION

It has long been recognized that "there is no other phase of American jurisprudence with so many refinements and subtleties as removal and remand."[1] Familiarity with the timing, grounds, and procedural steps of removal is essential, as a party's failure to follow the appropriate procedures may have long-standing effects. If the substantive requirements for removal are not satisfied, or if the procedural rules are not met, a party can readily find its case being tried in a different forum and before a different judge than originally anticipated.

The singular purpose of this survey, "FEDERAL JURISDICTION BASED ON REMOVAL: 50-State Survey," is to assist the practitioner in navigating successfully between state and federal courts. The survey comprises submissions for each of the fifty states and is organized alphabetically by circuit. Lawyers from across the country contributed their time and talent to highlight not only the fundamental concepts of removal jurisdiction, but also the unique nuances within their jurisdictions.

At first blush, one might assume that removing a case is simple. After all, how difficult can it be to determine whether complete diversity exists and whether or not the amount in controversy is in excess of the jurisdictional amount? In practice, however, it is not that simple. Numerous pitfalls for the unwary abound. Important considerations come into play in determining the "parties in interest" and the "amount in controversy." For example, what happens when the Complaint asserts claims against a "Doe" defendant or seeks neither money damages nor damages in a specific dollar amount? What if the case one wants to remove is a class action? This survey addresses each of these issues and related sub-issues in detail.

The well-known maxim, "Timing is everything," holds especially true in the removal context. Being able to recognize the event that triggers the 30-day period when an action is initially removable is critical. Equally important, is recognition of events that trigger the thirty-day removal period when a case in not initially removable. In either scenario, if the 30-day window closes, the case will remain in state court. The authors provide detailed analysis of the time of existence of the grounds for removal.

No discussion of removal would be complete without addressing the subject of fraudulent joinder, the impact of the voluntary/involuntary rule, and waiver of the right to remove. The case law on these subjects varies greatly by jurisdiction and continues to evolve. For the lawyer whose practice includes litigation involving pharmaceutical products, these subjects are of particular importance.

In closing, I want to extend my deep thanks to all of the authors for their contribution. Their efforts identify some common themes and highlight the lack

[1] *Hagerla v. Miss. River Power Co.,* 202 F. 771, 773 (S.D. Iowa 1912).

of uniformity on certain issues. We hope that this survey will assist you in your practice as this body of law continues to develop.

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September 2008

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1ST CIRCUIT

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I. POWER AND RIGHT TO REMOVE

A. The Parties

1. Defining "Parties in Interest"

The term parties in interest, as it appears in 28 U.S.C. § 1441(b) has not been defined by the courts of the District of Maine.[1] 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. However, the case of *Millett v. Atlantic Richfield Company*,[2] sheds some light on how that term may be defined if that issue were to come before the District Court for the District of Maine. In *Millett*, Magistrate Judge David Cohen issued a Recommended Decision on Plaintiffs Motion to Remand which rejected the out-of-state Defendants argument that the court, in analyzing whether there was diversity of citizenship to support removal under 28 U.S.C. § 1441, could not consider the citizenship of a Maine resident added as a defendant on the same day that Defendants motion for removal was filed. The magistrate held that even though the added defendant might not have been a

[1] *See* 28 U.S.C. § 1441(b).
[2] 1999 WL 33117145 (D. Me. 1999).

proper party before the action was removed, this fact was not relevant to an analysis of the existence of diversity jurisdiction. In a footnote, the magistrate noted that the last sentence of section 1441(b) comes into play only when diversity jurisdiction on removal under section 1441(a) has been established.[3] Rather [section 1441(b)] provides that, even if there is complete diversity of citizenship, a case cannot be removed if a defendant, properly joined and served is a citizen of the state in which the action is brought. It would seem, therefore, that the courts of the District of Maine would read the term parties in interest to merely refer to a defendant that is properly before the court as a party before the motion for removal has been filed.

2. Presence of "Doe" Defendants

In the First Circuit, the existence of fictitious or Doe defendants is to be ignored by the court in determining whether removal is proper under 28 U.S.C. § 1441(a), even in cases where the plaintiffs pleadings suggest that the residency of these defendants might preclude the courts exercise of diversity jurisdiction.[4] If, however, after removal, the fictitious defendants are identified as non-diverse parties, then diversity jurisdiction is defeated.[5]

B. The Amount in Controversy

1. Establishing the Amount in Controversy

In the state courts of Maine, parties are prohibited from asking for a specific amount of money in their pleadings.[6] Thus, upon removal, courts in the District of Maine must look to the pleadings and evidence presented by the defendant to determine whether the defendant has met its burden of establishing by a preponderance of the evidence that the amount in controversy exceeds

[3] *Id.* at *6 n.7 (citing Burke v. Humana Ins. Co., 932 F. Supp. 274, 275 (M.D. Ala. 1996).
[4] Casas Office Machines, Inc. v. Mita Copystar America, Inc., 42 F.3d 668, 673 (1st Cir. 1994).
[5] *Id.* at 674-75.
[6] 14 M.R.S.A. 52.

$75,000.[7] Some factors that have been held to be important in undertaking this inquiry include:

1. the compensable damages suffered by the plaintiff, *Doughty*, *supra*. at 219);
2. other elements of recovery sought by the plaintiff, including, among other things, punitive damages, Bernier v. Unicco Service Co., 2005 WL 767443 *1 (D. Me. 2005);
3. amounts that plaintiffs in similar cases in the locality have recovered, id.;
4. when authorized by statute or contract, an estimate of the reasonable attorneys= fees that could be recovered, Waldron v. George Weston Bakeries Dist., Inc., 477 F. Supp.2d 295, 296 (D. Me. 2007); and
5. whether the plaintiff has stipulated or attempted to stipulate, before removal, that the amount she is seeking in the suit is less than $75,000, Satterfield v. F.W. Webb, 334 F. Supp.2d 1, 3-4 (D. Me. 2004).

2. Defeating Removal by Amending Relief Sought

While a plaintiff may successfully defeat federal jurisdiction by asserting from the inception of the case that she will be seeking less than $75,000 in damages, the District of Maine, in dicta, has stated that cases holding that a post-removal attempt to so limit damages is ineffectual seem correct.[8]

3. Amount in Controversy Where Equitable Relief Sought

The question of how the court is to determine whether the amount in controversy requirement has been satisfied when the plaintiff seeks equitable relief is an open issue in this district and in the First Circuit. However, a fairly recent opinion from the First Circuit Court of Appeals may provide some insight into how the issue might be analyzed by the district courts in this circuit. In a case where the defendant challenged the district courts exercise of diversity jurisdiction over a the interpretation of an arbitration clause when the amount in controversy in the arbitration was just under $60,000, the First Circuit held that the $75,000 amount in controversy had

[7] Doughty v. Hyster New England, Inc., 344 F. Supp.2d 217, 219 (D. Me. 2004); *see also*, Vradenburgh v. Wal-Mart Stores, Inc., 397 F. Supp.2d 76, 78 (D. Me. 2005). (In determining whether the amount in controversy element is satisfied, the Court considers whether, taking all reasonable inferences in favor of Plaintiffs Complaint, the Court is persuaded by a preponderance of the evidence that the litigation value of the case exceeds $75,000.).

[8] *Id.* (citing Rogers v. Wal-Mart Stores, Inc., 230 F.3d 868, 872 (6th Cir. 2000); *In re* Shell Oil Co., 970 F.2d 355, 356 (7th Cir. 1992)).

nonetheless been met.[9] The court stated that the proper focus in analyzing the amount in controversy was not merely the monetary judgment which the plaintiff may recover, but more broadly what were the judgments pecuniary consequences to those involved in the litigation.[10] Thus, the extra costs that the plaintiff would have incurred if arbitration were held in one location versus another were properly included in the calculation of the amount in controversy.[11]

C. Time of Existence of Grounds for Removal

1. Event Triggering Thirty-Day Period for Actions Initially Removable

So long as the case is, on its face, removable on the initial pleading, the thirty-day removal period that is set forth in 28 U.S.C. § 1446(b) is triggered from receipt or service of the complaint.[12]

2. Event Triggering Thirty-Day Period for Actions Not Initially Removable

If, however, the case cannot be removed based on the face of the initial complaint, then, pursuant to section 1446(b), an unremovable case may become removable within 30 days of receipt of an amended pleading, motion, or other paper from which it may first be ascertained that the case is one which is or has become removable; in other words, a once non-removable case is removable within the 30 days after the defendant discovers that the case is or has become removable.[13]

While the receipt of an amended pleading or motion may trigger this latter 30-day removal period, so too may the receipt of some other paper. Other paper that has signified the newfound removability of a case and initiated the thirty-day period includes letters from opposing counsel, correspondence between parties, affidavits, proposed jury instructions, answers to interrogatories,

[9] Richard C. Young & Co., Ltd. v. Leventhal, D.D.S., M.S., 389 F.3d 1, 3 (1st Cir. 2004).
[10] *Id.*
[11] *Id.*
[12] Borgese v. American Lung Assn of Maine, 2005 WL 2647916 * 1 (D. Me. 2005).

motions for summary judgment, and documents produced in discovery.[14] In *Parker*, the receipt by defendant of a letter enclosing a Stipulation of Dismissal of the non-consenting defendant was held to be an other paper giving rise to the 30-day period provided for in the second paragraph of section 1446(b).[15] It is worth pointing out that despite the fact that complete diversity may exist among the plaintiff and all the defendants, one defendant can block removal by failing to give consent since all defendants must consent to removal.[16] It was not until defendant received this other paper that it realized that the case had become removable, given that removal could not have gone forward while the non-consenting defendant was still involved in the litigation.[17]

II. FRAUDULENT JOINDER

A. Test for Fraudulent Joinder

While the First Circuit has not defined how claims of fraudulent joinder should be analyzed, the District of Maine has held that to prove that a non-diverse defendant has been joined simply to defeat diversity jurisdiction, the burden is on the party challenging the jurisdiction-related allegations of the complaint to prove that they have no reasonable basis and to prove the pleaders objective bad faith in making those allegations.[18] The party challenging the joinder must prove to a legal certainty that, at the time of filing the complaint, no one familiar with the applicable law could reasonably have thought, based on the facts that the pleader knew or should have known at the time

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[13] Parker v. County of Oxford, 224 F. Supp.2d 292, 296 n.7 (D. Me. 2002).
[14] *Id.* at 294.
[15] *Id.* at 295.
[16] *Id.* at 293-94.
[17] *Id. But see Borgese*, 2005 WL 2647916 * 2-3 (holding that letter sent by plaintiffs counsel in the course of settlement negotiations was not an other paper, even though letter made vague reference to possible federal claims that could be asserted by plaintiff since it did not give notice of a change in diversity between parties or amount in controversy, and was not related to filing with court).
[18] *In re* Maine Asbestos Cases, 44 F. Supp.2d 368, 372 (D. Me. 1999).

that a cause of action against the resident defendant could ultimately be proven.[19]

B. Evidence of Fraudulent Joinder

The *In re Maine Asbestos Cases* test breaks down into two prongs: (1) facial invalidity, and (2) objective bad faith proven to a legal certainty.[20] Despite the fact that the District of Maine has announced the foregoing test, it has not been put into practice on more than a few occasions. Resort should be had to other district courts within this circuit, to the extent that they employ the same test, to further flesh out what constitutes evidence of fraudulent joinder.

III. VOLUNTARY / INVOLUNTARY RULE

A. "Voluntary" Dismissal

In *New England Explosives Corp. v. Maine Ledge Blasting Specialist, Inc.*,[21] the District of Maine opined in dictum that notwithstanding the entry of a default judgment against a non-diverse defendant, which, ostensibly, would have created complete diversity of citizenship among the remaining parties, the court could not exercise diversity jurisdiction. The court flatly held that the entry of a default judgment, being an act of the court, is not a voluntary act of the plaintiff that renders the once non-removable case removable.[22]

The District of Maine subsequently held that *New England Explosives* does not create a bright-line rule that a court order creating diversity is never a plaintiff's voluntary act for purposes of the involuntary/voluntary exception to removal of diversity actions from state to federal court. Instead, seventeen years later, the District of Maine changed the focus slightly so that now the

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[19] *Id.; see also* Polyplastics, Inc. v. Transconex, Inc., 713 F.2d 875, 877 (1st Cir. 1983) (stating that a finding of fraudulent joinder bears an implicit finding that the plaintiff has failed to state a cause of action against the fraudulently joined defendant).
[20] *See* Tardy v. Eli Lilly and Company, 308 F. Supp. 2d 18, 19-20 (D. Me. 2004).
[21] 542 F. Supp. 1343, 1347 (D. Me. 1982)
[22] *Id.* at 1347 n. 7.

question is whether the court order that created diversity was the result of a voluntary act by the plaintiff.[23] The court there noted that if the order that issued as a result of a motion filed by plaintiff, it could be considered a manifestation of [p]laintiffs voluntary act.[24] However, since the order that issued in *Maine Employers Mutual Ins. Co.* was contrary to the request for relief sought by plaintiff, the court held that the order was not a voluntary act of the plaintiff, meaning that the case was still not removable.[25] The ruling now casts doubt on the dictum in *New England Explosives*, since default judgment is typically sought by the plaintiff as voluntary act.

IV. WAIVER OF RIGHT TO REMOVE

A. Waiver by Defending

Cases arising from the First Circuit, suggest that waiver of the right of removal requires evidence of intent, which must be clear and unequivocal, and the defendant's actions must be inconsistent with the right to remove.[26] The actions from which intent is to be inferred must be clearly inconsistent with a purpose to pursue the right to remove.[27] It is well established in the district courts of this circuit that while conduct in state court which seeks affirmative relief or substantive disposition of a claim may constitute waiver, [n]either defensive pleadings nor motions to preserve the status quo ante waive the right to removal.[28] Filing an answer and asserting affirmative defenses did not constitute a waiver in *F.D.I.C. v. Greenhouse Realty Associates*.[29] Likewise, filing a motion for enlargement of time within which to answer the complaint is not a waiver, since such a rule would present a defendant with a Hobsons choice between answering the

[23] Maine Employers Mutual Ins. Co. v. Yates Insurance Agency, 52 F. Supp. 2d 135, 138 (D. Me. 1999).
[24] *Id.*
[25] *Id.*
[26] Hernandez-Lopez v. Com. of Puerto Rico, 30 F.Supp.2d 205, 209 (D. P.R.1998).
[27] Davila v. Hilton Hotels Intern, 97 F.Supp. 32, 34 (D. P.R. 1951).
[28] *Id. See also,* Houlton Sav. Bank v. American Laundry Machinery Co., 7 F.Supp. 858, 861 (D. Me. 1934).

complaint within the deadline to do so (for example, Maines deadline to file an answer is 20 from the date of service) and thus waiving the right to remove, or else risking default.[30] Similarly, opposing injunctive relief, or filing motions or memoranda as required by the court, do not constitute waivers of the right to remove.[31]

On the other hand, actions in the state court, that indicate the defendant has invoked the jurisdiction of the state court or has taken actions that manifest the defendant's intent to have the case adjudicated in state court will constitute waiver of the right of removal.[32] Removal following such actions may be seen as nothing more than a veiled attempt to appeal from an adverse ruling in the state court.[33] In *F.D.I.C. v. Greenhouse Realty Associates*, the Court noted that actively seeking disposition on the merits, such as by filing a motion to dismiss, would constitute a waiver of the right to remove a case to federal court.

B. Waiver by Consent

State laws requiring corporations registered to conduct business in the state to submit or consent to the jurisdiction of the states courts, standing alone, do not deprive such companies of their right to remove actions to the federal court.[34] The same can be said of insurers who register in particular state and thereby consent to be sued in the states courts.[35] The reason offered for the rule is that it is intent to waive which determines waiver, and it is the intent of the party seeking removal which is examined, not the intent of third parties, such as a states legislature.[36] The pertinent

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[29] 829 F.Supp. 507, 511 (D. N.H.1993)
[30] Malave v. Sun Life Assur. Co. of Canada, 392 F.Supp. 51, 51-52 (D. P.R. 1975).
[31] *Hernandez-Lopez, supra*.
[32] *Id.*
[33] *Id*.
[34] *Davila, supra*.
[35] CNA Cas. of Puerto Rico v. Fidelity and Cas. Co. of New York, 790 F.Supp. 45, 47 (D. P.R., 1992).
[36] *Id*.

statutes requiring registration of a corporation or insurer doing business within the state is merely to assure personal jurisdiction within the state, not to dictate whether suit must be maintained in state versus federal court.[37] Furthermore, the decisions uniformly hold that it is beyond the power of the States to impair the right to remove a case on diversity grounds when the removal is timely and diversity does in fact exist. A statute which in terms purported to effect such a result would be unconstitutional.[38]

The question may arise whether prior litigation by a party in state court may constitute consent to waive the right of removal in subsequent litigation, particularly where the parties to the two actions are the same and the transactions in litigation are closely related.[39] However, if it is true that waiver is always spelled out from occurrences after commencement of suit,[40] then conduct in prior litigation would have to be very closely related in order to constitute a waiver. The issue has not been further addressed in this circuit.

C. Waiver by Contract

The question of whether parties may agree by contract to waive the right of removal was last addressed in this circuit in 1949. Whether parties may stipulate in advance to restrict removal is highly doubtful, for such an understanding would run counter to the settled idea that bargains limiting parties to particular tribunals are illegal.[41]

V. PRACTICE POINTERS

In order to convince the court that the amount in controversy exceeds the jurisdictional limit, demand letters and other correspondence from plaintiff or its counsel, though often inflated, can

[37] *Id*. at 48.
[38] *Davila, supra*. at 34.
[39] Demarkles v. Rudolph Wurlitzer Co., 132 F.Supp. 20, 21 (D. Mass. 1955).
[40] *Davila, supra*. at 35

support a higher amount in dispute than a plaintiffs representations after removal is sought. The Maine Trial Lawyers Association publishes a report of jury verdicts in the state which provide information about each jury trial, pretrial settlement positions of the parties and the verdict amount. These may also provide evidence of the value of the claims at hand. Caution should be exercised, however, so as not to jeopardize settlement possibilities by inflating plaintiff's opinion of the value of its claim.

To avoid waiver it is important when defending a state court complaint that defense counsel not take any action beyond what is necessary to protect against default or maintain the status quo. Faced with a motion for prejudgment attachment, the case law suggests that objecting should not constitute a waiver of the right to appeal. Likewise, opposition to injunctive relief such as a motion for temporary restraining order (TRO) and preliminary injunction would not constitute a waiver. However, hearings on a preliminary injunction are often consolidated with a hearing on the merits. M.R.Civ.P. 65(b)(2). It is not inconceivable that such a hearing might take place within the time limit to remove, since Rule 65(a) states that [i]n case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time. Whether participating in such a consolidated hearing constitutes a waiver of the right to remove the matter may be very fact dependant. Unfortunately, a TRO may so hinder a defendant that a prompt hearing on the preliminary injunction is critical. Better practice would be to object to a consolidated hearing so as to avoid the appearance of seeking a resolution on the merits only to then seek removal as an alternative to appeal of an adverse ruling.

If a defendant potentially faces multiple similar suits between the same parties in state court,

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[41] General Phoenix Corporation v. Malyon, 88 F.Supp. 502, 503 (S.D. N.Y. 1949), quoted in *Davila, supra*.

such as between a manufacturer and wholesaler or retailer, it may want to consider at the outset whether it prefers to litigate in state or federal court. If it is even considering litigation in federal court, it would be wise to remove the first action rather than wait to see how it turns out in state court and then find its removal of subsequent actions blocked by an implied consent to waive removal.

Given the constitutional import of removal, it should be argued in favor of denying remand that there is no appeal from the grant of remand, while there is an appeal from the denial of remand.

> That right [of removal] is of sufficient value and gravity to be guarantied by the Constitution and the acts of Congress. If it exists, and the Circuit Court denies its existence, and remands or refuses to remove the suit, the error is remediless, and it deprives the petitioner of his constitutional right. If the right does not exist, and the court affirms its existence and retains the suit, the error may be corrected by the Supreme Court. An error that the aggrieved party may correct is less grievous than one that is without remedy.[42]

[42] Boatman's Bank v. Fritzlen 135 F. 650, 655 (8th Cir. 1905) quoted in *Houlton Sav.*, *supra*. at 862.

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I. POWER AND RIGHT TO REMOVE

A. The Parties

1. Defining "Parties in Interest"

The District Court of Massachusetts has provided minimal guidance about the definition of "parties in interest." The Court has stated that third-party defendants cannot remove a case from state court to federal court.[1] Similarly, the Court has found that a defendant's relationship with other parties that may have an interest in the case does not defeat diversity.[2] Moreover, "[f]or purposes of determining diversity, citizenship of a limited-liability corporation is that of each of its members."[3]

2. Presence of "Doe" Defendants

The District Court of Massachusetts found that original diversity jurisdiction did not exist in a case where there was only one defendant who was also a "Doe" defendant.[4] However, Massachusetts treats "Doe" defendants in removal cases as instructed: "In 1988, Congress

[1] Coren v. Jefferson et al., 139 F.R.D. 561, 564 (D. Mass. 1991).
[2] Whittaker Corp. v. Am. Nuclear Insurers, 2007 WL 2257084 at *1 (D. Mass. 2007) (unsuccessful argument that the court should consider the citizenship of all the members of ANI, an unincorporated association of member insurance companies that underwrote the insurance policy at issue, because they are the real parties in interest.)
[3] Landworks Creations, LLC v. Fid. & Guar. Co., 2005 WL 3728719 at *1 (D. Mass 2005).
[4] McMann v. John Doe, 460 F. Supp. 2d 259, 264-65 (D. Mass. 2006).

amended the removal statute, 28 U.S.C. §1441, by declaring that the presence of defendants sued under fictitious names does not defeat removal jurisdiction."[5] But when "Doe" defendants are ultimately named and diversity is destroyed, federal jurisdiction can only continue if the former "Doe" defendants are dispensable parties and are dismissed.[6]

3. Diversity for Putative Class Actions

The diversity determination in putative class actions is governed by the Class Action Fairness Act (CAFA),[7] which requires only minimal diversity. The District Court of Massachusetts found that residency and citizenship are not interchangeable when determining diversity jurisdiction under CAFA.[8] Instead, citizenship is equated with domicile.[9] Thus, a "putative class that is composed entirely of residents of Massachusetts, does not, by definition, foreclose the inclusion of non-citizens as well. This suffices to support the assertion of federal jurisdiction in this case."[10] There has also been some debate about the definition of "commencement" in CAFA, which states that the Act applies to any case commenced on or after February 18, 2005, the date of enactment. The District Court of Massachusetts held that an action is commenced as of the date of filing with the state court, not on the date that it was removed to federal court.[11] Moreover, the Court set forth two types of amendments that generally do establish the commencement of a new action for the purposes of CAFA: "1) amendments that add new defendants and 2) amendments that assert a wholly distinct claim for relief into a pending suit."[12]

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[5] *Id*. at 264.
[6] Casas Office Machines v. Mita Copystar Am., 42 F.3d 668, 675 (1st Cir. 1994).
[7] 28 U.S.C. §1332(d)(2).
[8] McMorris v. TJX Companies, 493 F. Supp. 2d 158, 162 (D. Mass. 2007).
[9] *Id*.
[10] *Id.* at 163.
[11] Natale v. Pfizer, 379 F. Supp. 2d 161, 176 (D. Mass. 2005).
[12] Moniz v. Bayer A.G., 447 F. Supp. 2d 31, 37 (D. Mass. 2006).

B. The Amount in Controversy

1. Establishing the Amount in Controversy

The First Circuit and the District Court of Massachusetts have elaborated upon what should be included in and excluded from the amount in controversy determination. For instance, a defendant's compulsory counterclaim is not part of the amount in controversy calculation.[13] On the other hand, colorable multiple damages claims should be included in the amount in controversy calculation.[14] For example, multiple damages claims under Chapter 93A of the Massachusetts Consumer Protection Act would be included in the determination.[15]

"Normally, attorney's fees are excluded from the amount in controversy determination . . ."[16] However, the First Circuit has outlined two exceptions: "when the fees are provided for by contract and when a statute mandates or allows payment of the fees."[17] For instance, attorney's fees available under Chapter 93A of the Massachusetts Consumer Protection Act would can be included in the determination.[18] But the lawyer's fees cannot be aggregated for an entire class. *Id*. Rather, "[a]ny reasonable amount of attorneys' fees must be divided pro rata among all members of the putative class."[19]

Furthermore, aggregation of claims is usually not allowed in order to meet the amount in controversy requirement.[20] But "[a]n exception to the rule. . . has been recognized for situations where 'several plaintiffs unite to enforce a single title or right, in which they have a common and

[13] FLEXcon Co. v. Ramirez Commercial Arts, Inc., 190 F. Supp. 2d 185, 187 (D. Mass. 2002).
[14] Payne v. Goodyear Tire & Rubber Co., 229 F. Supp. 2d 43, 46 (D. Mass. 2002) (overruled on other grounds).
[15] *Id*. (citing F.C.I. Realty Trust v. Aetna Cas. & Sur. Co., 906 F. Supp. 30, 32 n.1 (D. Mass. 1995).
[16] Spielman v. Genzyme Corp., 251 F.3d 1, 7 (1st Cir. 2001).
[17] *Id*.
[18] *Id*.
[19] Spielman v. Genzyme Corp., 193 F.R.D. 19, 22 (D. Mass 2000).
[20] Gattegno v. Sprint Corp., 297 F. Supp. 2d 372, 377 (D. Mass 2003).

undivided interest.'"[21] Such aggregation is more likely to occur in cases dealing with a single piece of property or an insurance policy, rather than a product liability claim.[22]

2. Amount in Controversy Where Equitable Relief is Sought

The amount in controversy determination is more difficult when equitable relief is sought. The general approach is that "[i]n actions seeking declaratory or injunctive relief, the amount in controversy is measured by the pecuniary value of the rights being litigated."[23] For instance, in a case where the plaintiff was seeking an injunction, the amount in controversy requirement was satisfied because of "the enormous value of the merger Plaintiffs seek to enjoin."[24] And in a declaratory judgment case, the potential costs of not obtaining the declaratory judgment were included in the determination.[25]

3. Defeating Removal by Amending Relief Sought

Neither the First Circuit nor the District Court of Massachusetts has directly examined whether a plaintiff can defeat federal diversity jurisdiction by amending the jurisdictional amount after the defendant has removed the case. The First Circuit follows the Supreme Court case of *St. Paul Mercury Indemnity Company v. Red Cab Company*,[26] and finds that "'the sum claimed by the plaintiff controls if the claim is apparently made in good faith.'"[27] When a defendant argues that the plaintiff overestimated the damages amount, the defendant must show a lack of good faith by the plaintiff.[28] But the First Circuit has not articulated a standard for when the

[21] *Id*. at 378 (citing Zahn v. Int'l Paper Co., 414 U.S. 291 (1973)).
[22] Natale v. Pfizer, 379 F. Supp. 2d 161, 180 (D. Mass. 2005).
[23] Giagrande v. Shearson Lehman/E.F. Hutton, 803 F. Supp. 464, 467-68 (D. Mass. 1992) (citing Hunt v. Washington State Advertising Comm'n, 432 U.S. 333, 347 (1977)).
[24] Drulias v. Ade Corp. et al., 2006 U.S. Dist. Lexis 43285 at 6 (D. Mass. 2006).
[25] Richard C. Young & Co. v. Leventhal, 389 F.3d 1,3 (1st Cir., 2004) (finding that a declaration that parties' agreement required arbitration to be held in Boston instead of California would avoid additional costs).
[26] 303 U.S. 283 (1938).
[27] *Spielman*, 251 F.3d at 5.
[28] Sattersfield. v. F.W. Webb, Inc., 334 F. Supp. 2d 1, 3 (D. Me. 2004).

defendant argues that the plaintiff understated the damages to avoid federal jurisdiction.[29] The District Court of Massachusetts does touch on the matter: "It is somewhat less common, though still permissible, for a defendant who has removed a case to federal court to seek to demonstrate that the plaintiff's damage estimate is unrealistically low, perhaps understated precisely in order to avoid federal jurisdiction."[30] Although the District Court of Massachusetts opens the door for a challenge, the Court does not explain the defendant's burden of proof.[31]

C. Time of Existence of Grounds for Removal

1. Event Triggering Thirty-Day Period for Actions Initially Removable

The Supreme Court established that "'the 30-day removal period does not begin to run until a defendant is formally served with the complaint.'"[32] Neither the First Circuit nor District Court of Massachusetts has adopted the "first-served defendant rule" or the "last-served defendant rule" in cases with multiple defendants.[33] However, the District Court of Massachusetts has held "that a subsequently-served defendant has thirty days to seek removal, even though its co-defendants may be time-barred from doing so."[34] The Court's rational is that the subsequently-served defendant should have the opportunity to persuade the original defendants to join in the removal petition.[35]

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[29] *Id*.
[30] Radlo v. Rhone Poulenc, S.A., 241 F. Supp. 2d 61, 63 (D. Mass. 2002).
[31] *Id*. at 4-5 (failing to choose either the "legal certainty" standard or the "preponderance of evidence standard" because the defendant does not have sufficient evidence under either standard).
[32] *In re* Pharm. Indus. Average Wholesale Price Litig., 307 F. Supp. 2d 190, 194 (D. Mass. 2004) (citing Murphy Bros. v. Mitchetti Pipe Stringing, 526 U.S. 344 (1999)).
[33] *Id*. at 9-10.
[34] Garside v. Osco Drug, 702 F. Supp. 19, 22 (D. Mass. 1988) (finding that defendant who files his removal petition less than thirty days after it was served but more than four years after its co-defendants were served could remove the case).
[35] *Id*. at 21.

2. Event Triggering Thirty-Day Period for Actions Not Initially Removable

If the case is not removable on the initial pleading, 28 U.S.C. §1441 provides that, "a notice of removal may be filed within thirty days of receipt by defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may be first ascertained that case is one which is, or has become removable…" The District Court of Massachusetts has commented on what constitutes "other paper."[36] Massachusetts follows a strict construction approach, providing a narrow scope for the words "other paper."[37] The Court looks at the phrase "other paper" in context and finds that the "other paper" must be similar to the other formal papers listed – a pleading, motion and order.[38] As a result, a deposition transcript does not qualify because it is not formal enough.[39] The Court recognizes that it has created an artificial line, but decides that it is necessary for the sake of clarity.[40]

II. FRAUDULENT JOINDER

A. Test for Fraudulent Joinder

The District Court of Massachusetts also explains when an amended complaint will revive the right to remove: "Generally, an alteration of a claim is not enough to give rise to a new removal right…But where the amendment is substantial, the policies underlying the 30 day rule are inapplicable."[41] The essential question is whether a significant enough change has occurred to revive the waived right to remove.[42] In *McKenna*, the case was removable on the initial complaint because of diversity, but the defendant did not remove.[43] The plaintiff amended

[36] Mill-Bern Associates, Inc. v. Dallas Semiconductor Corp. et al., 69 F. Supp. 2d 240 (D. Mass. 1999).
[37] *Id*. at 241-42.
[38] *Id*. at 242-43.
[39] *Id*. at 244.
[40] *Id*.
[41] McKenna v. Brassard, 704 F. Supp. 309, 311 (D. Mass. 1989).
[42] *Id*. at 310-11.
[43] *Id*. at 310.

the complaint to add a wrongful death claim, and the defendant removed the case to federal court.[44] The Court found that the nature of the change was not substantial enough to revive the right to remove.[45] Moreover, the amount of damages sought did not change drastically: "A change in the amount of damages sought, therefore, does not give rise to a new removal right."[46]

B. Evidence of Fraudulent Joinder

"The doctrine of fraudulent joinder is meant to prevent the improper joinder of a party in order to defeat federal jurisdiction."[47] In Massachusetts, in order to prove fraudulent joinder, a defendant "bears the burden of demonstrating, by clear and convincing evidence, either (1) that an outright fraud has been committed in the plaintiff's pleadings, or (2) that the pleadings show that no reasonable expectation exists of the plaintiff stating a cause of action in state court against the non-diverse defendants."[48] "The linchpin of the fraudulent joinder analysis is whether the joinder of the non-diverse party has a reasonable basis in law and fact."[49] The test is predominantly objective: "So long as the plaintiffs have an objectively valid basis for joining the party in the complaint, their subjective motivations are largely irrelevant."[50] In fact, the Court stated that "[s]ubjective good faith is not enough."[51] Moreover, "[e]ven where a plaintiff is mistaken about the factual basis for his claim, a court may infer a wrongful joinder where the plaintiff failed to conduct a reasonable investigation."[52] The Court also follows the Supreme Court opinion in *Chesapeake & Ohio Railway. Co. v. Cockrell*,[53] which finds that "fraudulent

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[44] *Id*.
[45] *Id*. at 312.
[46] *Id*.
[47] Rodrigues v. Genlyte Thomas Group LLC, 392 F. Supp. 2d 102, 107 (D. Mass. 2005).
[48] Kendall v. Metro. Life Ins. Co. *(In re* New Eng. Mut. Life Ins. Co. Sales Practices Litig.), 324 F. Supp. 2d 288, 304 (D. Mass. 2004); *see also In re* Massachusetts Diet Drug Litig., 338 F. Supp. 2d 198, 202 (D. Mass. 2004).
[49] Mills v. Allegiance Healthcare Corp., 178 F. Supp. 2d 1, 4 (D. Mass. 2001).
[50] *Id.* at 6.
[51] *Id*. at 4-5.
[52] *Id.* at 5.
[53] 232 U.S. 146 (2004).

joinder does not exist when an argument offered to prove the fraudulent joinder of non-diverse defendants simultaneously shows that no case exists against the diverse defendant or defendants."[54]

When evaluating whether there is a fraudulent joinder, a court can look beyond the allegations of the complaint.[55] A court can consider "summary judgment type evidence, such as affidavits, transcripts and exhibits."[56]

III. VOLUNTARY/INVOLUNTARY RULE

A. "Voluntary" Dismissal

According to the voluntary/involuntary rule, a defendant may remove a qualified diversity action from state to federal court after dismissal of a non-diverse defendant only if the plaintiff voluntarily dismisses the non-diverse defendant. Consequently, the District Court of Massachusetts acknowledges that elimination of the non-diverse party by summary judgment would not make the case removable.[57] It is not clear whether there is an exception to the involuntary/voluntary rule in the context of a fraudulent joinder. The District Court of Massachusetts surmised that there would not be an exception:

> There could be some question whether that rule endures after the amendment to *§ 1446(b)* that permits a new opportunity for removal after a party receives an "order" that makes the case removable. The Supreme Court has not answered that question, but the consensus of the lower courts is that the rule retains its vital force.[58]

[54] *Kendall*, 324 F. Supp. 2d 288, 304 (D. Mass. 2004).
[55] *Mills*, 178 F. Supp. 2d at 5.
[56] *In re Massachusetts Diet Drug Litig.*, 338 F. Supp. 2d at 202.
[57] Mill-Bern Associates, Inc. v. Dallas Semiconductor Corp. et al., 69 F. Supp. 2d 240, 245 (D. Mass. 1999).
[58] *Id*. at 245 (pointing out that the defendant cannot disguise a summary judgment action as a fraudulent joinder action in order to obtain diversity jurisdiction through removal).

IV. WAIVER OF RIGHT OF REMOVAL

A. Waiver by Defending

The District Court of Massachusetts recognizes that "a party may waive its right to remove if, before seeking to remove, it affirmatively evidences an intention to submit to the state court's jurisdiction."[59] However, the Court only gives this general statement and does not provide any further details about how to evaluate when a waiver has occurred.

B. Waiver by Contract

There is also language that suggests that a forum selection clause could function as a contractual waiver of removal. In general, "'[forum selection clauses] are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances.'"[60] However, in order to function as a waiver of removal, "'a forum selection clause must contain language that clearly designates a forum as the exclusive one.'"[61] Specifically, in order to be deemed mandatory, a forum selection clause should contain language that places jurisdiction "solely", "only" or "exclusively" in the state courts of the desired state, or that "all" litigation "must" be brought within a certain state.[62]

V. PRACTICE POINTERS

As noted above, Massachusetts generally follows traditional notions of removal and remand jurisprudence. Practitioners representing pharmaceutical and medical device companies here, however, should be mindful of how the naming of local co-defendants and subsequent voluntary dismissal of such parties may impact the analysis.

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[59] Demarkles v. Rudolph Wurlitzer Co., 132 F. Supp. 20, 21 (D. Mass. 1955) (citing Cyclopedia of Federal Procedure, § 3.101.).
[60] Kilgallen v. LJK Software, 99 F. Supp. 2d 125, 129 (1st Cir. 2000) (quoting Paul Bus. Sys., Inc. v. Canon U.S.A., Inc., 240 Va. 337, 397 S.E.2d 804, 807-08 (Va. 1990)).
[61] Trans Nat'l Travel, Inc. v. Sun Pacific Int'l, 10 F. Supp. 2d 79, 82 (D. Mass. 1998) (quoting Northern Dist. Council of Laborers v. Pittsburgh-Des Moines Steel Co. 69 F.3d 1034, 1037 (9th Cir. 1995)).
[62] Dorel Steel Erection Corp. v. Capco Steel Corp., 329 F. Supp. 2d 110, 115 (D. Mass. 2005).

A. Distributor Defendants

Independent third-party distributor defendants present unique questions surrounding removal rights. Unlike other jurisdictions, Massachusetts District Courts generally treat the addition of local distributor defendants at face value.

For example, the case *Mills v. Allegiance Healthcare Corp.*,[63] suggests a proclivity to allow the joinder of distributors. In *Mills*, the plaintiff was a registered nurse who became allergic to latex gloves. The defense argued that Caflin, the only distributor of latex rubber gloves named and the sole non-diverse party named, was fraudulently joined to defeat removal.[64] The Court dismissed the defendant's first argument that the plaintiff did not really intend to secure a judgment from Caflin and had only joined Caflin to facilitate discovery.[65] The Court emphasized that "as long as the plaintiffs have an objectively valid basis for joining Claflin in the complaint, their subjective motivations are largely irrelevant."[66] The Court also dismissed the defendant's second argument that the distributor's liability is secondary to that of the manufacturer.[67] The Court clarified the Massachusetts law pertaining to distributor liability:

> Massachusetts imposes strict liability on distributors of products, even those who are merely a conduit and neither alter the product nor contribute to its injuriousness. . . Under Massachusetts law, a plaintiff can recover for negligence and breach of warranty, express or implied, if the plaintiff was a person whom the manufacturer, seller, lessor or supplier might reasonably have expected to use, consume, "or be affected by the goods."[68]

[63] 178 F. Supp. 2d 1 (D. Mass. 2001).
[64] *Id.*
[65] *Id.* at 6.
[66] *Id.*
[67] *Id*. at 7.
[68] *Id*.

However, the defendant's third argument -- that "Claflin did not begin to distribute the latex gloves until after plaintiff contracted the allergy" so "its products could not possibly have caused the injury" – ultimately convinced the Court to hold that Claflin was a misjoined party.[69]

B. Hospital and Not-for-Profit Defendants

Plaintiffs sometimes name local hospitals or medical care facilities as co-defendants to defeat diversity. However, many hospitals in the Commonwealth are not-for-profit entities, and have certain statutory protections that may encourage plaintiffs to avoid naming such entities or drop them after the suit is filed. Specifically, Massachusetts has enacted a charitable immunity cap for tort actions: "[I]f the tort was committed in the course of any activity carried on to accomplish directly the charitable purposes of such corporation, trust or association, liability in any such cause of action shall not exceed the sum of twenty thousand dollars exclusive of interest and cost."[70] While hospitals are not automatically protected by the charitable immunity cap, "[h]ospitals were among the charitable institutions specifically targeted to be 'treated differently.'"[71]

C. Treating Physicians

Similarly, plaintiffs sometimes name a local treating physician as a co-defendant to defeat diversity jurisdiction. Again, Massachusetts procedural law requirements may encourage plaintiffs to avoid such a route or voluntarily dismiss the physician defendant well after an answer has been filed. Massachusetts law requires "[e]very action for malpractice, error or mistake against a provider of health care" to be heard by a malpractice tribunal.[72] The purpose of the tribunal is to "discourage frivolous claims whose defense would tend to increase premium

[69] *Id*. at 7-8.
[70] Mass. Gen. Laws. c. 231 §85K.
[71] Conners v. Northeast Hosp. Corp., 439 Mass. 469, 473 (2003) (quoting 1971 House Doc. No. 5976).
[72] Mass. Gen. Laws. c. 231, §60B.

charges for medical malpractice insurance."[73] The plaintiff must prove to the tribunal that "there is a legitimate question of liability appropriate for judicial inquiry" and that the injury is not "merely an unfortunate medical result."[74] If the tribunal finds for the defendant, the plaintiff can only continue its action by filing a $6,000 bond with the court clerk.[75] This bond is payable to the defendant to cover costs, including witness, expert and attorney fees if the defendant ultimately prevails.[76]

[73] Austin v. Boston Univ. Hosp., 372 Mass. 654, 655 (1977).
[74] Mass. Gen. Laws. c. 231, §60B.
[75] Mass. Gen. Laws. c. 231, §60B.
[76] Mass. Gen. Laws. c. 231, §60B.

NEW HAMPSHIRE

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I. POWER AND RIGHT TO REMOVE

A. The Parties

1. Defining "Parties in Interest"

The New Hampshire federal courts have written few opinions the issue of "parties in interest". The Court has ruled that the presence of a nominal or formal party with no personal stake in the outcome of an action will not prevent the District Court from exercising diversity jurisdiction because that party is not a "real party to the controversy."[1] Naming a state official as a party will not deprive the District Court of diversity jurisdiction when the state's only interest in the action is to protect its citizens; "if that were so the state would be a party in interest in all litigation[,] because the purpose of all litigation is to preserve and enforce rights and secure compliance with the law of the state."[2] "A party may be indispensable to an action filed in state court without being a real party to the controversy."[3]

[1] Am. Lung Ass'n N.H. v. Am. Lung Ass'n Charitable Trusts N.H., No. 02-108-B, 2002 U.S. Dist. LEXIS 13593 at 3-6 (D.N.H. July 25, 2002) (citing Navarro Savings Ass'n v. Lee, 446 U.S. 458, 461 (1980) ("A federal court must disregard nominal or formal parties and rest jurisdiction only upon the citizenship of real parties to the controversy.")).
[2] *Id.* at 5-6 (quoting Missouri, Kansas & Texas Ry. Co. v. Hickman, 183 U.S. 53, 60 (1901)).
[3] *Id.*

2. Presence of "Doe" Defendants

"The presence of John Doe does not destroy diversity jurisdiction in cases removed to federal court."[4] In *Evans v. Yum Brands, Inc.*,[5] the District Court explained that the Plaintiff had originally fought removal on the grounds that diversity was lacking because a John Doe defendant resided in New Hampshire, but thereafter sought to add the same defendant as a named party when the defendants invoked 28 U.S.C. § 1441(a)'s rule that the presence of John Does, does not destroy diversity.[6] Though the Evans Courts did not need to address the issue, the identification and addition of a non-diverse "fictitious" defendant will destroy diversity jurisdiction.[7]

B. The Amount in Controversy

1. Establishing the Amount in Controversy

The District Court determines the amount in controversy in a particular lawsuit based on the circumstances existing at the time the complaint was filed.[8] Generally, the sum of damages claimed by a plaintiff provides the amount in controversy, if the claim is made in good faith.[9] However, under New Hampshire state law, a plaintiff is precluded from specifying or alleging the amount of damages claimed in a complaint. [10]Attorneys' fees are typically excluded from an amount-in-controversy determination, except when they are provided for by contract or statute.[11]

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[4] Universal Communication Sys., Inc. v. Lycos, Inc., 478 F.3d 413, 426 n. 10 (1st Cir. 2007) (citing 28 U.S.C. § 1441(a) ("For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.")).
[5] 326 F. Supp. 2d 214 (D.N.H. 2004).
[6] *Id.* at 219; *see also* Evans v. Taco Bell Brands Corp., No. 04-cv-103-JD, 2005 U.S. Dist. LEXIS 13237 at 3 (D.N.H. June 30, 2005).
[7] Casas Office Machines v. Mita Copystar Am., 42 F.3d 668, 674-75 (1st Cir. 1994).
[8] Evans v. Yum Brands, Inc. 326 F.Supp.2d 214, 220-21 (D.N.H. 2004); *see also* Nollet v. Palmer, No. 02-265-JD, 2002 U.S. Dist. LEXIS 13564 at 5 (D.N.H. July 18, 2002).
[9] *Nollett*, No. 02-265-JD, 002 U.S. Dist. LEXIS 13564 at 5; *see also* Coventry Sewage Assocs. v. Dworkin Realty Co., 71 F.3d 1, 4 (1st Cir. 1995).
[10] N.H. RSA 508:4-c, *infra*.
[11] *See, e.g.*, Tremblay v. Philip Morris, 231 F.Supp.2d 411, 416 n.5 (D.N.H. 2002).

For example, in private actions brought pursuant to the New Hampshire Consumer Protection act, a court may award reasonable attorneys' fees and costs.[12]

The Class Action Fairness Act added a new provision governing diversity jurisdiction, 28 U.S.C. § 1332(d)(2), requiring that the amount in controversy exceed $5,000,000, an amount determined based on the aggregate amount of the class members' claims.[13]

2. Application When a Specific Dollar Amount is Not Pled

In any personal action brought under New Hampshire state law, the complaint may not specify or allege the amount of damages claimed, but shall, instead, state that the damages are within any minimum or maximum jurisdictional limits of the court to which the complaint is addressed.[14] Where a complaint does not quantify a plaintiff's claimed damages, the party seeking removal must show by a preponderance of the evidence that the amount in controversy exceeds the figure necessary for federal diversity jurisdiction.[15] Where there doubt as to the right of removal, federal jurisdiction should be rejected and the case resolved in favor of remand.[16] When the complaint does not claim a specific amount of damages, removal from state court is proper if it is facially apparent from the complaint that the amount in controversy exceeds the jurisdictional requirement.[17] In situations where the facially apparent test is not met, the District Court may require parties to submit "summary-judgment-type evidence" relevant to

[12] N.H. RSA 358-A:10, I (1995); *see* Kivikovski v. Smart Prof. Photocopy, No. 00-524-B, 2001 U.S. Dist. LEXIS 2017 at 8 n.6 (D.N.H. Feb. 20, 2001) ("Where . . . attorney's fees are authorized by a statute, such as the New Hampshire Consumer Protection Act, they may, to the extent reasonable, constitute part of the amount in controversy.").
[13] *Scott v. First Am. Title Ins. Co.*, No. 06-cv-286-JD, 2007 U.S. Dist. LEXIS 3820 at 2-3 (D.N.H. Jan 17, 2007) (citing Frazier v. Pioneer Americas LLC, 455 F.3d 542, 545 (5th Cir. 2006)).
[14] N.H. RSA 508:4-c (1997) ("Elimination of Ad Damnum Clause"); *see also* Evans v. Yum Brands, Inc., 326 F.Supp.2d 214, 218 n. 3 (D.N.H. 2004).
[15] *Id.* at 219-20; *see also* Sampson v. J-Pac LLC, No. 07-cv-253-JM, 2007 U.S. Dist. LEXIS 95533 at 3 (D.N.H. Dec. 21, 2007).
[16] *Tremblay*, 231 F.Supp.2d at 414.
[17] *Evans*, 326 F.Supp.2d at 220 (citing *Williams v. Best Buy Co.*, 269 F.3d 1316, 1319 (11th Cir. 2001)).

the amount in controversy at the time of removal.[18]

3. Amount in Controversy Where Equitable Relief is Sought

The District Court recognizes that it may be appropriate in certain cases to examine the amount in controversy requirement from a defendant's perspective when determining whether a plaintiff has satisfied the jurisdictional prerequisite.[19] Thus, the District Court has suggested that the potential cost to a defendant of affording injunctive relief to a plaintiff may suffice to satisfy the $75,000 amount-in-controversy jurisdictional requirement.[20] In addition, the Court will assess the amount in controversy based in the value of the right or property to be protected by the injunction.[21]

4. Defeating Removal by Amending Relief Sought

Once federal jurisdiction has been established, based on a jurisdictional amount alleged in good faith, it cannot be "ousted" by a subsequent change of events that results in an amendment to the value of the action.[22]

C. Time of Existence of Grounds for Removal

1. Event Triggering Thirty-Day Period for Actions Initially Removable

Removal of a New Hampshire state court civil action to the District Court requires that a defendant file a notice of removal within thirty days of receiving of the initial pleading setting forth the federal cause of action.[23] In cases involving multiple defendants, the thirty day period

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[18] *Evans*, 326 F.Supp.2d at 220 (quoting Allen v. R & H Oil & Gas Co., 63 F.3d 1326, 1336 (5th Cir. 1995)).
[19] Kivikovski v. Smart Prof. Photocopy, No. 00-524-B, 2001 U.S. Dist. LEXIS 2017 at 7-8 (D.N.H. Feb. 20, 2001).
[20] *Id.* at 8.
[21] *Id.*
[22] Bourne v. Town of Madison, 494 F.Supp.2d 80, 95 (D.N.H. 2007) (citing Coventry Sewage Assocs. v. Dworkin Realty Co., 71 F.3d 1, 4 (1st Cir. 1995)).
[23] Access Group, Inc. v. Frederico, No. 06-cv-275-JD, 2006 U.S. Dist. LEXIS 72888 at 3 (D.N.H. Oct. 5, 2006) (citing 28 U.S.C. § 1446(b)); *see also* Davidson v. Rand, No. 05-cv-012-SM, 2005 U.S. Dist. LEXIS 5871 at 2 (D.N.H. Apr. 6, 2005).

begins to run at the time of service upon the "first served defendant."[24] Failure of a "first-served defendant" to seek removal in a timely fashion results in the irretrievable loss of that defendant's right to remove, as well as the right to consent to a later-served defendant's attempt at removal; because the consent of all defendants is required for the removal of a state action to federal court, removal in such cases will be precluded.[25]

2. Event Triggering Thirty-Day Period for Actions Not Initially Removable

If an initial pleading does not allege a removable cause of action, the defendant may file a notice of removal within 30 days of receiving "a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable."[26] The District Court acknowledges that federal case law interpreting 28 U.S.C. § 1446(b) does not reveal any categorical bright-line rule for defining "other paper," but notes that the critical question in any case is whether the material, voluntarily produced by the plaintiff, unequivocally establishes federal jurisdiction.[27] The District Court has assumed, without deciding, that deposition testimony may constitute an "other paper" for the purposes of 28 U.S.C. § 1446(b).[28] However, it has also stated that a state court order, issued over plaintiffs' objection, may not so qualify.[29]

II. FRAUDULENT JOINDER

A. Test for Fraudulent Joinder

With respect to a claim of fraudulent joinder, "fraudulent" is a "term of art" that applies to the joinder of an in-state defendant against whom plaintiff "simply has no chance of success,

[24] *Davidson*, No. 05-cv-012-SM, 2005 U.S. Dist. LEXIS 5871 at 12-13.
[25] *Id.*
[26] Access Group, Inc. v. Frederico, No. 06-cv-275-JD, No. 06-cv-275-JD, 2006 U.S. Dist. LEXIS 72888 at 3-4 (D.N.H. Nov. 21, 2006) (citing 28 U.S.C. § 1446(b)).
[27] *Id.* at 6.
[28] Kiedaisch v. Nike, Inc., No. 03-502-M, 2004 U.S. Dist. LEXIS 2828 at 5 n.1 (Feb. 24, 2004).
[29] Longden v. Philip Morris, Inc., No. 03-353-M, 2003 U.S. Dist. LEXIS 14427 at 4 (D.N.H. Feb. 24, 2004).

whatever the plaintiff's motives."[30] In order to demonstrate that naming a non-diverse defendant is a "fraudulent joinder" designed to defeat diversity, the defendant must demonstrate, by clear and convincing evidence, either that there has been outright fraud committed in the plaintiff's pleadings, or that there is no possibility, based on the pleadings, that the plaintiff can state a cause of action against the non-diverse defendant in state court.[31] For a claim of fraudulent joinder based upon an allegedly baseless cause of action to succeed, it must be clear that there can be no recovery under the law of the state on the cause alleged or on the facts in view of the law.[32] Thus, the District Court will not find joinder to be fraudulent if a case can withstand a 12(b)(6) motion directed to the sufficiency of the cause of action.[33]

B. Evidence of Fraudulent Joinder

Though the District Court has not established a standard for determining what constitutes evidence of fraudulent joinder, it has made reference to other federal court decisions providing illustrative examples, including: joinder of a defendant for whom the applicable statute of limitations had elapsed; joinder of a defendant from whom recovery is plainly barred by state law; and joinder of a defendant that is plainly without liability (e.g., where a plaintiff's injuries were diagnosed before the plaintiff even used the defendant's product).[34]

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[30] Longden v. Philip Morris, Inc., No. 03-353-M, 2003 U.S. Dist. LEXIS 14427 at 7 (D.N.H. Feb. 24, 2004) (citing Hardy v. Ajax Magnathermic Corp., 122 F. Supp.2d 757, 759 (W.D.Ky. 2000)).
[31] *Longden*, No. 03-353-M, 2003 U.S. Dist. LEXIS 14427 at 7-8 (citing Mills v. Allegiance Healthcare Corp., 178 F. Supp.2d 1**,** 5 (D. Mass. 2001)).
[32] *Longden*, No. 03-353-M, 2003 U.S. Dist. LEXIS 14427 at 8 (citing *Hardy*, 122 F. Supp.2d at 759-60).
[33] *Longden*, No. 03-353-M, 2003 U.S. Dist. LEXIS 14427 at 8-9 (citing Ritchey v. Upjohn Drug Co., 139 F.3d 1313, 1319 (9th Cir. 1998)).
[34] Longden v. Philip Morris, Inc., No. 03-353-M, 2003 U.S. Dist. LEXIS 14427 at 9-10 (D.N.H. Feb. 24, 2004) (citations omitted).

III. VOLUNTARY / INVOLUNTARY RULE

A. "Voluntary" Dismissal

A defendant has the right to remove an initially non-diverse case when diversity is created by voluntary actions taken by a plaintiff that are not within the control of the removing defendant.[35] In other words, a plaintiff must voluntarily and affirmatively dismiss a non-diverse defendant to trigger a defendant's right of removal. The right of removal is not triggered by a state court order, issued over a plaintiff's objections, dismissing a non-diverse defendant.[36] Failure to appeal such a court order (i.e., voluntary acceptance) will constitute a voluntary dismissal giving rise to a right of removal only when the period of appeal applicable to the order has elapsed.[37]

IV. WAIVER OF RIGHT TO REMOVE

A defendant may waive the right to remove a state court action to federal court by taking actions in state court, after it is apparent that the case is removable, that manifest the defendant's intent to: (1) have the case adjudicated in state court; and (2) abandon the right to a federal forum.[38] It must be unequivocally apparent that the case is removable, the intent to waive the right to remove to federal court and submit to state court jurisdiction must be clear and unequivocal, and the defendant's actions must be inconsistent with the right to remove.[39]

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[35] Longden v. Philip Morris, Inc., No. 03-353-M, 2003 U.S. Dist. LEXIS 14427 at 4 (D.N.H. Feb. 24, 2004) (citing Maine Emp. Mut.Ins. Co. v. Yates Ins. Agency, 52 F.Supp.2d 135, 136 (D.Me. 1999)).

[36] *Longden*, No. 03-353-M, 2003 U.S. Dist. LEXIS 14427 at 4 (holding that grant of summary judgment to last non-diverse defendant in underlying action did not vest right of removal in defendant) (citing Mill-Bern Assocs., Inc. v. Dallas Semiconductor Corp., 69 F.Supp.2d 240, 245 (D.Mass 1995) ("[T]he elimination of nondiverse parties over the objection of the plaintiff, such as by a ruling on a defendant's motion for summary judgment, would not make the case removable.")).

[37] *Longden*, No. 03-353-M, 2003 U.S. Dist. LEXIS 14427 at 5.

[38] Cavadi v. Bank of America, No. 07-cv-224-PB, 2007 U.S. Dist. LEXIS 80346 at 4 (D.N.H. Oct. 30, 2007) (quoting 16 James Wm. Moore et al., Moore's Federal Practice § 107.18[3][a] (Matthew Bender 3d ed. 2007)).

[39] *Cavadi*, No. 07-cv-224-PB, 2007 U.S. Dist. LEXIS 80346 at 4-5 (quoting 16 James Wm. Moore et al., Moore's Federal Practice § 107.18[3][a] (Matthew Bender 3d ed. 2007)).

The First Circuit recognizes the validity and enforcement of a forum selection clause unless an opposing party demonstrates that enforcement is unreasonable.[40]

V. PRACTICE POINTERS

Because New Hampshire statutes prohibit a specification of damages in the State Court "writ" or complaint (New Hampshire still has common law pleading) it is not uncommon for defense counsel to call opposing counsel prior to removal to ask whether he or she will concede that the amount in controversy exceeds $75,000. In the ordinary case (and usually excluding class actions other than those filed under CAFA) opposing counsel will usually make that concession. While the agreement of the parties is not sufficient to confer jurisdiction on the Court, it lessens the likelihood of a challenge to removal.

Local Rule 81.1 of the Local Rules of the District Court provides guidance on procedures to be filed in removal. Among other provisions, it establishes the time for answering a complaint after removal (twenty days from the date of filing of a notice of removal, or for a later served defendant, as required in F.R.C.P. 81(c)); that motions filed in state court will not be considered unless refiled electronically in accordance with the Court's rules; and that the removing party must file a certified copy of the State Court record within ten days of the filing of the notice of removal.

[40] Kilgallen v. Network Solutions, Inc., 99 F.Supp.2d 125, 129 (1st Cir. 2000) (citing M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 10 ("[Forum selection clauses] are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be `unreasonable' under the circumstances.")); *cf* Eastern Bridge, LLC v. Bette & Cring, LLC, 2006 U.S. Dist. LEXIS 33183 at 8-9 (D.N.H. May 24, 2006) (enforcing choice of law provision and forum selection clause of contract and finding, accordingly, that defendant had waived any objection to personal jurisdiction).

RHODE ISLAND

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I. POWER AND RIGHT TO REMOVE

A. The Parties

1. Defining "Parties in Interest"

It has been long established that "the 'citizens' upon whose diversity a plaintiff grounds jurisdiction must be real and substantial parties to the controversy."[1] The court in *Fleet Nat. Bank v. Anchor Media Television, Inc.*,[2] adopted the District of Puerto Rico's interpretation of *Navarro's* holding: "the determination of a real party in interest for purposes of diversity jurisdiction, though roughly similar to ... Rule 17 ... must rest on the substantive right that a given party possesses."[3]

2. Presence of "Doe" Defendants

The presence of John Does does not destroy diversity jurisdiction in cases removed to federal court.[4] Rhode Island has determined that so long as the requirements of R.I. Gen. Law § 9-5-20 are met, John Doe pleadings must be allowed in a federal diversity action.[5]

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[1] Navarro Savings Ass'n v. Lee, 446 U.S. 458, 460 (1980).
[2] 1990 WL 82787, 4 (D.R.I. 1990).
[3] *Id.* (quoting Commonwealth of Puerto Rico v. Cordeco Development Corporation, 534 F. Supp. 612, 615 (D.P.R.1982)).
[4] Universal Communication Systems, Inc. v. Lycos, Inc., 478 F.3d 413, 426 (1st Cir. 2007).
[5] Westfall v. Whittaker, Clark & Daniels, Metropolitan Talc Co., 571 F. Supp. 304, 312 (D.R.I. 1983).

3. Diversity for Putative Class Actions

The most significant development in recent removal law is Congress's 2005 adoption of the Class Action Fairness Act (CAFA). At the time of writing, neither the First Circuit Court of Appeals nor the U.S. District Court for the District of Rhode Island have issued an opinion on the determination of diversity under CAFA. (While application of CAFA will no doubt generate new case law on removal in the First Circuit and in the Rhode Island Federal District Court, the only portion of the Act that has received any significant attention by either of these courts up to this point has been CAFA §9, which limits CAFA's reach "to any civil action commenced on or after the date of enactment of this Act[, February 18, 2005)."[6] However, the Act makes sweeping changes to the treatment of class action suits under 28 U.S.C. §1332 diversity jurisdiction, CAFA §4, and creates a new section at 28 U.S.C. §1453 entitled "Removal of class actions", CAFA §5.

The Act's amendment to §1332 eliminates the requirement of complete diversity in certain class actions.[7] Under the old §1332 all plaintiffs in a class action were required to be of a different jurisdiction than all defendants, a concept known as complete diversity.[8] Under the new §1332, the diversity requirement in certain class actions may be met with only minimal diversity.[9] Minimal diversity requires only that one plaintiff and one defendant be citizens of different jurisdictions.

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[6] *See* Natale v. Pfizeer, Inc., 424 F.3d 43 (1st Cir. 2005) (Commenced for CAFA purposes refers to date action was first filed in state court)).

[7] Scott L. Nelson, *The Class action Fairness Act of 2005: An Analysis*, presented at 2005 ABA Annual Meeting, Section of Litigation (Aug. 4-7, 2005).

[8] *See, e.g.,* Freitas v. First New Hampshire Mortgage Corp., 1998 WL 657606, 2 n. 2 (D.R.I. 1998) (citing *Snyder v. Harris,* 394 U.S. 332, 340 (1969) ("[I]f one member of a class is of diverse citizenship from the class' opponent, and no nondiverse members are named parties, the suit may be brought in federal court even though all other members of the class are citizens of the same State as the defendant ....").

[9] *See* 28 U.S.C. §1332 (d)(2).

Amended §1332 contains a series of sections that create federal jurisdiction over certain class actions, §1332(d)(3-4). The revised statute specifies cases where a court may or must decline jurisdiction, which primarily deal with the ratio of same-state parties compared to the ratio of diverse parties. Subsequent sections deal with class actions that fall outside federal jurisdiction. While these sections are complex, they generally are intended to keep class actions out of federal court that 1) involve mostly same-state defendants and plaintiff classes, §1332(d)(3-4), 2) are brought against state governments, §1332(d)(5)(A), 3) have fewer than 100 members, §1332(d)(5)(B), and 4) are brought by corporate shareholders and are based on state corporations law. §1332(d)(9).[10]

Section 1332(d)(3) allows a court to accept jurisdiction "[where] greater than one-third but less than two-thirds of the members of the proposed class [defined as named or unnamed members by §1332(d)(1)(D)] in the aggregate and the primary defendants are citizens of the State in which the action was filed…." The district courts are instructed to consider the following factors in making the determination: a) Is a national or state interest involved? b) Are the claims governed by the state in which the action was filed? c) Has the class action been pleaded to avoid Federal jurisdiction? d) Does the forum in which it was brought have "a distinct nexus" with the class, harm or defendants? e) Are the plaintiffs disproportionately represented in the state where it was originally filed, while all other plaintiffs are dispersed? and f) During the three years prior to filing were the same or similar claims filed elsewhere on behalf of the same or other persons?

Section 1332(d)(4) details when the district court has no discretion in exercising jurisdiction. It instructs that the district court "must decline" jurisdiction if a) more than two-thirds of plaintiffs are in-state, at least one defendant is significant (as to both amount of relief

[10] *Nelson*, *supra* at 5.

sought and culpable conduct) and is a citizen of the state, AND the principal injuries were incurred in-state. Also, no similar suits can have been filed elsewhere against any of the defendants on behalf of the same or other persons OR b) there is no diversity between two-thirds of the class and the primary defendants.

CAFA created 28 U.S.C. §1453. This new section applies the removal standards of 28 U.S.C. §§1441 and 1446 to the new diversity provisions of 28 U.S.C. §1332.[11] However, the one-year limitation on filing removal actions contained in §1446(b) does not apply to class actions removed under §1453. Consequently, a defendant can remove to federal court, so long as it is done within 30 days of the first filing in state court notifying the defendant that §1332(d) applies.

Although the U.S. District Court for the District of Rhode Island has not dealt with minimal diversity under CAFA, the Court has dealt with a similar concept of minimal diversity in applying the Multiparty, Multiforum Trial Jurisdiction Act (MMTJA) of 2002.[12]

Similar to CAFA, the MMTJA allows federal jurisdiction based on the concept of minimum diversity. The MMTJA addresses cases arising from a single accident "where at least 75 natural persons have died in the accident at a discrete location."[13] Section 1369 was drafted to "streamline the process by which multidistrict litigation governing disasters are adjudicated."[14]

The statute provides:

> (b) Limitation of jurisdiction of district courts.—
> The district court should abstain from hearing any civil action described in subsection (a) in which –

[11] *See* §1453(b).
[12] *See* 28 U.S.C. §1369.
[13] §1369(a).
[14] Passa v. Derderian, 308 F. Supp. 2d 43, 42 (citing H.R. CONF. REP. NO. 107-685 at 200 (2002), *reprinted in* 2002 U.S.C.C.A.N. 1120, 1152).

> 1) the substantial majority of all plaintiffs are citizens of a single State of which the primary defendants are also citizens; and
>
> 2) the claims asserted will be governed primarily by the laws of that State.[15]

The United States District Court for the District of Rhode Island authored one of the leading cases interpreting §1369, *Passa v. Derderian*,[16] which involved the 2002 Station Nightclub Fire. The blaze occurred in West Warwick, Rhode Island during a rock performance by the band Great White when a pyrotechnic display set fire to foam soundproofing around the stage. An estimated 412 people were in the building when it caught fire. Reported to be the fourth worst nightclub fire in the nation's history, it claimed the lives of 100 people and injured more than 200 others.

Plaintiffs from several states filed suit in multiple state and federal courts, including Rhode Island state court. In *Passa*, the Rhode Island federal court addressed remand motions in five case originating in the Rhode Island Superior Court. Neither side of the *Passa* debate disputed that §1369(a) -- creating federal jurisdiction over actions involving minimal diversity where at least 75 natural persons have died in an accident --applied to the facts of the Station Nightclub fire. *Passa* focused on three ambiguities in 28 U.S.C. §1369(b): 1) whether subsection (b) required mandatory abstention by the court or eliminated the court's jurisdiction, 2) what constitutes a "substantial majority" of plaintiffs, and 3) what constitutes a "primary defendant."

Opponents of federal jurisdiction argued that the term "Limitations on Jurisdiction" meant that the court would lack subject matter jurisdiction if subsection (b) applied. Proponents of federal jurisdiction argued that the term "[t]he district court should abstain" indicated that mandatory abstention applied. Although the court suggested this issue was irrelevant in deciding the issue at bar, the distinction may have meaning in future cases for two reasons. First, a party

[15] 28 U.S.C. 1369(b).
[16] 308 F. Supp. 2d 43 (2002).

advancing abstention has the burden of persuasion while the party asserting federal jurisdiction always has the burden of showing that jurisdiction exists. Second, if the court lacked subject matter jurisdiction at any point in the case, it would have to give up the case at that time. Abstention, once decided, would never be revisited. The court held that §1369(b) required mandatory abstention from the court if it applied, but would not eliminate the court's jurisdiction.

The issue of what constituted a "substantial majority of all plaintiffs" was essentially two questions. First, does "all plaintiffs" mean all plaintiffs currently part of the suit, or all potential plaintiffs. Looking at the legislative intent, the court found that "A case-by-case reading of the term 'all plaintiffs,' considering only those plaintiffs who have filed, would frustrate Congress' desire for consolidation."[17] Thus, all plaintiffs meant all potential plaintiffs.

The second issue was what percentage constituted a "substantial majority." The court found that a "majority" must make up more than 50% of the whole, and that a "substantial majority" must constitute a number somewhat in excess of that figure, such as two-thirds or three-fourths."[18] Because the Rhode Island plaintiffs only represented approximately 44.18% of all potential plaintiffs then accounted for the case was deemed removable.

Several interpretations of what constituted a "primary defendant" were advanced. The court rejected curtly a suggestion that the defendants with "the deepest pockets" should be considered primary defendants. It also rejected the suggestion that primary defendants are "those that are most culpable," as difficult or impossible to administer at the early stages of what could be prolonged litigation. The court stated "[t]o utilize this standard as a baseline, the Court would be forced to reserve ruling on abstention until the issues of liability were resolved."[19] Finally,

[17] *Id*. at 59.
[18] *Id*. at 61.
[19] *Id*. at 62.

the court interpreted the term "as including all defendants facing direct liability, and excluding all defendants joined as secondary or third-party defendants for purposes of vicarious liability."[20]

Ultimately, the court decided that the case was removable and that none of the limitations included in 28 U.S.C. §1339(b) were applicable to the situation in the case.

Despite the limited applicability and relative lack of detail in 28 U.S.C. §1369, it is skeletally similar to CAFA's amendments to 28 U.S.C. §1332. Both statutes grant jurisdiction to the federal courts based on minimal diversity, and both statutes limit their access to the federal courts similarly. Section 1369(b)(1)'s language requiring abstention by the federal courts when "the substantial majority of all plaintiffs are citizens of a single state in which the primary defendants are also citizens" is similar to §1332(d)(4)(B)'s parallel provisions. While §1332(d) refers to "greater than two-thirds" and §1369 refers to "substantial majority", *Passa* demonstrates that there is virtually no difference between these two requirements with respect to a class of plaintiffs. Moreover, the two statutes use the identical term "primary defendants" to describe which defendants count for the purpose of creating or shattering diversity.

Although, as mentioned above, decisions regarding the substance of CAFA are still in the pipeline, the *Passa* decision may prove a valuable citation in the Rhode Island federal District Court when removing under CAFA.

B. The Amount in Controversy

1. Establishing the Amount in Controversy

"[T]he sum claimed by the plaintiff controls if the claim is apparently made in good faith. It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to

[20] *Id.*

justify dismissal."[21] Therefore, a plaintiff's statement of damages in its complaint "will control the amount in controversy for jurisdictional purposes if it is made 'in good faith.'"[22] "It has long been the rule that a court decides the amount in controversy from the face of the complaint."[23]

2. Application When a Specific Dollar Amount is Not Pled

"The amount in controversy is measured 'by a reasonable reading of the value of the rights being litigated.'"[24] In *Gabrielle*, plaintiffs did not allege a precise amount of damages in the complaint. The court found that the inquiry was whether the complaint alleged facts sufficient to prove the amount in controversy. Because plaintiffs had enumerated some detail about their injuries in the complaints, the court found that the preponderance of the evidence indicated that the amount in controversy was over the jurisdictional requirement.

3. Amount in Controversy Where Equitable Relief is Sought

In an action for equitable relief, "the amount in controversy is measured by the value of the object of the litigation."[25] If the value is in dispute, then the party seeking to invoke federal jurisdiction has the burden of alleging "facts indicating that it is not a legal certainty that the claim involves less than the jurisdictional amount."[26] While the value of the object of litigation is typically assessed from the plaintiff's perspective, it can be viewed from the defendant's viewpoint in certain circumstances.[27]

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[21] Hainey v. World Am Communs., Inc., 263 F. Supp. 2d 338, 345 (D.R.I. 2003) (quoting Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 288-89 (1938).
[22] *Id.* (citing Coventry Sewage Assocs. v. Dworkin Realty Co., 71 F.3d 1, 6 (1st Cir. 1995)).
[23] *Coventry*, 71 F.3d at 4.
[24] Gabrielle v. Allegro Resorts Hotels, 210 F. Supp. 2d 62, 66 (D.R.I. 2002) (quoting Angus v. Shiley, Inc., 989 F.2d 142, 146 (3rd Cir. 1993)).
[25] Grotzke v. Kurz, 887 F. Supp. 53, 55 (D.R.I. 1995) (quoting Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 347 (1977)).
[26] *Id.* (quoting Dep't of Recreation and Sports v. World Boxing Ass'n, 942 F.2d 84, 88 (1st Cir. 1991)).
[27] *Id.* at 55, 57.

4. Defeating Removal by Amending Relief Sought

"Events occurring subsequent to removal, such as a stipulation, an affidavit, or an amendment that reduces the claims below the jurisdictional minimum, [will] not deprive the court of jurisdiction once it has attached."[28]

C. Time of Existence of Grounds for Removal

1. Event Triggering Thirty-Day Period for Actions Initially Removable

Rhode Island follows the rule enunciated by the Supreme Court in *Murphy Bros, v. Michetti Pipe Stringing, Inc.*,[29] that the thirty-day period within which a defendant must remove is triggered by formal service of process.

2. Event Triggering Thirty-Day Period for Actions Not Initially Removable

In *Woburn Five Cents Savings Bank v. Robert M. Hicks*,[30] the First Circuit held that the 30-day removal period for a receiver in bankruptcy begins to run at the time that the receiver is appointed, not when the receiver formally intervenes in pending litigation or when the receiver is formally substituted into the action.[31]

The United States District Court for the District of Rhode Island has held that the second clause of 28 U.S.C.A. § 1446(b) applied only where the initial pleading was filed at the time the summons was served on the defendant.[32] In *Cipriano*, the defendant had filed its petition for removal before the complaint was filed. The court held the petition premature, pointing out that the second clause only applies when the plaintiff's initial pleading has already been filed at the time the defendant is served with the summons.

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[28] *Grotzke*, 887 F. Supp. at 55-56 (citing *Coventry*, 71 F.3d at 5 n. 4).
[29] 526 U.S. 344 (1999).
[30] 930 F.2d 965 (1st Cir. 1991).
[31] *Id* at 969.
[32] Cipriano v. Monarch Life Ins. Co., 138 F Supp 50, -- (D.R.I. 1956).

Thus, any paper served on the defendant prior to the filing of the lawsuit in state court cannot constitute the "other paper" for the purposes of removal.

II. FRAUDULENT JOINDER

A. Test for Fraudulent Joinder.

"Fraudulent joinder occurs when a plaintiff's assertion of a claim against a defendant who is a citizen of the same state is done "without any purpose to prosecute the action in good faith as against him and with the purpose of fraudulently defeating the [defendant's] right of removal."[33] The court in *Arriaga* discussed the numerous tests used in other jurisdictions to determine whether joinder was fraudulent before deciding that the ultimate task of the court "is to determine whether it is reasonable to expect that the plaintiff may succeed on its claim." The "lynchpin of the fraudulent joinder analysis is whether the joinder of the non-diverse party has a reasonable basis in law and fact."[34] It must be determined "whether the plaintiff's claims against the non-diverse defendants have such little prospect of success that their joinder was improper."[35] The relevant inquiry is whether there is a sufficiently reasonable basis for the claim to preclude a finding that joinder amounts to nothing more than a means to prevent removal.[36]

B. Evidence of Fraudulent Joinder

"In order to show that naming a non-diverse defendant is a 'fraudulent joinder' effected to defeat diversity, the defendant must demonstrate, by clear and convincing evidence, either that there has been outright fraud committed in the plaintiff's pleadings, or that there is no possibility,

[33] Arriaga v. New England Gas Co., 483 F. Supp. 2d 177, 181 (D.R.I. 2007) (quoting Wilson v. Republic Iron & Steel, 257 U.S. 92, 98 (1921)).
[34] *Gabrielle,* 210 F. Supp. 2d at 67.
[35] *Arriaga*, 483 F. Supp. 2d at 183.
[36] *Arriaga*, 483 F.Supp.2d at 184 (citing *Wilson*, 257 U.S. at 97).

based on the pleadings, that the plaintiff can state a cause of action against the non-diverse defendant in state court."[37]

III. VOLUNTARY/INVOLUNTARY RULE

A. "Voluntary" Dismissal

Rhode Island has not addressed the voluntary/involuntary rule in the context of removal of a diversity action.

B. Exceptions

Not applicable.

IV. WAIVER OF RIGHT TO REMOVE

A. Waiver by Defending

Rhode Island has not addressed whether a defendant proceeding to defend an action in state court will waive his or her right to removal.

A. Waiver by Consent

Rhode Island has not addressed whether defendant's consent to plaintiff's filing of a suit in state count waives defendant's right to remove.

C. Waiver by Contract

The United States District Court for the District of Rhode Island has not squarely addressed whether contractual waivers of removal may be binding. However, the Court has enforced forum clauses generally.[38]

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[37] *Gabrielle*, 210 F. Supp. 2d at 67.

[38] Arrow Plumbing & Heating, Inc. v. North American Mechanical Services Corp., 810 F. Supp. 369, 372 (D.R.I. 1993) ("[A] [forum] clause is prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances…. To establish that a particular choice-of-forum clause is unreasonable, a resisting party must present evidence of fraud, undue influence, overweening bargaining power or such serious inconvenience in litigating in the selected forum that it is effectively deprived of its day in court." (internal citations and quotations omitted)).

V. PRACTICE POINTERS

A. Successful Strategies for Removal and Remand

Local Rule of Civil Procedure 81 for the United States District Court for the District of Rhode Island governs removal from state court, and provides:

> (a) Notice of Removal. A notice of removal pursuant to 28 U.S.C. § 1446 shall be accompanied by a copy of the complaint filed in the case being removed. In addition, the party filing the notice shall promptly:
>
> 1) file a copy of the notice in the Court from which the case is being removed; and
> 2) serve copies of the notice on all other parties.
>
> (b) Filing of State Court Record. Within ten (10) days after filing a notice of removal, the party filing the notice shall file certified or attented copies of the docket sheets and all documents filed in the case being removed arranged in the following order:
>
> 1) the docket sheet(s); and
> 2) the documents filed in the court from which the case is being removed, arranged in the same order as they appear on the docket sheet. Each document shall be numerically tabbed.[39]

[39] U.S. District Court for the District of R.I. LR Cv 81.

2ND CIRCUIT

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I. POWER AND RIGHT TO REMOVE

A. The Parties

1. Defining "Parties in Interest"

Generally, the term "parties in interest" is defined under Federal Rule of Civil Procedure 17(a). The standard for determining whether a particular party is a party in interest for purposes of diversity jurisdiction is whether the party has a "real interest" in the suit or, in other words, is a "real party" to the controversy.[1] In determining whether a case is removable, only indispensable and necessary parties are considered. Nominal or formal parties are disregarded.[2] "The Connecticut courts have uniformly defined indispensable parties as those who have such an interest in the subject matter that a final decree cannot be made without either affecting their interests or leaving the controversy in such condition that a final determination may be wholly inconsistent with equity and good conscience."[3]

[1] *See* 6 Wright & Miller, Federal Practice and Procedure § 1556, p. 711 (1971) (well settled citizenship rule testing diversity in terms of the real party in interest is grounded in notions of federalism).
[2] *See* 28 U.S.C. § 1441.
[3] Stonybrook Tenants Assn. v. Alpert, 194 F. Supp. 552, 557 (D. Conn. 1961).

2. Presence of "Doe" Defendants

The presence of "Doe" defendants does not destroy diversity or preclude removal to federal court as expressly stated by the removal statute.[4]

3. Diversity for Putative Class Actions

With regard to removal of class action lawsuits, Connecticut adheres to the Class Action Fairness Act ("CAFA") of 2005 in determining diversity. CAFA confers original federal jurisdiction over any class action involving: (1) 100 or more class members, (2) an aggregate amount in controversy of at least $5,000,000, exclusive of interest and costs, and (3) minimal diversity, that is, where at least one plaintiff and one defendant are citizens of different states.[5]

Under CAFA, minimal diversity of the parties occurs when (A) any member of a class of plaintiffs is a citizen of a State different from any defendant; (B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or (C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.[6] Under CAFA, class actions may be removed "without regard to whether any defendant is a citizen of the state in which the action is brought."[7] Notably, in class actions that do not meet the jurisdictional provisions of the CAFA, the defendants may remove a civil action from state court to federal court on the basis of diversity of citizenship only if none of the defendants is a citizen of the state in which the action was originally brought.[8]

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[4] *See* 28 U.S.C. § 1441(a).
[5] 28 U.S.C. § 1332(d); *see also* Blockbuster, Inc. v. Galeno, 472 F.3d 53 (2d Cir. 2006); Kocienda v. U-Haul Int'l, Inc., 2007 U.S. Dist. LEXIS 64938 (D. Conn. 2007)(Connecticut District Court analyzing diversity in a removal action under CAFA).
[6] 28 U.S.C. § 1332(d)(2).
[7] 28 U.S.C. § 1453(b).
[8] *See* 28 U.S.C. § 1441(b).

B. The Amount in Controversy

1. Establishing the Amount in Controversy

To qualify for removal pursuant to the diversity statute, the amount in controversy must exceed $75,000, exclusive of interest and costs.[9] The U.S. Supreme Court stated that the test to determine the amount in controversy is not the sum that is ultimately awarded to the plaintiff, but the sum that is demanded by the plaintiff when the complaint is filed.[10] The amount in controversy is determined on the basis of plaintiff's complaint at the time that the notice of removal is filed.[11]

2. Application When a Specific Dollar Amount is Not Pled

If the jurisdictional amount is not clearly set forth in the complaint, the notice of removal must allege specific facts satisfying the jurisdictional requirement.[12] "Where the pleadings themselves are inconclusive as to the amount in controversy, federal courts may look outside those pleadings to other evidence in the record … Some courts have held that in removal cases, when the plaintiff does not claim a specific amount of damages in the complaint, the court may consider affidavits or stipulations filed by the plaintiff after removal for purposes of clarifying ambiguities in the complaint."[13]

[9] 28 U.S.C. 1332(a); *see also* Mehlenbacher v. Akzo Nobel Salt, Inc., 216 F.3d 291, 295-296 (2d Cir. 2000).
[10] St. Paul Mercury Indem. Co. v. Red Cab. Co., 303 U.S. 283, 289-290 (1938).
[11] Tongkook Am., Inc. v. Shipton Sportswear Co., 14 F.3d 781, 784 (2d Cir. 1994).
[12] Lupo v. Human Affairs Int'l, Inc., 28 F.3d 269, 273-274 (2d Cir. 1994).
[13] Arute v. Carnival Cruise Line Companies, 2007 U.S. Dist. LEXIS 30185, 6-7 (D. Conn. 2007) (citing 14B Wright & Miller, Federal Practice and Procedure § 3702 at 70,118)(explaining that courts can consider other evidence, such as discovery material, affidavits, and the petition for removal).

3. Amount in Controversy Where Equitable Relief is Sought

In an action for equitable relief or when damages are not requested, the amount in controversy is determined as based on what the plaintiff will recover, avoid losing if the suit is successful, the value of the suit's intended benefit, or the value of the right being protected.[14] "The federal courts cannot take cognizance under 28 U.S.C §1331 of cases in which the rights are not capable of valuation in monetary terms … the jurisdictional test is applicable to that amount that flows directly and with a fair degree of probability from the litigation, not from collateral or speculative sources."[15] Commonly, the concept of considering only the value to the plaintiff of the relief requested is referred to as the plaintiff's viewpoint rule.

4. Defeating Removal by Amending Relief Sought

If plaintiff's complaint establishes that the matter in controversy does not exceed $75,000 and plaintiff later amends the complaint in state court to meet the jurisdictional amount, the action may then be removed.[16] Defense counsel should be aware of the one year limitation for diversity removal in 28 U.S.C. § 1446(b). If the defendant anticipates that plaintiff may wait more than a year to amend the amount in controversy, removal must be commenced before one year expires.

Once a case has successfully been removed to federal court, a plaintiff may not defeat diversity jurisdiction by amending to reduce the amount in controversy. "It is well settled that once a federal district court's jurisdiction has attached to a case removed from state court, a

[14] Kheel v. Port of N.Y. Auth., 457 F.2d 46, 48-49 (2d Cir. 1972), *cert. denied*, 409 U.S. 983 (1972).
[15] *Kheel*, 457 F.2d at 49.
[16] *See, generally* 28 U.S.C. §1441; Chase Manhattan Bank, N.A. v. American Nat'l Bank & Trust Co., 93 F.3d 1064 (2d Cir. 1996) (reversed the ruling that diversity jurisdiction was lacking because the amount was amended to satisfy the amount in controversy requirement).

plaintiff can not deprive the district court of jurisdiction by reducing his claim below the requisite jurisdictional amount by stipulation, by affidavit, or by amendment of his pleadings."[17]

C. Time of Existence of Grounds for Removal

1. Event Triggering Thirty-Day Period for Actions Initially Removable

In an opinion authored by Chief Judge Covello of the Connecticut District Court, sitting by designation, the Second Circuit said that the district court had interpreted *Murphy Brothers v. Michetti Pipe Stringing, Inc.*[18] incorrectly in assuming the defendant's receipt of the complaint triggered the removal period. Instead, the Second Circuit concluded "that the history and text of 28 U.S.C. § 1446(b) clearly make the defendant's receipt of the initial pleading the relevant triggering event, which is any pleading [and not necessarily the complaint] containing sufficient information to enable the defendant to intelligently ascertain the basis for removal."[19]

In this regard, a case is removable when the initial pleading "enables the defendant to 'intelligently ascertain' removability from the face of such pleading, so that in its petition for removal the defendant can make a short and plain statement of the grounds for removal as required by 28 U.S.C. § 1446(a)."[20] A pleading enables a defendant to intelligently ascertain removability when it provides "the necessary facts to support the removal petition."[21]

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[17] Ryan v. Cerullo, 343 F. Supp. 2d 157, 159 (D. Conn. 2004)(citing St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283, (1938)).
[18] 526 U.S. 344 (1999).
[19] Whitaker v. Am. Telecasting, Inc., 261 F.3d 196 (2d Cir. 2001) (internal quotations omitted); s*ee also* Contois v. Able Indus., 523 F. Supp. 2d 155 (D. Conn. 2007).
[20] *Whitaker*, 261 F.3d at 202 (quoting Ardison v. Villa, 248 F.2d 226, 227 (10th Cir. 1957)).
[21] *Whitaker*, 261 F.3d at 202 (quoting Rowe v. Marder, 750 F. Supp. 718, 721 (W.D. Pa. 1990), *aff'd*, 935 F.2d 1282 (3d Cir. 1991)).

"While this standard requires a defendant to apply a reasonable amount of intelligence in ascertaining removability, it does not require a defendant to look beyond the initial pleading for facts giving rise to removability."[22]

Notably, 28 U.S.C. § 1446, the procedure for removal statute, uses the phrase "service or otherwise" to describe the manner in which documents may spur removal. However, the commencement of the removal period can only be triggered by formal service, regardless of whether the statutory phrase "or otherwise" suggests other means of receipt of the initial pleading.[23] In the view of the majority of the Court, the words "or otherwise" are simply so indefinite as to be meaningless.[24]

2. Event Triggering Thirty-Day Period for Actions Not Initially Removable

Where a case is not removable by the service of the initial pleading, as described above, most other courts have held that "other papers" as stated in 28 U.S.C. § 1446(b) is not limited to papers filed in the litigation. The Second Circuit has not addressed the issue, but the reference to "other papers" in § 1446(b) in other courts has been held to include pre-removal correspondence between the parties, settlement offers or letters, depositions, and answers to interrogatories as evidence of the elements necessary for removability.[25]

Seemingly, there is an inconsistency concerning the court's interpretations that "service or otherwise" can only mean formal service of the initial pleading, whereas "other papers" can include letters or settlement negotiations for removal after the initial pleading. In this regard, cases in the other District Courts have begun the thirty day removal period upon receipt of the

[22] *Whitaker*, 261 F.3d at 205, 206 (citing *Rowe*, 750 F. Supp. at 720 ("a defendant must be able to ascertain easily the necessary facts to support his removal petition.")).
[23] *Whitaker*, 261 F.3d at 202 (employing the decision in *Murphy Brothers*); *see also*, Contois v. Able Indus., 523 F. Supp. 2d 155 (D. Conn. 2007).
[24] *Whitaker*, 261 F.3d at 202.
[25] Vermande v. Hyundai Motor Am., Inc., 352 F. Supp. 2d 195, 200 (D. Conn. 2004).

"other paper" where that document makes removal reasonably ascertainable.[26]

II. FRAUDULENT JOINDER

A. Test for Fraudulent Joinder

A plaintiff may not defeat a federal court's diversity jurisdiction and a defendant's right of removal by merely joining as defendants parties with no real connection with the controversy. In order to show that naming a non-diverse defendant is a "fraudulent joinder" effected to defeat diversity, the defendant must demonstrate, by clear and convincing evidence, either that there has been outright fraud committed in the plaintiff's pleadings, or that there is no possibility, based on the pleadings, that the plaintiff can state a cause of action against the non-diverse defendant in state court. Joinder will be considered fraudulent when it is established that there can be no recovery against the defendant under the law of the state on the cause alleged.[27]

B. Evidence of Fraudulent Joinder

"Joinder will be considered fraudulent when it is established that there can be no recovery against the defendants under the law of the state on the cause alleged."[28] "The defendant seeking removal bears a heavy burden of proving fraudulent joinder, and all factual and legal issues must be resolved in favor of the plaintiff."[29]

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[26] *See generally*, *Vermande*, 352 F. Supp. 2d 195 (citing other district court decisions holding "other papers" to include pre-removal documents); *see also* Dell'Aera v. Home Depot, U.S.A., Inc., 2007 U.S. Dist. LEXIS 50815, 7-8 (D. Conn. 2007) (remand denied where defendant removed case to district court within 30 days of receipt of neurological report indicating damages in excess of $75,000).

[27] Whitaker v. Am. Telecasting, Inc., 261 F.3d 196 (2d Cir. N.Y. 2001).

[28] *Whitaker*, 261 F3d 196, 207 (internal citation and original brackets omitted).

[29] Oliva v. Bristol-Myers Squibb Co., 2005 U.S. Dist. LEXIS 35881 (D. Conn. Dec. 15, 2005).

> In conducting a fraudulent joinder inquiry, 'courts can look beyond the pleadings to determine if the pleadings can state a cause of action.' Consolidated Fen-Phen Cases, 2003 U.S. Dist. LEXIS 20231 (citing Arseneault v. Congoleum Corp., 2002 U.S. Dist. LEXIS 5084 (D. Conn., Mar. 26, 2002) (holding that, in deciding whether fraudulent joinder had occurred, the court would look outside the pleadings to depositions and other evidence, because the Second Circuit has held that district courts can do so in deciding jurisdictional issues) (quoting United Food & Commercial Workers Union, Local 919, AFL-CIO v. CenterMark Props. Meriden Square, Inc., 30 F.3d 298, 305 (2d Cir. 1994)); *see also* Pampillonia v. RJR Nabisco. Inc., 138 F.3d 459, 461-62 (2d Cir. 1998) (considering affidavit to determine whether defendant was fraudulently joined).[30]

III. VOLUNTARY / INVOLUNTARY RULE

A. "Voluntary" Dismissal

If diversity of citizenship provides the jurisdictional basis for removal to federal court, the parties must be diverse not only when the petition is filed, but also when the case was first brought. However, if the parties become diverse because a non-diverse defendant is dismissed from the case, in contrast to a party's change in citizenship, then removal becomes possible under appropriate circumstances.

> The test to determine whether dismissal of a non-diverse defendant permits removal has been articulated in terms of the plaintiff's volition in obtaining the dismissal. If the plaintiff voluntarily dismissed the action against the non-diverse defendant, the case becomes removable. . . . However, if the nondiverse defendant were dismissed from the case on his own motion, against the plaintiff's will, then the case would not be removable. LGP Gem Ltd. v. Cohen, 636 F. Supp 881, 882 (S.D.N.Y. 1986) (citations omitted); *see also* Arseneault v. Congoleum, 2002 U.S. Dist. LEXIS 5084 (Mar. 26, 2002 S.D.N.Y.) (The general rule is that where removal is premised on diversity jurisdiction, . . . complete diversity must exist both at the time the action is commenced and at the time of removal).[31]

B. Exceptions

An exception to the general rule under 28 USC § 1446(b) and *Powers v. Chesapeake & Ohio Ry. Co.*,[32] occurs where the plaintiff after instituting the action creates complete diversity

[30] Read v. Nationwide Mut. Ins. Co, 2006 U.S. Dist. LEXIS 68299, 5-6 (D. Conn. 2006).
[31] Deming v. Nationwide Mut. Ins. Co., 2004 U.S. Dist. LEXIS 2396 (D. Conn. Feb. 14, 2004).
[32] 169 U.S. 92, 42 L. Ed. 673, 18 S. Ct. 264 (1898).

by voluntarily dismissing the action as to the non diverse parties, in which case removal becomes proper.[33]

To the extent 28 USC § 1446(b) permits the removal of cases that "become removable" after the original filing, that provision generally refers to a plaintiff's voluntary dismissal of a non-diverse party, and not to the acquisition of a diverse domicile.[34]

IV. WAIVER OF RIGHT TO REMOVE

A. Waiver by Defending

"A defendant may waive the right to remove an action to federal court by taking actions in the state court that clearly and unequivocally manifest submission to the state court's jurisdiction, including the following: participating in state court proceedings when it is not required, such as filing a permissive counterclaim, moving in state court to compel arbitration, or filing a motion to dismiss the state court complaint."[35] Conversely, the following have been found to not constitute a waiver of the right to remove: filing a pleading raising a defense that might be conclusive on the merits, opposing a motion for a temporary restraining order, or failing to remove a previous voluntarily-dismissed state action based on the same claim.[36]

B. Waiver by Contract

A defendant can also waive the right of removal from state to federal court by including a contractual provision limiting removal or venue. Most commonly, such a contractual provision takes shape in the form of a forum selection clause.[37] In *The Bremen v. Zapata Off-Shore Co.*,[38]

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[33] *Id.* (citations and internal quotation marks omitted); 16 Moore's Federal Practice, § 107.30[3][a][ii][C] ("The involuntary dismissal of a non-diverse defendant by court-ordered dismissal does not ordinarily create diversity.").
[34] Adrian Family Partners I, LP v. ExxonMobil Corp., 79 Fed. Appx. 489, 2003 U.S. App. LEXIS 22612 (2d Cir. N.Y. 2003).
[35] *See* Federal Litigation Guide: New York and Connecticut § 4.02 (internal quotations omitted).
[36] *See* Federal Litigation Guide: New York and Connecticut § 4.02 (internal quotations omitted).
[37] *See* The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972); Karl Koch Erecting Co. v. New York Convention Ctr. Dev. Corp., 838 F.2d 656, 659 (2d Cir. 1988).
[38] 407 U.S. 1 (1972).

the Supreme Court held that a court should enforce a contractual forum selection clause unless it is clearly shown that enforcement would be unreasonable and unjust or that the clause was obtained through fraud or overreaching.[39]

The Second Circuit has extended this rule to diversity and other non-admiralty cases.[40] "In particular, when the choice of forum is made in an arm's-length negotiation by experienced and sophisticated businessmen, and absent some compelling and countervailing reason, the choice of forum should be honored by the parties and enforced by the courts."[41]

V. PRACTICE POINTERS

In addition to the Federal Rule of Civil Procedure pertaining to the requirements for filing pleadings in federal court generally, several local rules apply to parties removing actions to the District of Connecticut pursuant to 28 U.S.C. § 1441. At the time a removal notice is filed with the clerk, the removing party must also file with the clerk a separate notice, entitled "Notice of Pending Motions," specifying any pending motions that require action by the district court judge.[42] This notice must include a true and complete copy of each such motion and all supporting and opposition papers. The removing party must also list in its certificate of service the name and address of counsel, the name of the party or parties represented by said counsel, and all parties appearing pro se.[43]

Additionally, all parties removing actions to the District of Connecticut pursuant to 28 U.S.C. § 1441 must, no later than five days after filing a notice of removal, file and serve a signed statement that includes the following: (1) the date on which each defendant first received

[39] *Id.* at 15.
[40] *See* Karl Koch Erecting Co. v. New York Convention Center Dev. Corp., 838 F.2d 656, 659 (2d Cir. 1988); Home Funding Group, LLC v. Kochmann, 2007 U.S. Dist. LEXIS 41376 (D. Conn. 2007); Vertucci v. Orvis, 2006 U.S. Dist. LEXIS 39320 (D. Conn. 2006); Hilb Rogal & Hobbs Co. v. MacGinnitie, 2005 U.S. Dist. LEXIS 2286 (D. Conn. 2005).
[41] Indymac Mortg. Holdings, Inc. v. Reyad, 167 F. Supp. 2d 222, 243 (D. Conn. 2001).
[42] *See* D. Conn., Standing Order on Removed Cases.
[43] *See* D. Conn., Standing Order on Removed Cases.

a copy of the summons and complaint in the state court action; (2) the date on which each defendant was served with a copy of the summons and complaint, if any of those dates are different from the dates set forth in item 1; (3) in a diversity case, whether any defendant who has been served is a citizen of Connecticut; (4) if removal takes place more than 30 days after any defendant first received a copy of the summons and complaint, the reasons why removal has taken place at this time; and (5) the name of any defendant served prior to the filing of the notice of removal who has not formally joined in the notice of removal, and the reasons why any such defendant did not join in the notice of removal.[44]

[44] *See* D. Conn., Standing Order on Removed Cases.

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I. POWER AND RIGHT TO REMOVE

A. The Parties

1. Defining "Parties in Interest"

As the Second Circuit Court of Appeals has recognized, "it has long been 'established that the 'citizens' upon whose diversity a [party] grounds jurisdiction must be real and substantial parties to the controversy' . . .'[A] federal court must disregard nominal or formal parties and rest jurisdiction only upon the citizenship of real parties to the controversy.'"[1] A party is a "nominal" party when it has "no personal stake in the outcome of the litigation and . . . [is] not necessary to an ultimate resolution."[2] The question of whether a party is nominal "appears to be governed by essentially the same legal standard as whether a party is fraudulently joined."[3]

2. Presence of "Doe" Defendants

Pursuant to 28 U.S.C. § 1441(a) (as amended in 1988), "[f]or purposes of removal . . ., the citizenship of defendants sued under fictitious names shall be disregarded." Thus, under amended Section 1441(a), "the citizenship of a fictitious defendant, such as one named as a John Doe, may be ignored in determining whether the requisite diversity exists. So as long as there is

[1] St. Paul Fire and Marine Insurance Company v. Universal Builders Supply, 409 F.3d 73, 80 (2d Cir. 2005) (citations omitted).
[2] Federal Insurance Company v. Tyco International Ltd., 422 F. Supp. 2d 357, 388 (S.D.N.Y. 2006).
[3] *Id*. at 389; *see infra* Sec. II (discussing standard for fraudulent joinder).

complete diversity between each plaintiff and each of the known and named defendants, the case may be removed."[4]

3. Diversity for Putative Class Actions

a. Class Action Fairness Act of 2005 ("CAFA")

Under CAFA--applicable to class actions involving 100 or more putative class members and where the aggregate amount in controversy exceeds $5 million--a class action is generally removable to federal court where any (named or unnamed) class member is a citizen of a state different from that of any defendant, *i.e.*, "minimal diversity."[5]

Under CAFA, a removed putative class action is subject to "mandatory remand" where either: (a) Two-thirds or more of the class members and the "primary defendants" are citizens of the forum state; OR (b) if all of the following four factors are present: (i) More than two-thirds of the class members are citizens of the forum state; (ii) at least one defendant, against whom "significant relief" is sought and whose conduct forms a "significant basis" for the claims the proposed class asserts, is a citizen of the forum state; (iii) "principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in the [forum] State"; and (iv) no other class action complaints asserting the "same or similar factual allegations" have been filed in the last three years against any of the defendants.

Under CAFA, a removed putative class action is subject to "discretionary remand" in the "interests of justice and the totality of the circumstances" (after weighing six statutory factors) if: (i) more than one-third but less than two-thirds of the class members are citizens of the forum state, and (ii) the "primary defendants" are citizens of the forum state.[6]

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[4] Bowen v. Home Depot, 2001 WL 920263, at *1 (E.D.N.Y. 2001).
[5] 28 U.S.C. § 1332(d); Blockbuster, Inc. v. Galeno, 472 F.3d 53 (2d Cir. 2006). Class actions involving certain securities and corporate governance issues are excluded from CAFA's expanded federal jurisdiction provisions. 28 U.S.C. § 1332(d)(9).
[6] *See* 28 U.S.C §1332(d)(3) (identifying six factors to be considered by the court).

In the Second Circuit, the removing defendant bears the burden under CAFA of establishing: (i) minimal diversity and (ii) that the amount in controversy exceeds $5 million.[7] With respect to the burden of establishing whether the mandatory or discretionary remand provisions apply, the Second Circuit did "not comment on whether" it agreed with other Circuits that the burden rests with plaintiffs.[8]

b. Other Class Action Removals

In putative class actions not subject to CAFA (*i.e.*, class actions involving fewer than 100 putative class members or where the aggregate amount in controversy does not exceed $5 million), removal is proper only if the citizenship of each named putative class representative is different from that of each defendant (and the requisite amount in controversy is satisfied).[9]

B. The Amount in Controversy

1. Establishing the "Amount in Controversy"

Under Second Circuit precedent, "[a] party invoking the jurisdiction of the federal court has the burden of proving that it appears to a 'reasonable probability' that the claim is in excess of the statutory jurisdictional amount."[10] The party asserting jurisdiction must supply "competent proof" that the requisite amount in controversy has been satisfied and "justify [its] allegations by a preponderance of evidence."[11]

The jurisdictional determination is to be made on the basis of the plaintiff's allegations, not on the merits of plaintiff's claims.[12] Where the pleadings themselves are inconclusive as to the amount in controversy, however, federal courts may look outside those pleadings to other

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[7] *Blockbuster*, 472 F.3d at 56.
[8] *Id*.
[9] Exxon Mobil Corp. v. Allapattah Services, 545 U.S. 546 (2005); Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356, 365-66 (1921).
[10] United Food & Commercial Workers Union, Local 919, AFL-CIO v. CenterMark Properties Meriden Square,Inc., 30 F.3d 298, 304-5 (2d Cir. 1994) (citations omitted).
[11] *Id*. at 305.
[12] Zacharia v. Harbor Island Spa, Inc., 684 F.2d 199, 202 (2d Cir.1982).

evidence in the record.[13] For example, courts have held that the requisite amount in controversy may be established by relying on complaints filed by the same plaintiffs' counsel involving similar allegations, seeking compensatory and punitive damages.[14]

2. Application When a Specific Dollar Amount is Not Pled

The "reasonable probability" standard applies to cases where plaintiffs do not plead a specific dollar amount in controversy as well as to cases where plaintiffs expressly seek less than the requisite amount in controversy.[15] Moreover, a federal court in New York held that the removing defendant had satisfied its burden that the requisite amount in controversy was satisfied where plaintiffs "refus[ed] to cap their recovery below [the requisite amount in controversy]."

3. Amount in Controversy Where Equitable Relief is Sought

In actions seeking declaratory or injunctive relief, the amount in controversy is measured by the value of the object of the litigation.[16] Although courts view that amount from plaintiff's perspective, a number of federal courts in New York have held that the value of injunctive relief in the form of a medical monitoring fund is more properly viewed as the cost to defendants because the relief sought "must be [fully] funded" to benefit any single member of the contemplated class.[17] In cases seeking equitable relief subject to CAFA, the requisite amount in controversy is satisfied if the aggregate amount of the equitable relief sought from defendants exceeds $5 million.[18]

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[13] *United*, *supra*, 30 F.3d at 305.
[14] *In re* Rezulin Prods. Liab. Litig., 133 F. Supp. 2d 272, 295-97 (S.D.N.Y. 2001).
[15] *Id.*
[16] *In re* Rezulin Prods. Liab. Litig., 168 F. Supp. 2d 136, 152 (S.D.N.Y. 2001).
[17] *Id. Accord*, *Rezulin*, 168 F. Supp. 2d at 152-53.
[18] *See* 28 U.S.C. § 1332(d)(6).

4. Defeating Removal by Amending Relief Sought

As the United States Supreme Court has held, "the right to remove . . . [is] to be determined according to the plaintiffs' pleading at the time of the petition for removal."[19] Applying this rule, a federal court in New York has held that it need not consider the [documents] . . . plaintiff appended to his motion to remand."[20] Applying this precedent, a removing defendant could argue that a court should not consider a post-removal amended complaint reducing the amount of damages sought.

C. Time of Existence of Grounds for Removal

1. Event Triggering Thirty-Day Period for Actions Initially Removable

The United States Supreme Court has held that the 30-day removal deadline is triggered by actual service, as opposed to receipt of the complaint through other means.[21]

Neither the statute nor the Supreme Court's decision in *Murphy Bros*. expressly addresses multi-defendant actions—*i.e*., whether the action must be removed within 30 days of service on the first-served defendant (the "First-Served Defendant Rule") or whether each defendant has 30 days from the date it was served with the complaint (the "Later-Served Defendant Rule").

The Second Circuit has not addressed this issue, but the evolving trend among district courts in the Circuit is to follow the Later-Served Defendant Rule.[22]

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[19] Pullman Co. v. Jenkins, 305 U.S. 534, 537-38 (1939).
[20] *In re* Rezulin Prods. Liab. Litig., 2003 WL 43356, at *1 n.4 (S.D.N.Y. Jan. 6, 2003).
[21] Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc., 526 U.S. 344 (1999).
[22] Glatzer v. Hanley, 2007 WL 1334971 (S.D.N.Y. 2007); Fernandez v. Hale Trailer Brake & Wheel, 332 F. Supp. 2d 621 (S.D.N.Y.2004); Piacente v. State Univ. of New York at Buffalo, 2004 WL 816885 (W.D.N.Y. Feb. 14, 2004); *In re* Tamoxifen Citrate Antitrust Litig., 222 F. Supp. 2d 326 (E.D.N.Y. 2002); Carter v. Geldis, 2002 WL 1159904 (E.D.N.Y. Apr. 23, 2002); Varela v. Flintlock Constr., Inc., 148 F. Supp. 2d 297 (S.D.N.Y. 2001); Russell v. LJA Trucking Inc., 2001 WL 527411 (E.D.N.Y. May 11, 2001); *cf*. Berisic v. Winckelman, 2003 WL 21714930 (S.D.N.Y. July 23, 2003) (stating in dicta that the court would be inclined to apply the later-served defendant rule). *But see* Yang v. ELRAC, Inc., 2004 WL 235208 (S.D.N.Y. Feb. 6, 2004) (adopting the first-served defendant rule in the absence of equitable reason to follow later-served defendant rule).

2. Event Triggering Thirty-Day Period for Actions Not Initially Removable

Under the Supreme Court's holding in *Murphy Bros.*, only actual service will trigger the 30-day period for removal. Although that decision addressed removals based on the initial pleading, a defendant could argue that the same construction should apply to the phrase "service or otherwise" in the context of removals based on "other paper."

"Federal courts look to state law to determine the propriety of service in the context of remand motions."[23]

To trigger the 30-day period for removal, a federal Magistrate Judge in New York has held that the "other paper" must be received by counsel to whom it was addressed; the illegible signature of a firm employee on a return receipt slip was insufficient to trigger the removal clock.[24]

As noted by a federal district court in New York, courts have applied a "very generous reading" to the phrase, "other paper."[25] Another court has observed that "[s]ection 1446(b) expressly provides . . . that only a written instrument can trigger the thirty day period."[26] Some courts have limited the "other paper" to documents "produced in the action itself."[27]

[23] Zeballos v. Tan, 2006 WL 1975995, at *4 n.5 (S.D.N.Y. July 10, 2006) (citations omitted).
[24] *In re Rezulin Prods. Liab. Litig.* (S.D.N.Y. Jan. 6, 2004; Report & Recommendation, Gorenstein, M.J.); *adopted in In re Rezulin Prods. Liab. Litig.* (S.D.N.Y. Feb. 2, 2004).
[25] Arseneault v. Congoleum, 2002 WL 472256 (S.D.N.Y. Mar. 26, 2002).
[26] Heafitz v. Interfirst Bank of Dallas, 711 F. Supp. 92, 95 (S.D.N.Y.1989).
[27] Pepsico, Inc. v. Wendy's Int'l, Inc., 118 F.R.D. 38, 42 (S.D.N.Y. 1987).

II. FRAUDULENT JOINDER

A. Test for Fraudulent Joinder

Even if there is a lack of complete diversity, under the doctrine of fraudulent joinder, an action may be removed to federal court when "there is no possibility that the claims against [the non-diverse] defendant could be asserted in state court."[28]

A federal district court in New York has reasoned that this cannot mean "no possibility" at all and held that the standard more accurately is described as requiring a showing that there is "no reasonable basis" for predicting liability on the claims alleged.[29] Another district court has held that the fraudulent joinder test is one of "no possibility," as opposed to whether there is a "reasonable basis" for predicting liability, but stated that "it is not too clear precisely what consequence the suggested modification [of 'no reasonable basis'] would have, other than to suggest a more lenient standard."[30]

B. Evidence of Fraudulent Joinder

In determining whether a defendant is fraudulently joined, courts look to whether the pleadings state a claim against the non-diverse defendant.[31] But courts are not limited to the pleadings. "'[F]ederal courts may look outside [the] pleadings to other evidence in the record.'"[32] For example, courts have routinely looked to affidavits to establish fraudulent joinder.[33]

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[28] Briarpatch Ltd., L.P. v. Phoenix Pictures, Inc., 373 F.3d 296, 302 (2d Cir. 2004); Whitaker v. American Telecasting, Inc., 261 F.3d 196, 207 (2d Cir. 2001); Pampillonia v. RJR Nabisco, Inc., 138 F.3d 459, 460-61 (2d Cir. 1998).

[29] *Rezulin*, 133 F. Supp. 2d at 280 n.4.

[30] *Arseneault*, 2002 WL 472256; s*ee also* Nemazee v. Premier, Inc., 232 F. Supp. 2d 172, 178 (S.D.N.Y.2002) ("Any possibility of recovery, even if slim, militates against a finding of fraudulent joinder; only where there is 'no possibility' of recovery is such a finding warranted.") (citation omitted).

[31] *See, e.g*., *Rezulin*, 133 F. Supp. 2d 272 (numerous examples of fraudulent joinder).

[32] *United*, *supra*, 30 F.3d at 305 (citations omitted).

[33] *Pampillonia*, 138 F.3d at 461-62; *Rezulin*, 133 F. Supp. 2d at 281-82; *In re* Consolidated Fen-Phen Cases, 2003 WL 22682440 (E.D.N.Y 2003).

III. VOLUNTARY / INVOLUNTARY RULE

A. "Voluntary" Dismissal

Under this rule, where plaintiff voluntarily dismisses the non-diverse defendant, the action may be removed. If the Court orders the dismissal ("involuntary dismissal") of the non-diverse defendant, the action may generally not be removed.[34] Thus, a defendant who wishes to remove an action on the ground that there is no claim against the non-diverse defendant should immediately remove the action on the basis of fraudulent joinder; a defendant seeking removal should not await an "involuntary dismissal" of the non-diverse defendant by the state court on a motion to dismiss.

B. Exceptions

The Second Circuit has stated that where the time to appeal an involuntary dismissal has expired, "plaintiffs' failure to take an appeal constitute[s] the functional equivalent of a 'voluntary' dismissal."[35] The rationale for this exception is that the failure to appeal creates "finality;" a federal court evaluating the propriety of the dismissal of the diversity-defeating defendant need not be concerned that a state appellate court might reverse the order of dismissal, thus making the action no longer removable.

IV. WAIVER OF RIGHT TO REMOVE

A. Waiver by Defending

Under the case law, "waiver [of the right to remove] will not occur by defensive action in state court, [but] not every action by a defendant is 'defensive.' … 'If [a] motion is made [in state court] only to preserve the status quo ante and not to dispose of the matter on its merits, it is clear that no waiver has occurred. On the other hand, if a motion seeks a disposition, in whole or

[34] Quinn v. Aetna Life & Cas. Co., 616 F.2d 38 (2d Cir.1980).
[35] *Id*. at 40 n.2.

in part, of the action on its merits, the defendant may not attempt to invoke the right to remove after losing on the motion.'"[36] Thus, while the filing of a dispositive motion may waive the right to remove,[37] the filing of an answer and noticing depositions do not.[38]

V. PRACTICE POINTERS / PITFALLS

A. Successful Strategies for Removal and Avoiding Remand

The following are several removal issues regarding which practitioners in New York (and in the Second Circuit) should be mindful in developing a removal strategy and avoiding remand.

1. Fraudulent Misjoinder

Even where a claim can be stated against the non-diverse defendant and thus precluding application of the fraudulent joinder doctrine, an alternative ground to deny remand is the "fraudulent misjoinder" doctrine. Under that doctrine, remand will be denied where the claims against the non-diverse defendant do not arise under the same transaction or occurrence as the claims against the diverse defendant, as required under Rule 20. This doctrine has been applied to deny remand in the following situations: (i) not all plaintiffs allege a claim against the non-diverse defendant;[39] (ii) only some of the plaintiffs are citizens of the same state as the diverse defendants;[40] and (iii) the claims against a diverse manufacturer defendants are misjoined with claims against a non-diverse physician defendant.[41]

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[36] Heafitz v. Interfirst Bank of Dallas, 711 F. Supp. 92, 96 (S.D.N.Y. 1989) (citations omitted).
[37] *Id.*
[38] Markantonatos v. Maryland Drydock Co., 110 F. Supp. 862 (S.D.N.Y.1953)
[39] *Rezulin*, 168 F. Supp. 2d at 145-48 (remanding only claims of plaintiff who alleged a connection with the non-diverse defendant).
[40] *In re* Rezulin Prods. Liab. Litig., 2002 WL 31496228 (S.D.N.Y. Nov. 7, 2002) (remanding only claims of plaintiffs with same citizenship as manufacturer defendant).
[41] *In re* Rezulin Prods. Liab. Litig., 2003 WL 21276425 (S.D.N.Y. June 2, 2003) (remanding only claim against non-diverse physician defendant).

2. Section 1446(b)'s one-year limitation on diversity-based removals

Under the removal statute, "[a] case may not be removed on the basis of jurisdiction conferred by section 1332 of this title [federal diversity jurisdiction] more than 1 year after commencement of the action."[42] A federal court in New York has held that the one-year limitation is a procedural rule; thus, it is subject to equitable exceptions where plaintiff has engaged in forum manipulation by voluntarily dismissing the non-diverse defendant immediately after expiration of the one-year period.[43]

3. In-Forum Defendant Rule

Even where there is complete diversity, an action may only be removed to federal court on the basis of federal diversity jurisdiction "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*."[44] The Second Circuit has held that the "in-forum defendant" rule is a "procedural" rule. Thus, plaintiff waives the right to assert this objection to removal if such objection is not made within 30 days of removal.[45]

4. Removal prior to service

"The fact that defendant was never properly served under New York law does not affect defendant's right to remove. Federal law specifically contemplates removal prior to service."[46]

5. Removals based on summons with notice

Under New York law, an action may be commenced with service of a "summons with notice," without service of the complaint.[47] The summons with notice will only trigger the 30

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[42] 28 U.S.C. § 1446(b) (emphasis added).
[43] *In re* Rezulin Prods. Liab. Litig., 2003 WL 21355201(S.D.N.Y. June 4, 2003); *see also* Hill v. Delta Intern. Machinery Corp., 386 F. Supp. 2d 427, 430-33 (S.D.N.Y. 2005) (but finding that circumstances did not warrant exception to one-year limitation).
[44] 28 U.S.C. § 1441(b).
[45] Shapiro v. Logistec USA Inc., 412 F.3d 307, 313 (2d Cir. 2005).
[46] Zeballos v. Tan, 2006 WL 1975995, n.6 (S.D.N.Y. 2006).

day removal deadline where the requisite diversity of citizenship and amount in controversy can be ascertained from the "face" of the summons with notice.[48]

6. Unincorporated/LLC Defendants

Where a party to an action is a limited liability company ("LLC"), the Notice of Removal must allege the citizenship of each of the LLC's members.[49] Removing defendants who fail to so allege should be cautioned that a court may remand the action.[50]

For actions subject to CAFA, unincorporated associations are treated like corporations in determining citizenship—and are deemed citizens of the state under whose laws the association is organized and of the state in which it has its principal place of business.[51]

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[47] N.Y. CPLR 305(b).
[48] *Whitaker*, 261 F.3d at 206.
[49] Handelsman v. Bedford Vill. Assocs. Ltd. Pshp., 213 F.3d 48, 52 (2d Cir. 2000) (LLC defendant is "for diversity purposes, [a] citizen[] of Florida because [it has] Florida members"); Nasso v. Seagal, 2003 WL 1908229, at *4 n.14 (E.D.N.Y. Apr. 11, 2003) ("For the purposes of establishing diversity of citizenship, a limited liability company is deemed to have the citizenship of its members").
[50] *See, e.g.*, Efam Enterprises, LLC v. Travelers Indem. Co. of America, Inc., 2002 WL 1148830 (S.D.N.Y. May 29, 2002).
[51] 28 U.S.C. § 1332(d)(10).

VERMONT

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Title 28 U.S.C. § 1441 authorizes the removal of civil actions from state court to federal court when the action initiated in state court is one that could have been brought, originally, in a federal district court.[1] The concise rule of removability is as follows: An action is removable if the plaintiff could have originally brought the action in federal court.[2] Because federal courts are courts of limited jurisdiction, removal statutes are to be strictly construed against removal and all doubts should be resolved in favor of remand.[3] Accordingly, the removing party bears the burden of showing the propriety of removal.[4]

I. POWER AND RIGHT TO REMOVE

A. The Parties

1. Defining "Parties in Interest"

In general, Federal Rule of Civil Procedure 17(a) defines the term "parties in interest." The standard for determining whether a particular party is a party in interest is whether the party

[1] 28 U.S.C. § 1441(a).
[2] 28 U.S.C. § 1441(a).
[3] Childs v. Valente, 2007 WL 805820, at *1 (D.Vt. March 15, 2007); *see* Lupo v. Human Affairs Int'l, Inc., 28 F.3d 269, 274 (2d Cir. 1994); *see also* Zerafa v. Montefiore Hosp. Hous. Co., Inc., 403 F.Supp.2d 320, 324 (S.D.N.Y. 2005) ("Removal jurisdiction is strictly construed inasmuch as it implicates significant federalism concerns and abridges the deference courts generally give to plaintiff's choice of forum").
[4] *Childs*, 2007 WL 805820, at *1 (citing Stan Winston Creatures, Inc. v. Toys "R" Us, Inc., 314 F.Supp.2d 177, 179 (S.D.N.Y. 2003)).

has a "real interest" in the suit, i.e., a "real party" to the controversy.[5] In determining whether a case is removable, only indispensable and necessary parties are considered. Nominal or formal parties are disregarded.[6]

As recognized by the Second Circuit Court of Appeals, it has long been "established that the 'citizens' upon whose diversity a plaintiff grounds jurisdiction must be real and substantial parties to the controversy."[7] A plaintiff may not defeat a federal court's diversity jurisdiction and a defendant's right of removal by merely joining as defendants parties with no real connection with the controversy.[8] Accordingly, "a federal court must disregard nominal or formal parties and rest jurisdiction only upon the citizenship of real parties to the controversy."[9]

2. Presence of "Doe" Defendants

In 1988, Congress amended the removal statute, 28 U.S.C. § 1441(a), to add the following new sentence: "For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded."[10] Thus, under the amended statute, "the citizenship of a fictitious defendant, such as one named as a John Doe, may be ignored in determining whether the requisite diversity exists."[11] The case may be removed provided there is complete diversity between each plaintiff and each of the known and named defendants.[12] A contrary rule would violate the express terms of § 1441(a), which requires that "fictitious" John Doe defendants be disregarded for the purposes of removal.

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[5] *See* 6 Wright & Miller, Federal Practice and Procedure § 1556, p. 711 (1971) (well settled citizenship rule testing diversity in terms of the real party in interest is grounded in notions of federalism).
[6] *See* 28 U.S.C. § 1441.
[7] St. Paul Fire and Marine Ins. Co. v. Universal Builders Supply, 409 F.3d 73, 80 (2d Cir. 2005).
[8] Pampillonia v. RJR Nabisco, Inc., 138 F.3d 459, 460-61 (2d Cir. 1998).
[9] *St. Paul Fire*, 409 F.3d at 80.
[10] 28 U.S.C. § 1441(a).
[11] *See* Bowen v. Home Depot, 2001 WL 920263, at *1 (E.D.N.Y. 2001); *see also* Changes in Federal Jurisdiction and Practice Under the New Judicial Improvements and Access to Justice Act, 123 F.R.D. 399, 403 (1989).
[12] *See id.*

3. Diversity for Putative Class Actions

The Class Action Fairness Act of 2005 ("CAFA")[13] amended the diversity statute by adding a new § 1332(d) to confer original federal jurisdiction over any class action involving (1) 100 or more class members, (2) an aggregate amount in controversy in excess of $5,000,000, exclusive of interest and costs, and (3) "minimal diversity," i.e., where at least one plaintiff and one defendant are citizens of different states.[14] The removing party bears the burden of showing there is a "reasonable probability" that at least one of the class members is "a citizen of a State different from any defendant."[15] In general, the jurisdictional requirements of minimal diversity and amount in controversy are evaluated on the basis of the pleadings, viewed at the time when defendant files the notice of removal.[16]

Moreover, an additional section of the Act enhances the ability of defendants to remove class actions originally filed in state court to federal court. Specifically, § 1453 permits a defendant to remove a class action even if a co-defendant is a citizen of the state in which the action was originally brought and without the consent of the other defendants in the action.[17] This provision overrides the former case law requirement that each defendant consent to removal.[18] Section 1453(b) incorporates by reference the general removal procedures of 28 U.S.C. § 1446, "except that the 1-year limitation under section 1446(b) [does] not apply."[19]

In putative class actions not subject to CAFA (for instance, class actions involving fewer than 100 proposed class members or where the aggregate amount in controversy does not exceed

[13] Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified in scattered sections of 28 U.S.C.).
[14] 28 U.S.C. § 1332(d)(2), (5)(b), (6).
[15] 28 U.S.C. § 1332(d)(2)(A); Blockbuster, Inc. v. Galeno, 472 F.3d 53, 59 (2d Cir. 2006).
[16] *Blockbuster*, 472 F.3d at 56-57; Vera v. Saks & Co., 335 F.3d 109, 116 n. 2 (2d Cir. 2003) (per curiam).
[17] 28 U.S.C. § 1453(b); *Blockbuster*, 472 F.3d at 56.
[18] *Blockbuster*, 472 F.3d at 56; Abrego Abrego v. Dow Chem. Co., 443 F.3d 676, 681 (9th Cir. 2006) (per curiam).
[19] 28 U.S.C. § 1453(b); *Blockbuster*, 472 F.3d at 56.

$5 million), removal is proper only if the citizenship of each named class representative is different from that of each defendant and the requisite amount in controversy is satisfied.[20]

B. The Amount in Controversy

1. Establishing the Amount in Controversy

To qualify for removal pursuant to the diversity statute, the amount in controversy must exceed $75,000, exclusive of interest and costs.[21] In a removed action, "[the] party invoking the jurisdiction of the federal court has the burden of proving that it appears to a 'reasonable probability' that the claim is in excess of the statutory jurisdictional amount."[22] Accordingly, the party asserting jurisdiction must support those facts with "competent proof" and "justify [its] allegations by a preponderance of evidence."[23] The jurisdictional determination is made on the basis of the plaintiff's allegations, not on the merits of the plaintiff's claims.[24]

2. Application When a Specific Dollar Amount is Not Pled

If the jurisdictional amount is not clearly set forth in the complaint, the notice of removal must allege specific facts satisfying the jurisdictional requirement.[25] Where the pleadings themselves are inconclusive as to the amount in controversy, federal courts may look outside those pleadings to other evidence in the record.[26] "[I]t must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal."[27]

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[20] Exxon Mobil Corp. v. Allapattah Services, 545 U.S. 546 (2005); Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356, 365-66 (1921).
[21] 28 U.S.C. § 1332(a); *see also* Mehlenbacher v. Akzo Nobel Salt, Inc., 216 F.3d 291, 295-296 (2d Cir. 2000).
[22] Gilman v. BHC Sec., Inc., 104 F.3d 1418, 1421 (2d Cir. 1997) (quoting United Food & Commercial Workers Union, Local 919, AFL-CIO v. CenterMark Properties Meriden Square, Inc., 30 F.3d 298, 304-05 (2d Cir. 1994) (citations omitted); Tongkook Am., Inc. v. Shipton Sportswear Co., 14 F.3d 781, 784 (2d Cir. 1994).
[23] United Food & Commercial Workers Union, Local 919, AFL-CIO v. CenterMark Properties Meriden Square, Inc., 30 F.3d 298, 305 (2d Cir. 1994).
[24] Zacharia v. Harbor Island Spa, Inc., 684 F.2d 199, 202 (2d Cir. 1982).
[25] Lupo v. Human Affairs Int'l, Inc., 28 F.3d 269, 273-74 (2d Cir. 1994).
[26] *United Food*, 30 F.3d at 305.
[27] Local 538 United Broth. of Carpenters and Joiners of America v. U.S. Fidelity and Guar. Co., 154 F.3d 52, 54 (2d Cir. 1998).

3. Amount in Controversy Where Equitable Relief is Sought

In actions seeking injunctive or declaratory relief, the amount in controversy is measured by "the value of the object of the litigation."[28] The prevailing method of calculating value in the Second Circuit is the "plaintiff's viewpoint" approach, where one calculates the value to the plaintiff, not the cost to the defendant.[29] In an action for equitable relief or when damages are not requested, the amount in controversy is determined as based on what the plaintiff will recover, avoid losing if the suit is successful, the value of the suit's intended benefit, or the value of the right being protected.[30] "The federal courts cannot take cognizance under 28 U.S.C. §1331 of cases in which the rights are not capable of valuation in monetary terms … the jurisdictional test is applicable to that amount that flows directly and with a fair degree of probability from the litigation, not from collateral or speculative sources."[31]

Claims may be aggregated only "when several plaintiffs unite to enforce a single title or right, in which they have a common and undivided interest."[32] In class actions seeking equitable relief subject to CAFA, the requisite amount in controversy is satisfied if the aggregate amount of the equitable relief sought from defendants exceeds $5 million.[33]

If plaintiff's complaint establishes that the matter in controversy does not exceed $75,000 and plaintiff later amends the complaint in state court to meet the jurisdictional amount, the action may then be removed.[34] Defense counsel should be aware of the one-year limitation for diversity removal in 28 U.S.C. § 1446(b). If the defendant anticipates that the plaintiff may wait

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[28] Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 347 (1977).
[29] Kheel v. Port of N.Y. Auth., 457 F.2d 46, 49 (2d Cir. 1972), *cert. denied*, 409 U.S. 983 (1972).
[30] *Id.* at 48-49.
[31] *Id.* at 49.
[32] Zahn v. Int'l Paper Co., 414 U.S. 291, 294 (1973).
[33] 28 U.S.C. § 1332(d)(6).
[34] *See, generally* 28 U.S.C. §1441; Chase Manhattan Bank, N.A. v. American Nat'l Bank & Trust Co., 93 F.3d 1064 (2d Cir. 1996) (reversed the ruling that diversity jurisdiction was lacking because the amount was amended to satisfy the amount in controversy requirement).

more than a year to amend the amount in controversy, removal must be commenced before one year expires.

4. Defeating Removal by Amending Relief Sought

Once a federal court exercises diversity jurisdiction, a plaintiff cannot amend her claimed damages to defeat federal jurisdiction. "It is well settled that once a federal district court's jurisdiction has attached to a case removed from state court, a plaintiff can not deprive the district court of jurisdiction by reducing his claim below the requisite jurisdictional amount by stipulation, by affidavit, or by amendment of his pleadings."[35]

C. Time of Existence of Grounds for Removal

1. Event Triggering Thirty-Day Period for Actions Initially Removable

The court looks to perfection of service under state law to determine the commencement of the time limit for removal.[36] In Vermont, the thirty-day time limit for removal begins when service is perfected (the "perfected service rule"), which, under Vermont R. Civ. P. 4(l), only occurs when service is acknowledged or accepted, not upon receipt of a copy of the initial pleading (the "receipt rule").[37] "While the perfected service rule may not be the majority viewpoint at present, it is the law of this District."[38] The majority rule, where a defendant's receipt of a copy of the initial pleading suffices trigger the removal period, does *not* apply in this jurisdiction.[39]

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[35] St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283 (1938).
[36] *Id.*
[37] Alling v. C.D. Cairns Irrevocable Trusts Partnership, 889 F. Supp. 768, 770 (D.Vt. 1995).
[38] Northern Sec. Ins. Co. v. Mitec Telecom, Inc., 3 F. Supp. 2d 483, 484 (D.Vt. 1998) (denying plaintiff's motion for remand and declining to adopt majority rule).
[39] *See id.* (emphasis added).

2. Event Triggering Thirty-Day Period for Actions Not Initially Removable

Notably, 28 U.S.C. § 1446, the procedure for removal statute, uses the phrase "service or otherwise" to describe the manner in which documents may trigger removal.[40] However, the commencement of the removal period can only be triggered by formal service, regardless of whether the statutory phrase "or otherwise" suggests other means of receipt of the initial pleading.[41]

As recognized by several federal district courts in Vermont, the perfected service requirement is "far clearer" than the receipt rule, which should foreclose further litigation surrounding the "through service or otherwise" language.[42] Vermont's acknowledgment of service requirement employs an already-existing procedure, service of process, designed to ensure that defendants are alerted to their need to respond.[43] In contrast, the receipt rule necessitates frequent elaboration as to what constitutes "receipt." As a result, courts may have to hold evidentiary hearings or indulge in speculation regarding when or whether a pleading was received.[44] Thus, Vermont Courts hold "[t]he perfected service rule is the more sensible choice."[45]

[40] 28 U.S.C. § 1446(b).
[41] Whitaker v. Am. Telecasting, Inc., 261 F.3d 196, 202 (2d Cir. 2001).
[42] *See Alling*, 889 F. Supp. at 770; *Northern Sec. Ins. Co.*, 3 F. Supp. 2d at 484.
[43] *See id.*
[44] *Northern Sec. Ins. Co.*, 3 F. Supp. 2d at 484.
[45] *Id.*

II. FRAUDULENT JOINDER

A. Test for Fraudulent Joinder

Pursuant to the doctrine of fraudulent joinder, an action may be removed to federal court when "there is no possibility that the claims against [the non-diverse] defendant could be asserted in state court."[46] The doctrine of fraudulent joinder is meant to prevent plaintiffs from joining non-diverse parties in an effort to defeat federal jurisdiction.[47]

B. Evidence of Fraudulent Joinder

In determining whether a defendant is fraudulently joined, courts look to whether the pleadings state a claim against the non-diverse defendant. However, courts are not limited to the pleadings. "'[F]ederal courts may look outside [the] pleadings to other evidence in the record.'"[48] For example, courts have routinely looked to affidavits to establish fraudulent joinder.[49]

III. VOLUNTARY / INVOLUNTARY RULE

A. "Voluntary" Dismissal

Under this rule, where the plaintiff voluntarily dismisses a non-diverse defendant, the action is removable. If the Court orders the dismissal (i.e., "involuntary dismissal") of the non-diverse defendant, the action is generally not removable.[50] Thus, a defendant seeking to remove a case on the ground that there is no claim against the non-diverse defendant, should immediately remove the action on the basis of fraudulent joinder; a defendant seeking removal should not

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[46] Briarpatch Ltd., L.P. v. Phoenix Pictures, Inc., 373 F.3d 296, 302 (2d Cir. 2004); Whitaker v. American Telecasting, Inc., 261 F.3d 196, 207 (2d Cir. 2001); Pampillonia v. RJR Nabisco, Inc., 138 F.3d 459, 460-61 (2d Cir. 1998).
[47] *Briarpatch*, 373 F.3d at 302.
[48] United Food & Commercial Workers Union, Local 919, AFL-CIO v. CenterMark Properties Meriden Square, Inc., 30 F.3d 298, 305 (2d Cir. 1994) (citations omitted).
[49] *Pampillonia*, 138 F.3d at 461-62.
[50] Quinn v. Aetna Life & Cas. Co., 616 F.2d 38 (2d Cir.1980).

await an "involuntary dismissal" of the non-diverse defendant by the state court on a motion to dismiss.

B. Exceptions

The Second Circuit has stated that where the time to appeal an involuntary dismissal has expired, "plaintiffs' failure to take an appeal constitute[s] the functional equivalent of a 'voluntary' dismissal."[51] The rationale for this exception is that the failure to appeal creates "finality;" in other words, a federal court evaluating the propriety of the dismissal of the diversity-defeating defendant need not be concerned that a state appellate court might reverse the order of dismissal, thus making the action no longer removable.

IV. WAIVER OF RIGHT TO REMOVE

A. Waiver by Defending

Where the actions taken by a defendant in state court manifestly are preliminary in nature, along with the timely filing of the removal petition, the right of removal is not lost by action in the state court short of proceeding to adjudication on the merits.[52]

B. Waiver by Consent

A consent to process and personal jurisdiction does not necessarily constitute a waiver of the right to remove.[53]

C. Waiver by Contract

A defendant can waive the right of removal from state to federal court by including a contractual provision limiting removal or venue. Most commonly, such a contractual provision

[51] *Id.* at 40 n.2.
[52] Universal Steel & Metal Co. Ltd. V. Railco, Inc., 465 F.Supp. 7, 9 (D.C. Vt. 1978).
[53] *Id.*

takes shape in the form of a forum selection clause.[54] In *The Bremen v. Zapata Off-Shore Co.*,[55] the Supreme Court held that a court should enforce a contractual forum selection clause unless it is clear that enforcement would be unreasonable and unjust or that the clause was obtained through fraud or overreaching. The Second Circuit has extended this rule to diversity and other non-admiralty cases.[56]

[54] *See* The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972); Karl Koch Erecting Co. v. New York Convention Ctr. Dev. Corp., 838 F.2d 656, 659 (2d Cir. 1988).
[55] 407 U.S. 1 (1972).
[56] *See* Karl Koch Erecting Co. v. New York Convention Center Dev. Corp., 838 F.2d 656, 659 (2d Cir. 1988).

3RD CIRCUIT

DELAWARE

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I. POWER AND RIGHT TO REMOVE

A. The Parties

1. Defining "Parties in Interest"

The historic rule in the Third Circuit was that "parties in interest" were indispensable parties within the meaning of Fed. R. Civ. P. 17(a).[1] Later Supreme Court cases recognized an asymmetry between the removal and Rule 17 standards.[2]

The Third Circuit has not recently positively defined "parties in interest" in a Section 1441(b) context, choosing instead to negatively define them as those parties that are not "nominal".[3] In Delaware, the question most often arises in the context of corporate suits. Where a plaintiff alleges that a corporation is an active participant in wrongdoing, such as a participant in a conspiracy, it is a party in interest.[4] Similarly, if the plaintiff requests any relief from the corporation, such as the registration of stock, the corporation is a necessary party.[5] Another common theme is that the citizenship of unincorporated entities is that of all their members, i.e. the "real party at interest" test does not limit an unincorporated entity's citizenship.[6]

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[1] *See, e.g.,* McHenry v. New York, P & O R Co, 25 F. 65, 68 (C.C.Pa. 1885); Kearney v. Dollar, 111 F.Supp. 738 (D.C. Del. 1953).
[2] *See* Navarro Sav. Ass'n v. Lee, 446 U.S. 458, fn9 (1980).
[3] *See, e.g.,* Bumberger v. Insurance Co. of North America, 952 F.2d 764 (3rd Cir. 1991) ("Nominal parties are generally those without a real interest in the litigation.").
[4] Dolmetta v. Interlakes (Canada) Realty Corp., 536 F.Supp. 685 (D. Del. 1982).
[5] Unanue v. Caribbean Canneries, Inc., 323 F.Supp. 63 (1971).
[6] Transamerica Corp. v. Reliance Ins. Co. of Illinois, 884 F.Supp. 133 (D. Del. 1995).

2. Presence of "Doe" Defendants

The Third Circuit employs a two-step analysis for determining a Doe defendant's effect on diversity jurisdiction. "First we must ask whether, on the face of the complaint, there are sufficient allegations concerning their identity and conduct to justify consideration of their citizenship. Second, we must look beyond the face of the complaint for indicia of fraudulent joinder …. In determining whether allegations against a Doe defendant are sufficient on their face to destroy diversity, courts have looked for some clue who the Doe might be, how the Doe might fit into the charging allegations, or how the Doe might relate to other parties. The purpose of this inquiry is to determine whether the Does, though unnamed, are 'real', or whether they are 'shams' that have been inserted into the complaint out of 'superstition' rather than any actual hope of obtaining a judgment."[7]

The first step gauges whether the Doe defendants, "live not and are accused of nothing".[8] Examples include complaints where no charge is specifically directed to the Doe defendant,[9] or where the Doe defendant is only vaguely alleged to be "somehow negligent and liable",[10] or where the Doe defendant's conduct is defined so broadly that it encompasses anyone on earth who might be liable for the alleged damages.[11] Conversely, a successful allegation may allege that "Jane Doe, a nurse, acting as an agent and servant of [named defendant], negligently administered a whirlpool treatment",[12] or that "Does 1-10 as employees and agents of [named

[7] Abels v. State Farm Fire & Cas. Co., 770 F.2d 26, 29 (3d Cir. 1985) (internal citations and quotation marks omitted).
[8] *Id.* at 32.
[9] *Id.* at 30.
[10] *Id.* at 30-31.
[11] *Id.* at fn 6.
[12] *Id.* at 31.

defendant] who were responsible for processing claim for benefits … committed a variety of unfair insurance practices" specifically enumerated in a relevant statute.[13]

The second step gauges the seriousness of Plaintiffs' attempt to actually secure a judgment against the Doe defendant. Examples of conduct satisfying this prong include attempting to identify the Does through discovery and attempting to join newly identified Does as named parties.[14] Failure to move to compel such discovery or filing a pleading without attempting to join identified Does is evidence of fraudulent joinder.[15] However, joining a Doe for the express purpose of defeating diversity is not evidence of fraudulent joinder.[16]

Note that failure to join a Doe defendant to a notice of removal does not render the notice deficient.[17]

3. Diversity for Putative Class Actions

The "minimal diversity" standard applies to cases meeting the Class Action Fairness Act of 2005 ("CAFA")'s amendments to 28 U.S.C. §1332, i.e. class actions with 100 members and valued at $5 million or more.[18] CAFA does not address citizenship of defendants; and traditional rules for determining their citizenship therefore apply.[19]

Plaintiffs remain free to structure their complaints to avoid the $5 million threshold and thus removal based upon Section 1332 (2) or (6), but in such cases the amount in controversy

[13] *Abels*, 770 F.2d at 31-32.
[14] *Id.* at 32.
[15] *Id.*
[16] *Id.*
[17] *See* Green v. America Online, 318 F.38 465, 470 (3rd Cir. 2003).
[18] Morgan v. Gay, 471 F.3d 469 (3rdCir. 2006); Schwartz v. Comcast Corp., 2007 WL 4212693 (3rdCir.); *see generally In re* Welding Fume Products Liability Litig., 245 F.R.D. 279 (N.D.Ohio 2007).
[19] *See* 16 JAMES WM MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 107.14[2][d][ii] (3d ed. 2007).

will be scrutinized carefully.[20] Assuming Plaintiffs overcome that hurdle, the pre-CAFA rule of complete diversity between the named class representative and all the defendants applies.[21]

B. The Amount in Controversy

1. Establishing the Amount in Controversy

In general, the amount in controversy is that pled in good faith by the Plaintiff in the complaint. "If [the plaintiff] does not desire to try his case in the federal court he may resort to the expedient of suing for less than the jurisdictional amount, and though he would be justly entitled to more, the defendant cannot remove."[22] If the complaint specifically avers that the claim is less than the jurisdictional amount, the defendant must prove that averment false to a legal certainty to avoid remand.[23] If the complaint contains no such averment, remand is required "if it appears to a legal certainty that the plaintiff *cannot* recover the jurisdictional amount."[24] Punitive damages, damage multipliers for fraud, attorneys fees recoverable via statutory or contractual provision, and the like are part of the amount in controversy.[25]

2. Application When a Specific Dollar Amount is Not Pled

If the complaint contains no specific averment of the jurisdictional amount, remand is required "if it appears to a legal certainty that the plaintiff *cannot* recover the jurisdictional amount."[26] "A district court's determination as to the amount in controversy must be based on the plaintiff's complaint at the time the petition for removal was filed. The court must measure the amount not ... by the low end of an open-ended claim, but rather by a reasonable reading of the value of the rights being litigated. However, claims of several plaintiffs, if they are separate

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[20] *See, e.g.*, Frederico v. Home Depot, - F.3d -, 2007 WL 3310553 (3rdCir. 2007); *Morgan*, 471 F.3d 469.
[21] *In re* School Asbestos Litigation, 921 F.2d 1310, 1317 (3rd Cir. 1990).
[22] Morgan v. Gay**,** 471 F.3d 469, 474 (3rd Cir. 2006), citing St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 294, (1938).
[23] Frederico v. Home Depot, - F.3d -, 2007 WL 3310553 (3rd Cir. 2007).
[24] *Id*.
[25] *Id*.
[26] Frederico v. Home Depot, - F.3d -, 2007 WL 3310553 (3rd Cir. 2007).

and distinct, cannot be aggregated for purposes of determining the amount in controversy. Only claims, whether related or unrelated, of a single plaintiff against a single defendant may be aggregated."[27]

3. Amount in Controversy Where Equitable Relief is Sought

"Where the plaintiff in a diversity action seeks injunctive or declaratory relief, the amount in controversy is … determined by the value of the object of the litigation."[28] "It is well settled that in an action of this nature, the jurisdictional amount is to be calculated on the basis of the property right which is being injured. If that property right has a [jurisdictional threshold] value the Federal Court has jurisdiction of such a diversity suit even though the plaintiff had not suffered [jurisdictional threshold] damage at the time suit was instituted."[29] If the value of the right is challenged, the costs of alternatives to the proposed equitable relief that still defend the right are evidence of the right's value.[30] However, it is the value of the right itself that is determinative, not the cost of ceasing a specific encroachment upon it.[31] Collateral or speculative damages flowing from injury to the right are not considered.[32]

4. Defeating Removal by Amending Relief Sought

"[A] plaintiff following removal cannot destroy federal jurisdiction simply by amending a complaint that initially satisfied the monetary floor."[33]

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[27] Werwinski v. Ford Motor Co., 286 F.3d 661, 667 (3rd Cir. 2002) (internal citations and quotation marks omitted).
[28] Columbia Gas Transmission Corp. v. Tarbuck**,** 62 F.3d 538, 541 (3rd Cir. 1995).
[29] *Id.* (citing Kelly v. Lehigh Nav. Coal Co., 151 F.2d 743, 745 (3d Cir.1945)).
[30] *Tarbuck***,** 62 F.3d at 543.
[31] *Id.*
[32] *Id.*
[33] Angus v. Shiley Inc., 989 F.2d 142, 145 (3rd Cir. 1993).

C. Time of Existence of Grounds for Removal

1. Event Triggering Thirty-Day Period for Actions Initially Removable

For "initial pleadings", because Delaware complaints must be served with the summons, the thirty-day removal period begins with the filing of the complaint.[34] Only formal service on the actual party will begin the thirty-day time period.[35] Long-arm service on the Secretary of State does not suffice.[36] Pre-complaint correspondence is inadequate notice of the removal right and does not trigger the thirty-day period.[37] Note that a court cannot raise *sua sponte* a procedural defect such as the untimeliness of removal based on the thirty-day time period.[38]

For later pleadings indicating a change in circumstances that creates a removal right, the thirty-day time period begins to run only when the grounds for removal are "clearly established."[39] This means, for example, the date the state court rules on a motion to realign parties, rather than the date such motion is filed.[40] However, the District of Delaware has repeatedly held that statements made in court and correspondence indicating settlement by non-diverse parties will trigger the thirty-day window even absent a formal filing.[41]

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[34] Sikirica v. Nationwide Ins. Co., 416 F.3d 214, fn7 (3rd Cir. 2005).
[35] *See* Lynch v. Coinmaster USA, Inc., 2006 WL 2616217 (D. Del. 2006).
[36] *Id.*
[37] *Sikirica*, 416 F.3d at 216.
[38] *In re* FMC Corp. Packaging Sys. Div., 208 F.3d 445, 446-47 (3d Cir. 2000).
[39] Graphic Scanning Corp. v. Yampol, 677 F. Supp. 256 (D. Del. 1988).
[40] *Id.*
[41] *See* Hessler v. Armstrong World Industries, Inc., 684 F. Supp. 393 (D. Del. 1988); Mancari v. AC & S Co., Inc., 683 F.Supp. 91 (D. Del. 1988).

2. Event Triggering Thirty-Day Period for Actions Not Initially Removable

In general, only formal service on the actual party will begin the thirty-day time period.[42] Service on the Secretary of State does not suffice.[43] Docket entries, such as the entry of an order dismissing an non-diverse party, suffice.[44] In cases of settling non-diverse defendants, the District of Delaware has held that mere comments at a Court proceeding coupled with correspondence suffice to trigger the removal period.[45]

The court in *Hessler v. Armstrong World Industries, Inc.*[46] held that correspondence indicating settlement of non-diverse parties combined with remarks by Plaintiffs counsel on the record regarding same constituted adequate "other paper" to trigger removal period. One district court, in *Mancari v. AC & S Co., Inc.*,[47] held that, "It is not required that dismissal of the nondiverse defendants be in writing or be formalized" to trigger the right of removal, suggesting that "other paper" need not even be a writing.

II. FRAUDULENT JOINDER

A. Test for Fraudulent Joinder

Fraudulent joinder analysis in the District of Delaware is governed by a trio of Third Circuit cases: *Batoff v. State Farm Ins. Co.*,[48] *Boyer v. Snap-on Tools Corp.*,[49] and *Abels v. State*

[42] *See* Lynch v. Coinmaster USA, Inc., 2006 WL 2616217 (D. Del. 2006).
[43] *Id.*
[44] *See, e.g.*, Graphic Scanning Corp. v. Yampol, 677 F. Supp. 256 (D. Del. 1988).
[45] *See* Hessler v. Armstrong World Industries, Inc., 684 F. Supp. 393 (D. Del. 1988); Mancari v. AC & S Co., Inc., 683 F.Supp. 91 (D. Del. 1988).
[46] 684 F. Supp. 393 (D. Del. 1988).
[47] 683 F.Supp. 91, 93 (D. Del. 1988).
[48] 977 F.2d 848, 851 (3rd Cir. 1992).
[49] 913 F.2d 108 (3d Cir. 1990).

Farm Fire & Cas. Co.[50] The Third Circuit neatly summarized and reaffirmed the rule of these cases in *In re Briscoe*.[51] *Batoff* states the general rule best:

> Joinder is fraudulent where there is no reasonable basis in fact or colorable ground supporting the claim against the joined defendant, or no real intention in good faith to prosecute the action against the defendants or seek a joint judgment. But, if there is even a possibility that a state court would find that the complaint states a cause of action against any one of the resident defendants, the federal court must find that joinder was proper and remand the case to state court. … [W]here there are colorable claims or defenses asserted against or by diverse and non-diverse defendants alike, the court may not find that the non-diverse parties were fraudulently joined based on its view of the merits of those claims or defenses.[52]

"In evaluating the alleged fraud, the district court must focus on the plaintiff's complaint at the time the petition for removal was filed. In so ruling, the district court must assume as true all factual allegations of the complaint. It also must resolve any uncertainties as to the current state of controlling substantive law in favor of the plaintiff."[53]

"[T]he removing party carries a heavy burden of persuasion" to show that the claim against the fraudulently joined party is "wholly insubstantial and frivolous."[54]

B. Evidence of Fraudulent Joinder

In *In re Briscoe*,[55] the Third Circuit first explicitly addressed consideration of evidence of fraudulent joinder outside the pleadings, holding that District Courts may take judicial notice of facts found in other proceedings:

[50] 770 F.2d 26 (3d Cir. 1985).
[51] 448 F.3d 201 (3rd Cir. 2006).
[52] Batoff v. State Farm Ins. Co., 977 F.2d 848, 851 (3rd Cir. 1992) (internal citations and quotation marks omitted).
[53] *Id.* at 851-852 (internal citations and quotation marks omitted).
[54] *Id.*
[55] 448 F.3d 201 (3rd Cir. 2006).

> [I]n reviewing a limitations question, we see no reason to preclude a district court from a limited consideration of reliable evidence that the defendant may proffer to support the removal. Such evidence may be found in the record from prior proceedings, which firmly establishes the accrual date for the plaintiff's claim, or in other relevant matters that are properly subject to judicial notice. Such a limited look outside the pleadings does not risk crossing the line between a proper threshold jurisdictional inquiry and an improper decision on the merits.

III. VOLUNTARY / INVOLUNTARY RULE

A. "Voluntary" Dismissal

The voluntary/involuntary rule applies to any voluntary act by the plaintiff that creates grounds for removal, not just a dismissal.[56] In general, a dismissal under Fed. R. Civ. P. 41(a) is voluntary unless it follows an indication by the court that it intends to rule against the plaintiff on a pending motion.[57]

B. Exceptions

There appear to be no recognized exceptions to the voluntary/involuntary rule in the Third Circuit or the District of Delaware.

IV. WAIVER OF RIGHT TO REMOVE

A. Waiver by Defending

A Defendant can waive its right to removal by proceeding to defend an action in State Court.[58] Such waiver must be "clear and unequivocal."[59] "[T]he stage the case is in should be and is crucial when analyzing whether there has been a waiver of the right to removal. For example, filing a pleading in the early stages of litigation may not be as clear and unequivocable

[56] Compare Graphic Scanning Corp. v. Yampol, 677 F. Supp. 256 (D. Del. 1988)(Plaintiff's argument in favor realignment of defendant corporation when such realignment rendered Plaintiff a nominal party was a voluntary act that created right of removal, even though Plaintiff remained a party.); Putterman v. Daveler, 169 F.Supp. 125 (D.C. Del.1958) (Implied realignment of defendant corporation does not constitute voluntary act by Plaintiff).
[57] DuToit v. Strategic Minerals Corp., 136 F.R.D. 82, 86 (D. Del. 1991).
[58] See Mancari v. AC & S Co., Inc., 683 F.Supp. 91, 94 (D. Del. 1988)(waiting two days after right to remove was created by the settlement of non-diverse parties constituted "experimenting with its case in state court" and therefore waiver).
[59] *Id*.

an act as continuing to present evidence in a trial."[60] "It is reasonable to conclude that a defendant who continues to present witnesses or seek other relief from a court during a trial evidences a clear and unequivocal intent to waive its right to remove."[61]

B. Waiver by Consent

A defendant's consent to the filing of a case in State Court can waive the defendant's right to remove. For example, a contractual clause indicating consent to the jurisdiction of any court will be held to have waived a right to remove.[62]

C. Waiver by Contract

Contractual waivers of removal are binding.[63] Note that the assertion of a contractual basis for remand is not subject to the same 30-day time limit as the assertion of a statutory basis.[64] For mere diversity cases, contractual waivers need not be "clear and unequivocal," but rather are interpreted under the normal standard for review of a contractual provision.[65] For example, a forum selection clause will be held to be *prima facia* valid.[66] However, in cases governed by federal statutes with a foreign policy basis, such as FISA and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, any ambiguity in the forum selection clause will be resolved against waiver.[67]

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[60] *Id*. at 94-95.
[61] *Id*. at 95.
[62] Connecticut Bank of Commerce v. Republic of Congo, 440 F.Supp.2d 346 (D. Del. 2006); citing Foster v. Chesapeake Ins. Co., Ltd., 933 F.2d 1207, 1216-17 (3d Cir. 1991).
[63] *See* Foster v. Chesapeake Ins. Co., Ltd., 933 F.2d 1207 (3rd Cir. 1991).
[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] *In re* Texas Eastern Transmission Corp. PCB Contamination Ins. Coverage Litigation, 15 F.3d 1230 (3rd Cir. 1994); Suter v. Munich Reinsurance Co., 223 F.3d 150 (3rd Cir. 2000).

V. PRACTICE POINTERS

Perhaps the most dangerous pitfall of Delaware removal practice is the extremely short time constituting waiver in the case of settling non-diverse defendants.[68] The right to remove close to or during trial must be immediately preserved or lost forever.

The fact that service of suit clauses are often deemed to be contractual waivers of the right to remove invites first-strike actions for declaratory judgments from parties that might otherwise logically be defendants. This tactic has been held to be valid.[69]

If one defendant is a citizen of the state in which the action is filed, no removal based on diversity is possible.[70] According to the Delaware Department of State: Division of Corporations, approximately 60% of Fortune 500 companies and 50% of all publicly traded companies are incorporated in Delaware.[71] It is thus often difficult to remove actions filed in Delaware state courts that feature multiple corporate defendants.

[68] Hessler v. Armstrong World Industries, Inc., 684 F. Supp. 393 (D. Del. 1988); Mancari v. AC & S Co., Inc., 683 F.Supp. 91 (D. Del. 1988).
[69] Foster v. Chesapeake Ins. Co., Ltd., 933 F.2d 1207, 1216-17 (3d Cir. 1991).
[70] 28 U.S.C. § 1441(b).
[71] *See* www.corp.delaware.gov/aboutagency.shtml.

NEW JERSEY

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I. POWER AND RIGHT TO REMOVE

A. The Parties

1. Defining "Parties in Interest"

For purposes of removal, New Jersey case law does not provide much direction with respect to the interpretation of the term "parties in interest." However, New Jersey federal case law has held that a non-party "purporting to be an 'additional defendant'" does not have the requisite authority to seek to remove a case.[1]

2. Presence of "Doe" Defendants

Additionally, in accordance with 28 U.S.C. § 1441(a), the New Jersey federal district court disregards the citizenship of "Doe" defendants which will not be deemed to destroy diversity or preclude removal.[2] Similarly, the rule requiring that all defendants join in or consent to removal is disregarded with respect to "Doe" defendants.[3]

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[1] *See In re* Notice of Removal Filed by William Einhorn, 481 F. Supp. 2d 345, 346-7 (D.N.J. 2007) (a non-party insurer cannot properly file a notice of removal).
[2] Joshi v. K-Mart Corp., No. 06-5448, 2007 WL 2814599, at *2 (D.N.J. Sept. 25, 2007).
[3] Green v. Am. Online, 318 F.3d 465, 470 (3d Cir. 2003).

3. Diversity for Putative Class Actions

In connection with putative class actions, courts in New Jersey evaluate diversity in accordance with the Class Action Fairness Act (CAFA).[4]

With respect to putative class actions, in accordance with the rationale outlined by the Seventh, Ninth, and Eleventh Circuits, the Third Circuit has held that the burden under CAFA of establishing the requisite amount in controversy remains with the removing party.[5]

It should also be noted that, by merely consenting to the removal of a case to federal court, a defendant will not be deemed to have waived any objections to personal jurisdiction or any other 12(b) defenses.[6]

B. The Amount in Controversy

1. Establishing the Amount in Controversy

While no reported New Jersey federal case law was found specifically interpreting the term "amount in controversy," New Jersey state law creates some unique quirks in this regard. Specifically, New Jersey Court Rule 4:5-2 prohibits specific allegations of unliquidated money damages in a complaint.[7] The operation of this rule creates some tension with 28 U.S.C. § 1446

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[4] Hirschbach v. NVE Bank, 496 F. Supp. 2d 451, 458-9 (D.N.J. 2007). The relevant provision of CAFA, 28 U.S.C. § 1332(d)(2), establishes that, for purposes of federal jurisdiction, diversity exists where: "(A) any member of a class of plaintiffs is a citizen of a State different from any defendant; (B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or (C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state."

[5] *Morgan*, 471 F.3d at 473.

[6] Marosovitz v. Trustees of Deed of Trust Created by Nusbaum, No. 88-2653, 1988 WL 83089, at *3 (D.N.J. Aug. 2, 1988) (quoting 5 Wright and Miller § 1395).

[7] Buchanan v. Lott, 255 F. Supp. 2d 326, 327-8 (D.N.J. 2003). Seemingly inconsistently, however, case law emanating from New Jersey has permitted a plaintiff to specifically seek damages *less* than the jurisdictional amount, thereby keeping the case out of federal court. Morgan v. Gay, 471 F.3d 468, 474 (3d Cir. 2006) (claim brought pursuant to CAFA).

insofar as it means that a defendant may not be able to accurately ascertain whether the amount in controversy exceeds $75,000 for purposes of determining the removability of a case.[8] Thus, in order to rectify this situation, New Jersey Court Rule 4:5-2 allows a defendant to serve a written request for a statement of damages and the plaintiff must provide the same within 5 days of service.[9] Depending on the responses to this discovery, the defendant may then determine the removability of such a case.

2. Application When a Specific Dollar Amount is Not Pled

In accordance with these New Jersey state rules, certain New Jersey federal decisions have held that "a specific allegation that damages exceed the minimum federal jurisdictional amount" is required before a defendant may properly remove the case.[10] However, even without such a specific allegation, other New Jersey federal decisions have held that a complaint that includes "a simple statement of 'severe' or 'serious' injuries, along with pain and suffering, is sufficient to put a defendant on notice that the claim could amount to over $75,000."[11]

Although there is consensus that the party invoking federal jurisdiction bears the burden of proof regarding the amount in controversy, there is some confusion among the district courts

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[8] *Id.* at 328.

[9] *See, e.g., id.* at 330 n.2; Valerio v. Mustabasic, No. 07-534, 2007 WL 2769636, at *3 (D.N.J. Sept. 21, 2007); Stein v. Bayer Corp., No. 05-2476, 2005 WL 2000143, at *2 (D.N.J. Aug. 18, 2005).

[10] Vartanian v. Terzian, 960 F. Supp. 58, 61-62 (D.N.J. 1997).

[11] *See Buchanan*, 255 F. Supp. 2d at 328-329, 331 (where complaint is silent as to the amount of damages sought, "the Court must independently appraise the plaintiff's claims as set forth in the complaint, and determine the amount in controversy 'by a reasonable reading of the value of the rights being litigated.'" (quoting Angus v. Shiley, Inc., 989 F.2d 142, 146 (3d Cir. 1993))); *but see Valerio*, 2007 WL 2769636, at *1, *4 (general claims of severe permanent damage, pain and suffering, present and future medical expenses, and lost wages were insufficient basis to establish requisite amount in controversy). A court must first look to the complaint in order to determine if the amount in controversy has been met; however, when that complaint is silent as to the specific amount of damages sought (in compliance with New Jersey Court Rule 4:5-2), the Court may consider other evidence included with the notice of removal and/or the plaintiff's motion to remand. Faltaous v. Johnson and Johnson, No. 07-1572, 2007 WL 3256833, at *6 (D.N.J. Nov. 5, 2007).

in the Third Circuit as to what quantum of proof is needed.[12] The Third Circuit recently spoke to this issue and held that a preponderance of the evidence standard should be applied in resolving factual disputes and, once any such factual disputes have been resolved, the legal certainty test should be applied.[13] Specifically, the court explained, in reliance on U.S. Supreme Court precedent, that the "legal certainty" test requires that a case be remanded if it is demonstrated to a "legal certainty" that the plaintiff is not entitled to recover an amount in excess of the amount in controversy.[14] Conversely, if a plaintiff has attempted to expressly limit the damages sought to an amount below the jurisdictional threshold, the proponent of federal jurisdiction can seek to overcome such a claim by showing -- to a "legal certainty" -- that the jurisdictional amount will be met or exceeded.[15]

3. Amount in Controversy Where Equitable Relief is Sought

Consistent with other states' rulings in this regard, where declaratory or injunctive relief is sought, in New Jersey, "it is well established that the amount in controversy is measured by the value of the object of the litigation."[16]

4. Defeating Removal by Amending Relief Sought

Furthermore, with respect to determining the amount in controversy for purposes of removal to a New Jersey federal court, "it is well-settled that a plaintiff may not, after removal,

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[12] Frederico v. Home Depot, No. 06-2266, WL 3310553, at *3 (3d Cir. Nov. 9, 2007).
[13] *Id.* at *4-5.
[14] *Id.* at *4.
[15] *Id.* at *5.
[16] Russ v. Unum Life Ins. Co., 442 F. Supp. 2d 193, 198 (D.N.J. 2006) (quoting Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 347 (1977)).

by stipulation, by affidavit, or by amendment of the pleadings, reduce the amount in controversy to deprive the district court of jurisdiction."[17]

C. Time of Existence of Grounds for Removal

1. Event Triggering Thirty-Day Period for Actions Initially Removable

In accordance with 28 U.S.C. § 1446(b), a notice of removal must be filed within 30 days of receipt by the defendant of the initial pleading though "service or otherwise." Certain New Jersey cases have held that this removal clock is triggered by formal service under New Jersey court rules, not by a defendant's "mere receipt of the Complaint."[18] However, other decisions from the District of New Jersey reflect a different view, holding that the "or otherwise" language does not require "delivery in a manner that would constitute effective service of process" for purposes of starting the removal time period.[19]

In cases where multiple defendants are named but have been served at different times, New Jersey federal courts have followed the "intermediate rule" (a variation on the "first served rule" holding that the 30-day removal deadline will start to run when the first defendant is served) which requires a later-served defendant to join in an "otherwise valid removal petition"

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[17] Kolokowski v. Crown Equipment Corp., No. 05-4257, 2005 WL 3320777, at *2 (D.N.J. Dec. 6, 2005) (citing St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 290-293 (1938)); *see also* Modica v. Home Depot, No. 06-5307, 2007 WL 1231793, at *2 (Apr. 23, 2007) (subsequent Offer of Judgment for less than the jurisdictional amount does not eliminate jurisdiction).

[18] *Joshi*, 2007 WL 2814599, at *3; Hicks v. Monaco Coach Corp., No. 06-3949, 2006 WL 3780703, at *1 (D.N.J. Dec. 21, 2006).

[19] *See* Yorker v. Manalapan Police Dept., No. 04-5170, 2005 WL 1429879, at *3-4 (D.N.J. June 17, 2005) ("service or otherwise" indicates that the time to remove starts running when the summons and complaint were served on someone authorized to accept service, not when the acknowledgement of service was signed). In ruling on this issue, the Third Circuit has held that the service of a summons alone will not trigger the removal clock; however, it should be noted that such a holding was made in a case emanating out of a Pennsylvania federal court and was founded on the fact that, under Pennsylvania law, a summons does not provide any information about the cause of action. Sikirica v. Nationwide Ins. Co., 416 F.3d 214, 221-223 (3d Cir. 2005).

within 30-days of being served.[20] Under this rule, if the first-served defendant does not opt to remove the case within its 30-day window, the removal time period will not restart upon service of the later-served defendants.[21]

2. Event Triggering Thirty-Day Period for Actions Not Initially Removable

In terms of the events that may be deemed to trigger the removal clock when the case is not initially removable, New Jersey courts have determined that the "other paper" language of 28 U.S.C. §1446(b) can be interpreted to include expert deposition testimony and post-complaint statements regarding damages but will not include statements made in connection with settlement discussions.[22] With respect to the determination of what constitutes "service or otherwise" of any such "other paper," New Jersey courts have required less formality than with respect to the interpretation of the similar language contained in the first paragraph of 1446(b).[23]

II. FRAUDULENT JOINDER

A. Test for Fraudulent Joinder

New Jersey courts -- as other courts -- define fraudulent joinder to be the joinder of an in-state defendant "where there is no reasonable basis in fact or colorable ground supporting the

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[20] Epstein v. Sensory Mgmt. Servs., LLC, No. 07-2113, 2007 WL 2702646, at *1-2 (D.N.J. Sept. 12, 2007).

[21] *Id.* at *2.

[22] Connolly v. Aetna U.S. Healthcare, Inc., 286 F. Supp. 2d 391, 399 (D.N.J. 2003) (expert deposition testimony constitutes "other paper"); Modica, 2007 WL 1231793, at *2 (statement of damages is deemed "other paper"); Entrekin v. Fisher Scientific Inc., 146 F. Supp. 2d 594, 612, 615 (D.N.J. 2001) (informal settlement discussion is not "other paper"). The court in *Entrekin* raised but did not resolve the "admittedly troublesome question[s]" of whether oral statements constitute "other paper" and whether a document must be filed in order to be considered "other paper." *Entrekin*, 146 F. Supp. 2d at 612, 616.

[23] *See* Eyal Lior v. Sit, 913 F. Supp. 868, 877-8 (D.N.J. 1996) (receipt of stipulation (deemed to be "other paper") by facsimile -- as opposed to date of filing -- is sufficient to trigger removal clock). Notably this case was decided before the U.S. Supreme Court decision in *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, which held that when determining when a case is initially removable, the "mere receipt of the complaint unattended by formal service" is insufficient to trigger the 30-day removal deadline. *Murphy Bros., Inc.* , 526 U.S. 344, 347-48 (1999).

claim against the joined defendant, or no real intention in good faith to prosecute the action against the defendant or seek a joint judgment."[24] Specifically, the New Jersey District Court and the Third Circuit have found the joinder of an in-state defendant to be fraudulent when the claims against that defendant are "wholly insubstantial or frivolous," where there is no cause of action against the defendant recognized under the state's laws, or when the non-diverse defendant is joined after the statute of limitations has expired.[25]

B. Evidence of Fraudulent Joinder

In terms of evidence of fraudulent joinder, trial courts within the Third Circuit have the authority to look beyond the pleadings including by engaging in an examination of a record from prior proceedings or considering relevant matters that would be properly subject to judicial notice in order to determine if "colorable claims" have been asserted against an in-state defendant; however, in doing so, trial courts have been cautioned to avoid considering the merits of the case.[26]

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[24] Gil v. Related Mgmt. Co., No. 06-2174, 2006 WL 2358574, at *2 (D.N.J. Aug. 14, 2006) (quoting Boyer v. Snap-On-Tools Corp., 913 F.2d 108, 111 (3d Cir. 1990)).

[25] Allen v. Bongiovi, No. 07-44, 2007 WL 869535, at *2-3 (D.N.J. Mar. 19, 2007); *Boyer*, 913 F.2d at 111-112; *In re Briscoe*, 448 F.3d 201, 219 (3d Cir. 2005); *see also Gil*, 2006 WL 2358574, at *4.

[26] *See, e.g., In re Briscoe*, 448 F.3d at 219-21; *see also* Abels v. State Farm Fire & Cas. Co., 770 F.2d 26, 32 (3d Cir. 1985); *Boyer*, 913 F.2d at 112; *Allen*, 2007 WL 869535, at *2-3.

III. VOLUNTARY/INVOLUNTARY RULE

A. "Voluntary" Dismissal

Pursuant to the voluntary-involuntary rule, if a non-diverse party is dismissed involuntarily (for example, if a court grants a defendant's motion to dismiss), the action does not become properly removable; however, if a plaintiff voluntarily terminates an action with regard to a non-diverse party, the action may become properly removable.[27]

New Jersey courts have held that the voluntary-involuntary rule applies both in the case of dismissal of claims against a non-diverse defendant and in the case of severance of claims against a non-diverse defendant. Am. Cas. Co. of Reading, Pa. v. Continisio, No. 91-5107, 1992 WL 489730, at * 4 (D.N.J. Sept. 11, 1992). With respect to the time period in which a defendant may remove a case after a non-diverse defendant has been dismissed or severed from an otherwise removable case, the case law has reiterated that the commencement of the removal time clock begins with service of the initial complaint in accordance with New Jersey state law. Id. at *3 (court-severance of claims against non-diverse defendant did not initiate a "new" action nor a "initial pleading").[28]

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[27] Am. Dredging Co. v. Atlantic Sea Con, Ltd., 637 F. Supp. 179, 181 (D.N.J. 1986) (citing Great Northern Ry. Co. v. Alexander, 246 U.S. 276 (1918)).

[28] The District of New Jersey specifically distinguished a holding in which the Second Circuit determined that an involuntary dismissal was converted into the functional equivalent of a voluntary one because the plaintiff had not timely appealed the trial court's dismissal; the New Jersey court held that the dismissal at issue in the case before it would not be so converted because it had been vigorously opposed by the plaintiff and because it was not final insofar as the plaintiff had the right to appeal or rejoin the dismissed defendant after complying with procedural requirements. Am. Dredging Co., 637 F. Supp. at 182-3 (distinguishing Quinn v. Aetna Life & Cas. Co., 616 F.2d 38 (2d Cir. 1980)).

B. Exceptions

The federal court for the District of New Jersey has specifically held that the voluntary-involuntary rule does not provide an exception to the removal deadline provision of 28 U.S.C. § 1446(b) (establishing that, when a case is not initially removable, there is an outer limit of one-year from commencement of the action in which the case may be removed); the court held that to create such an exception would be "in contravention of the plain language" of the statute.[29]

IV. WAIVER OF RIGHT TO REMOVE

The New Jersey Court of Chancery has held that that a "[w]aiver of right of removal may be not only by express agreement, but by conduct also."[30]

A. Waiver by Contract

With respect to any claimed waiver by agreement, in New Jersey, the manner in which the validity of a contractual waiver of a defendant's right to remove will be examined is dependent upon the structure and purpose of the statute conferring the basis of removal jurisdiction.[31] If the basis of removal is federal question jurisdiction, founded in a federal statute that includes an express preference that the claims at issue be litigated in federal court, waiver of a defendant's right to remove is not properly found absent "clear and unambiguous language" reflecting such a waiver.[32] However, where the basis of removal is diversity jurisdiction, a court should interpret the contractual provision alleged to waive a defendant's right to remove "using

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[29] Lee v. Carter-Reed Co., L.L.C., No. 06-cv-1173, 2006 WL 3511160, at *2-3 (D.N.J. Dec. 5, 2006).
[30] Eckel v. Shell Eastern Petroleum, 167 A. 869, 871 (N.J. Ch. 1933).
[31] *See* Suter v. Munich Reinsurance Co., 223 F.3d 150, 156-158 (3d Cir. 2000).
[32] *Id.* (because of clear policy choice that claims under the Convention Act be brought in federal court, contractual language consenting to service of suit was not deemed to be a waiver of right to remove); *see also In re* Texas Eastern Transmission Corp., 15 F.3d 1230, 1241-4 (3d Cir. 1994) (similar finding pursuant to the Foreign Services Immunity Act).

the same benchmarks of construction and, if applicable, interpretation as it employs in resolving all preliminary contractual questions."[33]

B. Waiver by Defending

With respect to any claimed waiver by conduct, a New Jersey state court, following the holding of an Oklahoma state case, held that "a right to remove a cause from a state to a federal court may be waived by estoppel through conduct unequivocally evincing election to proceed in state court."[34]

Pursuant to New Jersey federal case law, any waiver of a right to remove by a defendant's participation in state court proceedings must be "clear and unequivocal;" the New Jersey court has held that to hold otherwise would create a situation in which a defendant seeking to ensure that no such waiver would be found, would be required to be inactive and, thereby, risk default.[35]

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[33] *Suter*, 223 F.3d at 156 (citing Foster v. Chesapeake Ins. Co., Ltd., 933 F.2d 1207, 1216-8 (3d Cir. 1991) (upholding finding of waiver)).
[34] *Eckel*, 167 A. at 871.
[35] *Foster*, 933 F.2d at 1218 n.15.

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I. POWER AND RIGHT TO REMOVE

A. The Parties

1. Defining "Parties in Interest"

Under the law of Pennsylvania, a real party in interest is a principle upon which a person or entity is identified for purposes of enforcing a right.[1] The rule does not require that the 'real party in interest' be the party who will ultimately benefit from the lawsuit. The purpose of the rule is to protect defendants from subsequent similar actions by the party actually entitled to recover.[2] To determine whether the 'real party in interest' requirement has been satisfied, Pennsylvania's substantive law determines whether the action has been initiated by the party possessing the substantive right to relief.[3]

2. Presence of "Doe" Defendants

Pennsylvania follows 28 U.S.C. 1441(a) which provides for purposes of removal, 'the citizenship of defendants sued under fictitious names shall be disregarded.' However, the inquiry must go further to determine whether the unidentified "Doe" defendants are fictitious for purposes of satisfying the citizenship requirement. In other words, the presence of a 'Doe'

[1] *Kenrich Corporation v. Miller*, 256 F. Supp. 15 (E.D. Pa. 1966) *aff'd. on other grounds*, 377 F.2d 312 (3rd Cir. 1967).
[2] *White Hall Bldg. Corp v. Profexray Div. of Litton Ind.*, 387 F. Supp. 1202 (E.D. Pa. 1972) *aff'd.* 578 F.2d 1377 (3rd Cir. 1978).
[3] See 6 C Wright, Miller & Cooper, Federal Practice and Procedure, Sec. 1544 at 647 (1971).

defendant will not destroy diversity if plaintiff can establish that their citizenship creates complete diversity.[4]

3. Diversity for Putative Class Actions

In *Exxon Mobil Corp. v. Allapattah Services*, The United States Supreme Court ruled that where at least one named plaintiff in the action satisfies the statutory requirement, jurisdiction over the claims of other plaintiffs in the same case or controversy, even if those claims are for less than the requisite amount, does not destroy diversity.[5] In class actions brought in federal court based upon diversity, the citizenship of the named representative of the class establishes diversity.[6] In cases that qualify as class actions under the Class Action Fairness Act of 2005 ("CAFA"), at least 100 members and an aggregate amount in controversy exceeding $5 million.), diversity subject matter jurisdiction is established if any class member is of diverse citizenship from any defendant. In other words, only minimal diversity is required.[7]

B. The Amount in Controversy

1. Establishing the Amount in Controversy

The amount of controversy is determined from the "face of the plaintiff's complaint."[8] A motion for remand will be granted if defendants cannot establish "with legal certainty" that the amount in controversy exceeds the statutory minimum.[9] In this regard, it is the defendant's burden to establish that the amount in controversy exceeds the statutory amount.[10]

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[4] *Brooks v. Purcell*, C/A No. 02-2370, 2002 WL 3195311, at *3 (C.A.3. Pa December 23, 2003).
[5] 545 U.S. 546 (2005).
[6] See id. at 583 (*citing Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356, 366 (1921)).
[7] See 28 U.S.C. §1332 (d).
[8] *Angus v. Shiley Inc.*, 989 F.2d 145, 146 (3rd Cir. 1993).
[9] *Lasch d/b/a Bucks County Enterprises and East Coast Mechanical v. Idearc Media Corp. f/k/a Verizon Directories Corp.*, C/A No. 07-4039, 2007 U.S. Dist. LEXIS 90479, at *8 (D. Pa. December 7, 2007).
[10] *Morgan v. Gay*, 471 F. 3d 469 (3rd Cir. 2006).

2. Application When a Specific Dollar Amount is Not Pled

Although the amount in controversy is measured by the pecuniary value of the rights being litigated[11], when the complaint does not limit its request to a precise monetary amount, Pennsylvania courts apply a subjective analysis defined as a "reasonable reading of the value of the rights being litigated."[12] Attorneys fees and costs are excluded from the calculation unless those amounts are recoverable. Claims cannot be aggregated for purposes of determining the amount in controversy.[13]

3. Amount in Controversy Where Equitable Relief is Sought

In actions seeking declaratory judgment, the amount in controversy is measured by the value of the object of the litigation[14] or the direct pecuniary value of the right that the plaintiff seeks to enforce or protect. Stated differently, the amount in controversy for jurisdiction purposes is the value of the object that is subject matter of the lawsuit.[15] In declaratory judgment actions, as to those seeking specific monetary relief, the amount in controversy requirement can be satisfied by looking to the underlying suit.[16] For example, in a bad faith claim against an insurer, the court examined the underlying suit and the insurance policy amounts. Concluding that a possible award involved more than the jurisdictional amount, the court denied remand.[17]

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[11] *Hunt v. Wash. Apple Advertising Comm'w.*, 432 U.S. 333, 347 (1977).
[12] *Angus v. Shiley*, 989 F.2d 142 (3rd Cir. 1993).
[13] *Meritcare v. St. Paul Mercury Ins. Co.*, 166 F.3d 214, 219 (3rd Cir. 1999) (quoting 14B Miller, Wright, Cooper, Federal Practice and Procedure, Section 3704 at 134 (1994)).
[14] *Hunt* supra at 347.
[15] *Press v. Harford*, 326 F. Supp. 2d 626 (2004).
[16] *Manze v. State Farm Ins. Co.*, 817 F2d 1062 (3rd Cir. 1987).
[17] *Id.*

4. Defeating Removal by Amending Relief Sought

Diversity cannot be destroyed by amending a complaint that initially satisfies the amount in controversy amount.[18]

C. Time of Existence of Grounds for Removal

1. Event Triggering Thirty-Day Period for Actions Initially Removable

Removal is triggered when the 'initial pleading' *reveals* a ground for removal which has been interpreted by Pennsylvania courts as that which provides information about the nature of the action.[19] For example, a summons is an insufficient vehicle to reveal the nature of the action since it merely contains the plaintiff's name, the defendant's name, and notice that an action has been commenced, with the county, date and name of the clerk. These facts are wholly insufficient to notify the defendant "what the case is about."[20]

2. Event Triggering Thirty-Day Period for Actions Not Initially Removable

In Pennsylvania, the time to remove is triggered by simultaneous service of the summons and complaint, or by receipt of the complaint, 'through service or otherwise,' after and apart from service of the summons but not by mere receipt of the complaint unattended by any formal service.[21] In other words, formal service of the complaint triggers removal.

Service of process is governed by rules of civil procedure and in Pennsylvania, those rules provide that service is accomplished by personal service upon the defendant or by handing a copy of the document to an adult member/clerk/or authorized agent. Pa. R.Civ.Pro. 402. Pennsylvania also allows for service by ordinary or registered mail. Pa.R.Civ. Pro. 403.

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[18] *Albright v. R.J. Reynolds Tobacco Co.*, 531 F.2d 132 (3d Cir.), *cert. denied*, 426 U.S. 907 (1976); *Davis v. Travelers Insurance Co.*, 574 F. Supp. 188 (W.D.Pa. 1983).
[19] *Sikirica v. Nationwide Ins. Co.*, C/A No. 04-2035, 2005 U.S. App. LEXIS 16077, at *10 (C.A. 3. Pa. August 4, 2005).
[20] Id. at *11.
[21] *Smith v. Twin Express, Inc.*, C/A No. 07-1400, 2007 U.S. Dist. LEXIS 91652 at *3 (D.C. Pa. December 13, 2007) (*citing Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 347-348 (1999)).

Interestingly, there is no definitive opinion on what constitutes "other paper" under section 1446(b) in Pennsylvania. Some court's decisions have concluded that "other paper" as those which are actually filed with the court, but most have given the term an "embracive construction" including a wide array of documents.[22] One Pennsylvania court recently held that plaintiff's response to the defendant's first request for admission constituted "other paper" which triggered removal.[23]

II. FRAUDULENT JOINDER

A. Test for Fraudulent Joinder

Joinder is fraudulent "where there is no reasonable basis in fact or colorable ground supporting the claim against the joined defendant, or no real intention in good faith to prosecute the action against the defendant or seek a joint judgment."[24] The presence of a party fraudulently joined cannot defeat removal.[25] Whether the claims against joined defendants are viable is a matter of state substantive law.[26] If there is even a *possibility* that a state court finds that the complaint states a cause of action against the joined defendant, the district court must find that joinder was proper and remand the case to the state court.[27] The party asserting fraudulent joiner bears a heavy burden.[28]

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[22] *McGhee v. Allstate Ins. Co.*, 2005 U.S. Dist. LEXIS 17995 at *2 (D.C. Pa. August 22, 2005); *Efford v. Milam*, 368 F. Supp. 2d 380, 384 (E.D. Pa. 2005).
[23] *Marchiori v. Vanguard Car Rental USA Inc., Alamo Rent-A-Car, LLC and Budget Rent A Car System, Inc.*, C/A 05-5685, 2006 U.S. Dist. LEXIS 11385 at *3 (D.C. Pa. March 17, 2006).
[24] *Boyer v. Snap-On Tools Corporation*, 913 F.2d 108 (1999) (*citing Abels v. State Farm Fire & Casualty Co.*, 770 F.2d 26 (3rd Cir. 1985)).
[25] *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 97 (1921).
[26] *In Re Diet Drugs.*, 294 F. Supp 2d 667 (2003) D.C. No. 03-20173, 2003, U.S. Dist. LEXIS 15479, at *4, (D.Pa. July 30, 2003).
[27] *Boyer*, 913 F.2d at 111. *(emphasis supplied)*
[28] *In Re Diet Drugs* at *9.

B. Evidence of Fraudulent Joinder

In evaluating the alleged fraud, the district court must focus on the plaintiff's complaint at the time the petition for removal was filed. In so doing, the court must assume as true all of the factual allegations of the complaint.[29] The relevant inquiry is whether the claims are "wholly insubstantial and frivolous" according to state substantive law.

III. VOLUNTARY/INVOLUNTARY RULE

A. "Voluntary" Dismissal

In Pennsylvania district court, a "voluntary dismissal" means the discontinuance of the action against the resident defendant. The test is whether the resident defendant's dismissal was as a result of a voluntary action by the plaintiff. For example, in an insurance coverage case, certain defendants were dismissed because they had not been served within the time limitation period proscribed by state law. The court held that the dismissal of those defendants was "unquestionably voluntary."[30]

B. Exceptions

Pennsylvania recognizes an exception to the voluntary/involuntary distinction where the dismissed nondiverse party was fraudulently joined at the inception of the case. Important to the exception is a demonstration of a 'subjective' intent to actually proceed with the matter and an established 'objective' basis for the claim against the alleged fraudulently joined party.[31]

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[29] *Steel Valley Author. v. Union Switch & Signal Div.*, 809 F.2d 1006, 1010 (3rd Cir. 1987).
[30] *Abels v. State Farm Fire and Casualty Co.*, 694 F. Supp. 140 (W.D. Pa. 1984). See also, 1A Moore, B. Ringle & J. Wickler Moore's Federal Practice, para. 168 [3.-5-6] at 597 (2d ed. 1987); *Cook v. Pep Boys*, 641 F. Supp. 43 (E.D. Pa. 1985)(where parties become diverse through dismissal of nonadverse defendant, such dismissal must have occurred pursuant to voluntary action by plaintiff in order for removal to be proper).
[31] *Abels* at p. 5.

IV. WAIVER OF THE RIGHT OF REMOVAL

A. Waiver by Defending

Under Pennsylvania law, while no clear standard has been defined, the right to remove is considered not waived unless the defendant's intent to waive is clear and unequivocal.[32] Generally, in considering the issue of waiver, an examination of the stage of the case or its procedural posture is warranted and crucial when analyzing whether there has been a waiver of the right of removal.[33] Thus, pleadings that are filed early in the proceeding are rarely construed as clear waivers of the right to remove.[34] The right to remove is maintained where there has been no litigation on the merits and no prejudice to any of the parties.[35]

B. Waiver by Consent

Pennsylvania district courts have not addressed whether a defendant's consent to plaintiff's institution of a lawsuit in state court waives the defendant's right to remove.

C. Waiver by Contract

Under Pennsylvania law, a party to a contract may waive the right to remove a case to federal court through an express waiver contained in the contract.[36] To this end, a court may order remand of a case removed in violation of the contract which is construed as a valid waiver of the right to remove.[37]

V. PRACTICE POINTERS

The seven most common acts which constitute defendant's waiver of removal are:

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[32] *Selvaggi v. Prudential Property and Casualty Ins. Co.*, 871 F. Supp. 815 (1995) C/A 94-CV-5709, 1995 U.S. Dist. LEXIS 30 at *2, (D.C. Pa. January 5, 1995) (*citing Bryfogle v. Carvel Corp.*, 666 F. Supp. 730, 733 (E.D. Pa. 1987)).
[33] Id. at *2 (*citing Mancari v. AC & S Co.*, 683 F. Supp. 91, 94 (D.Del. 1988)).
[34] Id. at *2-*3 stating that "actions which are preliminary and nonconclusive in character have been held not to constitute waiver.
[35] *Gore v. Stenson*, 616 F. Supp. 895 (S.D. Tex. 1984).
[36] *Foster v. Chesapeake Ins. Co. Ltd.*, 933 F2d 1207, 1217 (3rd Cir.) cert. denied, 502 U.S. 908, (1991).
[37] Id. at 1214.

- Seeking affirmative relief in state court, if not compelled to do so.

- Making a motion in state court to compel arbitration.

- Proceeding to or continuing with trial of a case that became removable at or shortly before trial, or obtaining a continuance of the trial date.

- Arguing and losing an issue in state court, then trying to remove the action to in effect appeal the adverse decision.
- Defendant actively invoking state court's jurisdiction (seeking injunction, moving for summary judgment, etc.)

- Filing and litigating motion to dismiss state court action on ground of forum non conveniens.

- Filing a motion to dismiss state court complaint.

4TH CIRCUIT

MARYLAND

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I. POWER AND RIGHT TO REMOVE

A. The Parties

1. Defining "Parties in Interest"

The U.S. District Court for the District of Maryland has concluded that the "real party in interest" requirement set forth in Federal Rule of Civil Procedure 17(a) means that "[e]very action shall be prosecuted in the name of the party who, by the substantive law, has the right to be enforced."[1] In other words, the real party in interest is the party that has the right to bring and control the lawsuit, and not necessarily the party that may benefit financially from the suit.[2] In the subrogation context, a subrogee becomes a real party in interest and, if it pays the entire loss, stands in the shoes of the subrogor and thereby becomes the sole real party in interest.[3]

2. Presence of "Doe" Defendants

The District of Maryland has taken the position that a "Doe" defendant will not be permitted to destroy diversity and preclude removal. The court recently commented that, while all defendants must give timely notice of removal, this requirement does not extend to " 'John

[1] Potomac Elec. Power Co. v. The Babcock & Wilcox Co., 54 F.R.D. 486, 489 (D. Md. 1972) (citation omitted).
[2] South Down Liquors, Inc. v. Hayes, 323 Md. 4, 7-8, 590 A.2d 161, 162-63 (1991) (citations omitted) (comparing Maryland Rule 2-201 to its federal counterpart, F.R.C.P. 17(a)).
[3] U.S. v. Sherwood Distilling Co., 235 F. Supp. 776, 781 (D. Md. 1964).

Doe' defendants whose identities are unknown."[4] "Exceptions [to the requirement that each defendant timely file a notice of removal] exist for nominal defendants or defendants over whom the state court has no acquired jurisdiction, who need not consent to the removal."[5]

3. Diversity for Putative Class Actions

Determination of diversity in the class action context may be in a state of flux in the District of Maryland and the Fourth Circuit. The Fourth Circuit has observed that in federal class actions based on diversity jurisdiction, only the named plaintiffs, and not all plaintiffs, must have citizenship that is diverse from that of the defendants.[6] However, recent amendments to 15 U.S.C. § 1332 may have relaxed class action diversity requirements in Maryland federal court cases. According to the Class Action Fairness Act of 2005 ("CAFA"), federal jurisdiction exists over a class action where any named or unnamed class member's citizenship is distinct from that of any defendant.[7] This warrants monitoring, because while the Fourth Circuit and the District of Maryland have not determined the CAFA's affect on diversity, at least one circuit court has held that CAFA supercedes *Snyder v. Harris*,[8] on which the *Central Wesleyan College* decision relies.[9]

[4] Nozick v. Davidson Hotel Co., Civ. No. CCB-03-2988, 2004 U.S. Dist. LEXIS 101, *4-*5 (D. Md. Jan. 6, 2004) (citing Green v. America Online (AOL), 318 F.3d 465, 470 (3d Cir. 2003)).
[5] *Id*. at *5 (citing Egle Nursing Home, Inc. v. Erie Ins. Group, 981 F. Supp. 932, 933 (D. Md. 1997)).
[6] Central Wesleyan College v. W.R. Grace & Co., 6 F.3d 177, 186 n.3 (4th Cir. 1993) (citations omitted).
[7] 15 U.S.C. § 1332(d) (2005) (cited in Chavis v. Fidelity Warranty Servs., Inc., 415 F. Supp. 2d 620, 625 (D.S.C. 2006)).
[8] 394 U.S. 332, 89 S. Ct. 1053, 22 L. Ed. 2d 319 (1969).
[9] *See* Lowery v. Alabama Power Co., 483 F.3d 1184, 1194 n.24 (11th Cir. 2007).

B. The Amount in Controversy

1. Establishing the Amount in Controversy

To satisfy the requirements of diversity jurisdiction, a defendant must also show that the amount in controversy *exceeds* $75,000.[10][11] In a class action suit, absent a "common and undivided interest" uniting the class members, the defendant has the burden of showing that each class member's claim exceeds the amount in controversy.[12] A court may not include in the jurisdictional amount a plaintiff's potential recovery of punitive damages and legal fees or available equitable relief, but these awards cannot be aggregated for each claimant.[13]

2. Application When a Specific Dollar Amount is Not Pled

Where a plaintiff does not claim a specific dollar amount, the defendant carries the burden of showing that the claim exceeds the jurisdictional amount. "When . . . the plaintiff's complaint does not specify a particular amount of damages, the removing defendant must prove by a preponderance of the evidence that plaintiff's claims meet the amount in controversy requirement."[14]

3. Amount in Controversy Where Equitable Relief is Sought

There appears to be some ambiguity in cases decided by the District of Maryland regarding satisfaction of the amount in controversy in cases where equitable relief is sought. The amount in controversy for federal jurisdiction is measured by the claim's value to either the

[10] The CAFA has amended the amount in controversy requirement so that "district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000[.]" 28 U.S.C. § 1332(d)(2) (2005).
[11] McKenzie v. Ocwen Fed. Bank FSB, 306 F. Supp. 2d 543, 547 (D. Md. 2004) (citing 28 U.S.C. § 1332(a) (2005)) (emphasis added).
[12] Mattingly v. Hughes Elec. Corp., 107 F. Supp. 2d 694, 696 (D. Md. 2000) (citation omitted); *see also* Rosmer v. Pfizer Inc., 263 F.3d 110, 124 (4th Cir. 2001) (Motz, J., dissenting) (citation omitted).
[13] *Mattingly*, 107 F. Supp. 2d at 697-98.
[14] *Id.* at 696 (citations omitted).

plaintiff or defendant. *In re Microsoft Corp. Antitrust Litig.*,[15] Therefore, the amount in controversy threshold can be met by the aggregate cost of compliance to the defendant where multiple plaintiffs have requested injunctive relief.[16] However, the District of Maryland has also held that the amount in controversy requirement was not met by equitable claims because the claims could not be aggregated.[17] The District of Maryland has recently clarified that to measure the amount in controversy from the defendant's cost of compliance perspective, the plaintiffs must "unite to enforce a single title or right in which they have a common and undivided interest."[18]

4. Defeating Removal by Amending Relief Sought

The District of Maryland and the Fourth Circuit have differed over whether diversity can be defeated after removal by a reduction in the jurisdictional amount. According to the district court, the diversity determination occurs at the time of filing.[19] Therefore, "even if 'the plaintiff after removal, by stipulation, by affidavit, or by amendment of his pleadings, reduces the claim below the requisite amount, this does not deprive the district court of jurisdiction.'"[20] But the Fourth Circuit has stated that a court has discretion to remand if the amount is reduced below the threshold and the amount claimed in the complaint was pled in good faith.[21]

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[15] 127 F. Supp. 2d 702, 718 (D. Md. 2001) (superceded on other grounds) (citing Government Employees Ins. Co. v. Lally, 327 F.2d 568, 569 (4th Cir. 1964)).
[16] *Id*. (citation omitted).
[17] *See Mattingly*, 107 F. Supp. 2d at 698 (citation omitted); Gilman v. Wheat, First Secs., Inc., 896 F. Supp. 507, 511 (D. Md. 1995).
[18] Peek v. Microsoft Corp., Civ. No. JFM-05-474, 2005 U.S. Dist. LEXIS 10935, *2-3 (D. Md. Jun. 3, 2005) (citation omitted).
[19] Gardner v. AMF Bowling Ctrs., Inc., 271 F. Supp. 2d 732, 733 (D. Md. 2003) (citation omitted).
[20] *Id*. (quoting St. Paul Mercury Indem. Co v. Red Cab Co., 303 U.S. 283, 292, 58 S. Ct. 586, 82 L. Ed. 845 (1938)) (other citation omitted).
[21] Shanaghan v. Cahill, 58 F.3d 106, 112 (4th Cir. 1995) (citations omitted).

C. Time of Existence of Grounds for Removal

1. Event Triggering Thirty-Day Period for Actions Initially Removable

The thirty-day removal period is triggered by an initial pleading that shows the grounds for removal on its face.[22] When the grounds for removal are obscured, omitted, or misstated, the period starts when the grounds are revealed in subsequent documents exchanged in the case by the parties.[23] Because receipt of a complaint notifies a defendant of the grounds for removal, proper service is not necessary to meet the "service or otherwise" requirement of 28 U.S.C. § 1446(b).[24] Section 1446(b)'s "other paper" requirement refers to "documents generated within the state court litigation."[25]

II. FRAUDULENT JOINDER

A. Test for Fraudulent Joinder

The Fourth Circuit has adopted a two-part test to determine whether joinder of a defendant was fraudulent: the party seeking removal must show "that either (1) there is no possibility that the plaintiff would be able to establish a cause of action against the in-state defendant in state court; or (2) there has been outright fraud in the plaintiff's pleading of jurisdictional facts."[26]

B. Evidence of Fraudulent Joinder

A court may look beyond the pleadings and may "'consider the entire record[] and determine the basis of joinder by any means available.'"[27] In a recent opinion, the Fourth Circuit asserted that affidavits and deposition testimony could be relied upon to demonstrate the

[22] Lovern v. General Motors Corp., 121 F.3d 160, 162 (4th Cir. 1997).
[23] *Id*.
[24] Schwartz Bros., Inc. v. Striped Horse Records, 745 F. Supp. 338, 340 (D. Md. 1990).
[25] Pack v. AC and S, Inc., 838 F. Supp. 1099, 1101 (D. Md. 1993) (citations omitted).
[26] Riverdale Baptist Church v. Certainteed Corp., 349 F. Supp. 2d 943, 947 (D. Md. 2004) (citing Mays v. Rapoport, 198 F.3d 457, 464 (4th Cir. 1999)) (internal citation omitted).
[27] *Riverdale Baptist Church*, 349 F. Supp. 2d at 947 (quoting *Mays*, 198 F.3d at 464) (internal citation omitted).

fraudulent joinder of a defendant.[28] However, in the context of state law-based statutes of limitation, federal courts "should make 'only a limited piercing of the pleadings' for fraudulent joinder . . ."[29]

III. VOLUNTARY/INVOLUNTARY RULE

A. "Voluntary" Dismissal

A plaintiff has three opportunities to voluntarily dismiss a claim. First, a plaintiff may seek voluntary dismissal by filing "a notice of dismissal at any time before the adverse party files an answer."[30] Second, a plaintiff may enter into a stipulation with all other parties to execute a voluntary dismissal after an answer is filed.[31] Third, a plaintiff may move the court to enter a voluntary dismissal.[32]

B. Exceptions

Logically, fraudulent joinder is an exception to the voluntary/involuntary rule in Maryland.[33] While Maryland has extended a "sealed container" defense to retailers under limited circumstances, the statute affording the defense contains a provision that prevents the creation of diversity through both a reinstatement clause and a requirement that the retailer remain a party to the suit throughout the litigation.[34]

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[28] Boss v. Nissan N. Am., Inc., 228 Fed. Appx. 331, 336 (4th Cir. 2007) (citations omitted).
[29] McGinty v. Player, 396 F. Supp. 2d 593, 598 (D. Md. 2005) (quoting *Riverdale Baptist Church*, 349 F. Supp. 2d at 950).
[30] MD. RULE 2-506(a).
[31] *Id*.
[32] MD. RULE 2-506(b).
[33] *See Riverdale Baptist Church*, 349 F. Supp. 2d at 946; *see also Mays*, 198 F.3d at 461.
[34] MD. CODE ANN., CTS. & JUD. PROC. § 5-405(c) (2002).

IV. WAIVER OF THE RIGHT OF REMOVAL

A. Waiver by Defending

A defendant can waive its right to removal by undertaking to defend itself in state court. "[A] defendant's absolute right to removal can be waived by a defendant provided that the defendant's intent to waive is 'clear and unequivocable [sic].'"[35] Such a waiver should only be found in "extreme situations."[36] Waiver does not necessarily result from filing an answer to a complaint in state court before the claim is removed, but will arise from the filing of motions seeking dispositive relief.[37]

B. Waiver by Contract

In most instances, a contractual waiver of removal will bind a defendant. A defendant may waive its right to removal by giving contractual consent to the plaintiff's forum selection.[38] However, waiver through such a clause must be "clear and unequivocal."[39]

[35] Johnson v. The Celotex Corp., 701 F. Supp. 553, 554 (D. Md. 1988) (quoting Mancari v. AC & S Co., Inc., 683 F. Supp. 91, 94 (D. Del. 1988)) (other citation omitted).
[36] Grubb v. Donegal Mut. Ins. Co., 935 F.2d 57, 59 (4th Cir. 1991) (citation omitted); *see also* Gist v. Eagle-Picher Indus., Inc., Civ. No. JFM 88-604, 1988 U.S. Dist. LEXIS 18296, *5-*7 (D. Md. Mar. 4, 1988).
[37] *See Gist*, 1988 U.S. Dist. LEXIS 18296 at *5.
[38] Black & Decker (U.S.) Inc. v. Twin City Fire Ins. Co., Civ. No. HAR 92-3352, 1993 U.S. Dist. LEXIS 2838, *9-*10 (D. Md. Feb. 9, 1993) (citations omitted).
[39] *Id*. at *9 (citations omitted).

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I. POWER AND RIGHT TO REMOVE

A. The Parties

1. Defining "Parties in Interest"

Under 28 U.S.C. § 1441(b), an action may be removed 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." Federal district courts in North Carolina have interpreted the "parties in interest" requirement to preclude removal whenever any defendant is a resident of North Carolina, unless that defendant is merely a "nominal" or "formal" party.[1] A "nominal" party is in turn defined as one who "has no personal stake in the outcome of the litigation and is not necessary to an ultimate resolution."[2] Such parties, even though citizens of the state in which the action is brought, cannot prevent removal under § 1441(b).

2. Presence of "Doe" Defendants

The inclusion of fictitiously-named "Doe" defendants destroy diversity or preclude removal under § 1441(b). Though there are no reported North Carolina decisions that consider the issue directly, courts having occasion to do so would be bound by § 1441(a)'s command that

[1] *See* Sutton Woodworking Machine Co. v. Mereen-Johnson Machine Co., 328 F. Supp. 2d 601, 604 (M.D.N.C. 2004); BJT, Inc. v. Molson Breweries USA, Inc., 848 F. Supp. 54, 57 (E.D.N.C. 1994).
[2] Dempsey v. Transouth Mort. Corp., 88 F.Supp.2d 482, 484 (W.D.N.C. 1999).

"[f]or purposes of removal . . . the citizenship of defendants sued under fictitious names shall be disregarded."

3. Diversity for Putative Class Actions

Where the action sought to be removed is a class action, it is well-accepted that diversity is determined by reference to the citizenship of named class representatives, rather than that of individual class members.[3] Moreover, following the enactment of the Class Action Fairness Act of 2005,[4] class actions that are otherwise removable under the Act need only meet the requirement of "minimal diversity," which is satisfied if "any member of a class of plaintiffs is a citizen of a State different from any defendant . . . ."[5]

Though there are no reported North Carolina decisions on point, the Act also makes § 1441(b)'s requirement that no defendant be a citizen of the state in which the action is brought inapplicable to class actions.[6]

A. The Amount in Controversy

1. Establishing the Amount in Controversy

In North Carolina, the amount in controversy in an action removed on the basis of diversity of citizenship may include all recoverable compensatory and punitive damages sought in the plaintiff's complaint.[7] Attorneys' fees may also be included if the right to such fees is provided by statute.[8]

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[3] *See* Central Wesleyan College v. W.R. Grace & Co., 6 F.3d 177, 186 (4th Cir. 1993).
[4] Pub. L. No. 109-2, 119 Stat. 4 (the "Act," codified in scattered sections of 28 U.S.C).
[5] 28 U.S.C. § 1332(d)(2)(A).
[6] *See* 28 U.S.C. § 1453 ("A class action may be removed to a district court of the United States in accordance with section 1446 . . . without regard to whether any defendant is a citizen of the State in which the action is brought …").
[7] Griffin v. Holmes, 843 F. Supp. 81, 84- 85 (E.D.N.C. 1993).
[8] Talantis v. Paugh Surgical, Inc., 273 F. Supp. 2d 710, 713 n. 3 (M.D.N.C. 2003).

Though there is older authority to the contrary, it is reasonably clear in North Carolina that counterclaims may not be considered in determining the amount in controversy for purposes of removal.[9]

2. Application When a Specific Dollar Amount is Not Pled

Where a complaint does not seek a specific dollar amount, the defendant must show by a preponderance of the evidence that the amount-in-controversy requirement is satisfied.[10] In determining whether the amount has been met, the court may consider "all evidence bearing on the issue,"[11] including, for example, the removal petition and a party's affidavit.[12]

3. Amount in Controversy Where Equitable Relief is Sought

Where a complaint seeks equitable relief, federal district courts sitting in North Carolina apply the "either viewpoint rule" to determine the amount in controversy.[13] Under that rule, the amount-in-controversy requirement is satisfied "if either the gain to the plaintiff or the cost to the defendant" of complying with an equitable decree exceeds the requisite amount-in-controversy.[14]

4. Defeating Removal by Amending Relief Sought

Once a defendant establishes that the amount in controversy is satisfied for purposes of removal, the plaintiff cannot, by amending the complaint to allege a lower amount, deprive the federal court of jurisdiction and thereby cause a remand.[15]

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[9] *See* Cabe v. Pennwalt Corp., 372 F. Supp. 780, 782 (W.D.N.C. 1974) (holding that counterclaims, whether permissive or compulsory, should not be considered in determining the jurisdictional amount for removal of diversity actions to federal court); Grecon Dimter, Inc. v. Horner Flooring Co., Inc., No. 3:02-CV-101-W, 2007 WL 121732, at *1-2 (W.D.N.C. Jan. 11, 2007) (same); *but see* National Upholstery Co. v. Corley, 144 F. Supp. 658, 662 (M.D.N.C. 1956) (holding that a counterclaim may be considered for purposes of computing jurisdictional amount).
[10] Lawson v. Tyco Elecs. Corp., 286 F. Supp. 2d 639, 641 (M.D.N.C. 2003).
[11] *Id.*
[12] *See* Dash v. FirstPlus Home Loan Owner Trust 1996-2, 248 F.Supp.2d 489, 499 (M.D.N.C. 2003).
[13] *See* Chandler v. Cheesecake Factory Restaurants, 239 F.R.D. 432, 439 (M.D.N.C. 2006) (citing Gov't Employees Ins. Co. v. Lally, 327 F.2d 568, 569 (4th Cir. 1964)).
[14] *Id.*
[15] *See Griffin*, 843 F. Supp. at 87.

B. Time of Existence of Grounds for Removal

1. Event Triggering Thirty-Day Period for Actions Initially Removable

Section 1446(b) requires a defendant's notice of removal to be filed within thirty days after the receipt "through service or otherwise," of the initial pleading showing grounds for removal. Where the basis for removal is diversity of citizenship and the amount in controversy is not clear on the face of the complaint, the burden is on the defendant "to assess and ascertain the amount in controversy within the 30-day time limit …."[16]

Where, as is required under North Carolina Rule of Civil Procedure 4(j), the summons and complaint are served simultaneously, the 30-day period begins to run upon service.[17] Where, however, service is attempted but not properly achieved, the period does not begin to run until the defendant actually receives the complaint.[18]

2. Event Triggering Thirty-Day Period for Actions Not Initially Removable

Section 1446(b) also provides that where the initial pleading does not disclose a basis for removal, the defendant must file the notice of removal within 30 days of receiving "through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable . . . ." In North Carolina, party and witness affidavits, depositions, and deposition exhibits constitute "other paper" for purposes of § 1446(b), and thus can trigger the 30-day period.[19]

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[16] Marler v. Amoco Oil Co., Inc., 793 F.Supp. 656, 659 (E.D.N.C. 1992).
[17] Parker v. Johnny Tart Enters., Inc., 104 F. Supp. 2d 581, 584 (M.D.N.C. 1999).
[18] *See* Triad Motorsports, LLC v. Pharbco Mktg. Group, Inc., 104 F. Supp. 2d 590, 595-96 (M.D.N.C. 2000) (30-day period for filing notice of removal was triggered on date that corporate defendant's principal actually received copy of summons and complaint sent by certified mail, rather than earlier date when person in same building, who was neither employee or agent of defendant, signed receipt).
[19] *See* McPhatter v. Sweitzer, 401 F. Supp. 2d 468, 474-76 (M.D.N.C. 2005).

II. FRAUDULENT JOINDER

A. Test for Fraudulent Joinder

The doctrine of fraudulent joinder "permits a district court to assume jurisdiction of a case, even if there is a lack of complete diversity between the parties, in order to dismiss nondiverse defendants and thereby retain diversity jurisdiction . . . ."[20] To establish fraudulent joinder in North Carolina, "'the removing party must demonstrate either outright fraud in the plaintiff's pleading of jurisdictional facts' or that 'there is no possibility that the plaintiff can establish a cause of action against the in-state defendant in state court.'"[21]

B. Evidence of Fraudulent Joinder

To determine whether a defendant's presence in an action is the result of fraudulent joinder, the court "is not bound by the allegations of the pleadings, but may instead consider the entire record, and determine the basis of joinder by any means available."[22] To that end, the "key factor" is "whether the plaintiff intended to obtain a judgment against the defendant alleged to be fraudulently joined."[23] Mere evidence of the plaintiff's subjective intent, however, unaccompanied by an objective showing regarding the plaintiff's inability to recover against the defendant, is unlikely to lead to a finding of fraudulent joinder.[24]

Objective evidence regarding the plaintiff's intent can often be found in the complaint itself. If, for example, a defendant is the sole defendant named in a particular claim or count, courts are less likely to view that defendant has having been joined solely for the purpose of defeating removal.[25]

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[20] Clark v. Travelers Indem. Co., 359 F. Supp. 2d 429, 435 (M.D.N.C. 2004).
[21] *Id.* at 435-36 (quoting Hartley v. CSX Transp., Inc., 187 F.3d 422, 424 (4th Cir. 1999)).
[22] *Clark*, 359 F. Supp. at 436 (quoting AIDS Counseling and Testing Ctrs. V. Group W Television, Inc., 903 F.2d 1000, 1004 (4th Cir. 1990)).
[23] Storr Office Supply Div. v. Radar Business Systems-Raleigh, Inc. 832 F.Supp. 154, 156 (E.D.N.C.,1993).
[24] *See* Willard v. United Parcel Service, 413 F. Supp. 2d 593, 599 (M.D.N.C. 2006).
[25] *See Storr Office Supply*, 832 F. Supp. at 157.

III. VOLUNTARY/INVOLUNTARY RULE

A. "Voluntary" Dismissal

Under the so-called "Voluntary/Involuntary Rule," an action that is initially not removable because of the presence of a nondiverse defendant may become removable upon dismissal of that defendant, but only where the dismissal is voluntary.[26] Though there are no reported North Carolina decisions on point, courts will likely apply the rule as adopted by the Fourth Circuit in Higgins.

B. Exceptions

Certain exceptions may also apply to the rule. For example, the rule will not likely be applied to bar removal if an involuntarily-dismissed defendant was fraudulently joined to begin with.[27]

IV. WAIVER OF RIGHT TO REMOVE

A. Waiver by Defending

Defendants may waive their right to remove an action by demonstrating a "clear and unequivocal" intent to remain in state court.[28] Such intent will be presumed whenever a defendant takes "substantial defensive action in the state court before petitioning for removal," such as filing counterclaims or cross claims.[29] Merely seeking an extension of time within which to respond to a complaint, however, will not waive the right of removal.[30]

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[26] *See* Higgins v. E.I. DuPont de Nemours & Co., 863 F.2d 1162, 1166 (4th Cir. 1988) ("The voluntary act has demonstrated the plaintiff's desire not to pursue the case against the non-diverse party.").
[27] *See* Mayes v. Rapoport, 198 F.3d 457, 461 n. 9 (4th Cir. 1999) ("The 'fraudulent joinder' doctrine has also been applied in other circumstances, including as an exception to the 'voluntary-involuntary' rule.").
[28] Grubb v. Donegal Mut. Ins. Co., 935 F.2d 57, 59 (4th Cir. 1991).
[29] Aqualon Co. v. MAC Equip., Inc., 149 F.3d 262, 264 (4th Cir. 1998).
[30] *See* Pigg v. Progressive Cas. Ins. Co., No. 3:06 CV 125-H, 2006 WL 1789145, at *5 (W.D.N.C. Jun. 27, 2006).

B. Waiver by Contract

A defendant may also waive the right to remove by contract, through, for example, a forum selection clause.[31] Such waivers are enforceable, and are judged by the "clear and convincing" standard.[32]

V. PRACTICE POINTERS

A recurring issue that North Carolina practitioners are likely to encounter is the problem of establishing federal diversity jurisdiction where North Carolina Rule of Civil Procedure 8(a)(2) applies to limit the specificity with which a plaintiff may state its claimed damages. That rule provides that:

> In all negligence actions, and in all claims for punitive damages in any civil action, wherein the matter in controversy exceeds the sum or value of ten thousand dollars ($10,000), the pleading shall not state the demand for monetary relief, but shall state that the relief demanded is for damages incurred or to be incurred in excess of ten thousand dollars ($10,000).[33]

Thus in North Carolina, a plaintiff is forbidden in some cases from claiming a specific amount greater than $10,000, so that such cases may not be removable on the face of the complaint due to failure to meet requisite the amount in controversy.

As explained above, the defendant bears the burden of establishing, by a preponderance of the evidence, that the amount in controversy actually exceeds the jurisdictional minimum of $75,000. Defendants might make that showing in various ways.

First, Rule 8(a)(2) permits a defendant to "request of the claimant a written statement of the monetary relief sought . . . ."[34] The claimant, however, has 30 days to respond, id., so that

[31] *See* Basu v. Robson Woese, Inc., No. Civ. 1:03-CV-00098, 2003 WL 1937119, at *3 (M.D.N.C. Apr. 22, 2003).
[32] Welborn v. Classic Syndicate, Inc., 807 F. Supp. 388, 390 (W.D.N.C. 1992).
[33] N.C. R. Civ. P. 8(a)(2).
[34] N.C. R. Civ. P. 8(a)(2).

the defendant should not rely on Rule 8(a)(2) as the exclusive means to determine the amount in controversy, lest the time for filing the notice of removal runs out.

Second, the defendant may show that North Carolina law permits the plaintiff to recover in excess $75,000. Third, the defendant can produce actual evidence to show that the recoverable damages exceed that amount. Finally, the defendant can appeal to the court's "common sense" regarding the value of the plaintiff's claim.[35]

In sum, defendants seeking to remove actions involving negligence claims or claims for punitive damages in North Carolina should be prepared to move quickly to determine whether the claimed damages may exceed $75,000, and to make a showing to that effect if and when the case is removed to federal court.

[35] *Dash*, 248 F. Supp. at 498.

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I. POWER AND RIGHT TO REMOVE

A. The Parties

1. Defining "Parties in Interest"

Whether a real party in interest *should* be joined in an action is a procedural matter controlled by the Federal Rules of Civil Procedure in district court.[1] However, the question of "whether or not a party *is* a real party in interest and has the right to enforce the claim in question" must be determined under the applicable substantive state law.[2] In a diversity action in South Carolina district court where no federal right is claimed, the applicable substantive law would be South Carolina state law (e.g., in a case in which the propriety of joining insurance carriers as real parties in interest is an issue, the appropriate inquiry would be whether the substantive law of South Carolina vests an insurance company with a legal right to enforce the claims in the case).[3] According to South Carolina state law, generally a "real party in interest is one who has a real, material, or substantial interest in the subject matter of the action, as opposed to one who has only a nominal or technical interest in the action."[4]

[1] *See* Ralph E. Briggs Textile Co. v. Allied Prods. Corp., 32 F. Supp. 2d 361, 362 (D.S.C. 1982).
[2] *Id.* (emphasis added).
[3] *See id.* at 362-63.
[4] Mulherin-Howell v. Cobb, 608 S.E.2d 587, 592-93, 362 S.C. 588, 597-98 (Ct. App. 2005) (citations omitted).

2. Presence of "Doe" Defendants

South Carolina district courts follow 28 U.S.C. § 1441(a), which states, "For purposes of removal . . ., the citizenship of defendants sued under fictitious names shall be disregarded." However, it is unclear whether the presence of Doe defendants affects diversity in cases in which a *plaintiff* files suit in federal court based on diversity jurisdiction because the plaintiff may not be able to carry its burden of proving complete diversity.[5]

3. Diversity for Putative Class Actions

Determining diversity in class actions is addressed in 28 U.S.C. § 1332 and United States Supreme Court cases such as *Exxon Mobil Corp. v. Allapattah Services*.[6] In class actions brought in federal court based on diversity, only the citizenship of the named representative of the class is taken into account to establish diversity.[7] In cases that qualify as class actions under the Class Action Fairness Act of 2005 ("CAFA") (at least 100 members and an aggregate amount in controversy exceeding $5 million), diversity subject matter jurisdiction is established if *any* class member (a named or absent class member) is of diverse citizenship from *any* defendant; in other words, only minimal diversity is required.[8]

B. The Amount in Controversy

1. Establishing the Amount in Controversy

Generally, the sum of damages claimed by a plaintiff in his complaint determines the amount in controversy,[9] and a plaintiff may avoid removal and federal jurisdiction by pleading a

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[5] *See* David M. Epstein, Annotation, *Propriety of Use of Fictitious Name of Defendant in Federal District Court*, 139 A.L.R. FED. 553 (1997) ("Suits against Doe defendants are usually permissible only against real but unidentified defendants and the court may dismiss an action against a Doe defendant if it does not appear that the true identity of the Doe defendant can be determined.").
[6] 545 U.S. 546 (2005).
[7] *See id.* at 583 (citing Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356, 366 (1921)).
[8] *See* 28 U.S.C. § 1332(d).
[9] *See* Crosby v. CVS Pharmacy, 409 F. Supp. 2d 665, 667 (D.S.C. 2005)).

sum less than the jurisdictional amount in her complaint.[10] The South Carolina district court "has noted that it will not adopt any approach under which the court will be required to undertake its own independent review of the amount in controversy despite a specific limitation on damages in the plaintiff's complaint."[11] In determining the amount in controversy, South Carolina district courts may examine claims for damages, restitution, and injunctive relief.[12] Both actual and punitive damages are included in any calculation of damages for the amount in controversy.[13] In addition, attorneys' fees may be included in determining the amount in controversy in cases in which statutory provisions authorize the recovery of those fees.[14]

2. Application When a Specific Dollar Amount is Not Pled

There are conflicting cases among South Carolina district courts regarding how the amount in controversy is determined on a motion to remand when a specific dollar amount is not pled. Neither has the Fourth Circuit decided the precise standard on a motion to remand for determining the value of an unspecified damage claim.[15] Judges in recent cases have applied differing standards when requiring a removing defendant to show that the amount in controversy has been satisfied. One judge has applied a "preponderance of the evidence" standard requiring the defendant to produce evidence that establishes by a preponderance of the evidence that the actual amount in controversy exceeds $75,000.[16] Another judge has stated that the district court "leans towards requiring defendants . . . to show either to a 'legal certainty' or at least within 'reasonable probability' that the amount in controversy has been satisfied."[17] However, at least

[10] *See* Phillips v. Whirlpool Corp., 351 F. Supp. 2d 458, 461 (D.S.C. 2005).
[11] *Id.*
[12] *See* Jones v. Allstate Ins. Co., 258 F. Supp. 2d 424, 427 (D.S.C. 2003).
[13] *See* Hagood v. Electrolux Home Prods., Inc., C/A No. 8:06-1799-HFF, 2006 WL 1663804, at *2 (D.S.C. June 15, 2006).
[14] *See Phillips*, 351 F. Supp. 2d at 461 (citing Saval v. BL Ltd, 710 F.2d 1027, 1033 (4th Cir. 1983)).
[15] *See Crosby*, 409 F. Supp. 2d at 667.
[16] *See id.* at 667-68 (Judge Duffy).
[17] *Phillips*, 351 F. Supp. 2d at 461 (Judge Norton).

one district judge had held that a defendant need only show that "it does not appear to a legal certainty that the removed claim is for less than the jurisdictional amount."[18]

In breach of contract cases in which the plaintiff sues for an amount less than the jurisdictional amount but the defendant removes the case to federal court and counterclaims, arguing the entire contract is at issue, if the value of the entire contract meets the jurisdictional amount requirement, the case will not be remanded.[19] In *Congaree Broadcasters*, the plaintiff sued for breach of contract in state court to recover a deposit of $1,800 paid to the defendant. The defendant removed the case to federal court and counterclaimed for breach of contract, arguing that the entire contract was at issue, making the amount in controversy $21,800 (well over the jurisdictional amount at the time of $10,000).[20] The court agreed with the defendant's argument, holding that the defendant's counterclaim placed the entire contract worth $21,800 in dispute, and therefore the jurisdictional requirement was met.[21]

3. Amount in Controversy Where Equitable Relief is Sought

In actions seeking declaratory or injunctive relief, the amount in controversy is measured by the value of the object of the litigation.[22] South Carolina district courts follow the Fourth Circuit, which has held that in cases in which there is only one plaintiff, the amount in controversy may be calculated as the "value to either party."[23] In multiple-party or class action cases, the cost of injunctive relief is viewed from the plaintiffs' perspective, and "the value of each plaintiff's claim for injunctive relief must be evaluated separately."[24] However, if the

[18] Woodward v. Newcourt Commercial Fin. Corp., 60 F. Supp. 2d 530, 531 (D.S.C. 1999) (Judge Shedd).
[19] *See* Congaree Broadcasters, Inc. v. TM Programming, Inc., 436 F. Supp. 258, 259-62 (D.S.C. 1977).
[20] *Id.* at 259.
[21] *See id.* at 262.
[22] *See Jones*, 258 F. Supp. 2d at 428.
[23] *Id.* (quoting Gov't Emp. Ins. Co. v. Lally, 327 F.2d 568, 569 (4th Cir. 1964)).
[24] Spann v. Style Crest Prods., Inc., 171 F. Supp. 2d 605, 610 (D.S.C. 2001).

plaintiffs possess a common or undivided interest in an indivisible, single *res*, the cost of injunctive relief may be looked at from "either viewpoint"—the plaintiffs' or defendant's.[25]

4. Defeating Removal by Amending Relief Sought

When an action is removed by the defendant, a plaintiff may not defeat diversity jurisdiction by filing a post-removal amended complaint reducing the amount of damages sought.[26]

C. Time of Existence of Grounds for Removal

1. Event Triggering Thirty-Day Period for Actions Initially Removable

South Carolina follows the Fourth Circuit rule that "only where an initial pleading reveals a ground for removal will the defendant be bound to file a notice of removal within 30 days."[27] If it is not clear from the complaint that the case is removable, the defendant has thirty days from when grounds for removal are revealed in an amended pleading, motion, order, or other paper to file its notice of removal.[28]

2. Event Triggering Thirty-Day Period for Actions Not Initially Removable

If the case not removable on the initial pleading, § 1446(b) provides that, "a notice of removal may be filed within thirty days of receipt by defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may be first ascertained that case is one which is, or has become removable…"

Since the United States Supreme Court held in *Murphy Bros. Inc. v. Michetti Pipe Stringing, Inc.*,[29] that formal service is required to trigger a named defendant's time to remove a

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[25] *Id.* at 611.
[26] *See Woodward*, 60 F. Supp. 2d at 531.
[27] Hawes v. Cart Prods., Inc., 386 F. Supp. 2d 681, 684 (D.S.C. 2005).
[28] *See id.* (citing 28 U.S.C. § 1446(b)).
[29] 526 U.S. 344 (1999).

case to federal court, South Carolina district courts have provided no other directive regarding what qualifies as "otherwise."[30]

Regarding what constitutes "service," although federal law requires a defendant to file a notice of removal within thirty days of service, state law governs the sufficiency and service of process.[31] Rule 4(d)(1) of the South Carolina Rules of Civil Procedure generally states that an individual may be served by delivering a copy of the summons and complaint to the individual personally or by leaving copies at his dwelling house or place of abode with a person of suitable age and discretion, or by delivering a copy to an agent authorized to receive service. Rule 4(d)(3) permits a corporation, partnership, or other unincorporated association to be served by delivering a copy of the summons and complaint to an officer, managing or general agent, or to any other agent authorized by appointment or law to receive service of process.

Rule 4(d)(8) of the South Carolina Rules of Civil Procedure permits service by registered or certified mail if return receipt is requested and delivery is restricted to the addressee. "[T]he requirement that the person who receives mail on behalf of the named individual be authorized to do so is critical to the effectiveness of Rule 4(d)(8)."[32] However, it is not required that the person who receives the mail be authorized to receive *service*; an individual is authorized for purposes of Rule 4(d)(8) if he is specifically authorized in writing by the addressee to receive his mail.[33]

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[30] *See id*. at 347-48 ("[W]e hold that a named defendant's time to remove is triggered by simultaneous service of the summons and complaint, or receipt of the complaint, 'through service or otherwise,' after and apart from service of the summons, but not after mere receipt of the complaint unattended by any formal service.").

[31] *See* Perry v. Wal-Mart Stores, Inc., C/A No. 5:05-3609-MBS, 2006 U.S. Dist. LEXIS 30246, at *3 (D.S.C. May 10, 2006); *see also* City of Clarksdale v. Bellsouth Telecomm., Inc., 428 F.3d 206, 211 n.6 (5th Cir. 2005) ("For a federal district court to have jurisdiction over a case removed from state court, the state court must first have jurisdiction. For this reason, we look to state law to verify that service of process effectively brought the defendant within the state court's jurisdiction." (citations omitted)).

[32] Hunter v. CSX Transp., Inc., C/A No. 3:06-1454-CMC, 2006 U.S. Dist. LEXIS 48670, at *5 (D.S.C. July 12, 2006).

[33] *See id.* at *6; *see also* Langley v. Graham, 472 S.E.2d 259, 261 n.3, 322 S.C. 428, 431 n.3 (Ct. App. 1996).

There is no clear guidance from South Carolina district courts regarding what constitutes "other paper," but the following have been considered "other paper" by the South Carolina district courts and the Fourth Circuit. A dismissal of an in-state defendant has constituted "other paper" in South Carolina district court.[34] In addition, a state court judgment entered against only the nonresident defendant and dismissing the resident defendant was found to be "other paper."[35] The Fourth Circuit has found that documents produced in discovery were sufficient to trigger the thirty-day removal period.[36] The defendant had thirty days from the day documents were produced revealing grounds for removal to file a notice for removal.[37]

The South Carolina district court also has held that technical flaws in a defendant's removal, such as there being no "other paper" from which it may be ascertained that a case is removable, will not necessarily defeat a defendant's right to remove a case.[38] For example, remarks made by plaintiff's counsel during closing arguments that asked the jury not to return a verdict against the one resident defendant amounted to a de facto dismissal, and although the dismissal was not in writing, the plaintiffs could not defeat the defendant's right of removal because "both the circumstances creating removability and the alleged formal deficiencies were wholly beyond the control of the defendant."[39]

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[34] *See Hawes*, 386 F. Supp. 2d at 686.
[35] *See* Aiken v. Waffle House, Inc., C/A No. 2:07-413-DCN, 2007 WL 1721973, at *2 (D.S.C. June 14, 2007).
[36] *See* Boss v. Nissan North Am., Inc., 228 Fed. Appx. 331, 334 (4th Cir. 2007).
[37] *See id.*
[38] *See* Heniford v. Am. Motors Sales Corp., 471 F. Supp. 328, 335-36 (D.S.C. 1979) ("Where removability does not occur until late in the litigation of a case and the defendant proceeds with removal without delay, . . . deficiencies with respect to incidental provisions of the removal statute are not fatal to the removal, if they are the result of circumstances beyond the defendant's control.").
[39] *Id.* at 336.

II. FRAUDULENT JOINDER

A. Test for Fraudulent Joinder

The South Carolina district courts follow the Fourth Circuit rule that the removing party has a heavy burden to prove fraudulent joinder.[40] "All issues of law and fact must be resolved in the plaintiff's favor and the plaintiff will prevail even where 'only the possibility of a right to relief' is asserted."[41] To prove fraudulent joinder successfully, a defendant "must show 'either that there is *no possibility* that the plaintiff would be able to establish a cause of action against the in-state defendant in state court; or that there has been outright fraud in the plaintiff's pleading of jurisdictional facts.'"[42]

South Carolina districts courts have not addressed what constitutes "outright fraud in the plaintiff's pleading of jurisdictional facts," but another Fourth Circuit district court has described this branch of the fraudulent joinder test as fraudulently identifying the residency of in-state defendants.[43]

B. Evidence of Fraudulent Joinder

If a defendant raises a colorable claim of fraudulent joinder, the court may look beyond the pleadings and consider the entire record to determine whether the nondiverse party has been fraudulently joined.[44]

Besides considering the entire record, the court may also look to previous lawsuits filed by the plaintiff. For example, if a plaintiff filed a previous lawsuit in state court but voluntarily dismissed the case once it was determined that the case was removable only to refile the case in state court after adding a nondiverse defendant, the court may consider that further evidence of

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[40] *See* Bessinger v. Food Lion, Inc., 305 F. Supp. 2d 574, 578 (D.S.C. 2003).
[41] *Id.*
[42] *Id.* (quoting Marshall v. Manville Sales Corp., 6 F.3d 229, 233 (4th Cir. 1993) (emphasis in original)).
[43] *See* Skevofilax v. Aventis Pasteur, Inc., 304 F. Supp. 2d 691, 692 (D. Md. 2003).
[44] *See Bessinger*, 305 F. Supp. 2d at 578; Brantley v. Vaugh, 835 F. Supp. 258, 261 (D.S.C. 1993).

fraudulent joinder.[45] The court may also consider actions *not* taken by the plaintiff. For example, if there are potential defendants residing in other states that could *possibly* be found liable but the plaintiff chose not to join them as defendants, instead joining resident defendants against whom there does not appear to be a possibility of recovery, the court may find that supports a finding of fraudulent joinder.[46]

III. VOLUNTARY/INVOLUNTARY RULE

A. "Voluntary" Dismissal

This rule provides that a defendant may remove a qualified diversity action from state to federal court after dismissal of non-diverse defendant only if the plaintiff voluntarily dismisses non-diverse defendant. In South Carolina district court, voluntarily dismissing a case against a nondiverse defendant includes discontinuing or in any way abandoning the action against the resident defendant.[47] The paramount consideration is whether the resident defendant was dropped from a case as a result of a voluntary act of the plaintiff.[48]

No exceptions to the voluntary/involuntary rule have been explicitly carved out by the South Carolina district courts or the Fourth Circuit. However, if a defendant successfully proves fraudulent joinder and the nondiverse defendant is dismissed by the court, although the plaintiff did not "voluntarily dismiss" the nondiverse defendant, the case should not be remanded.[49]

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[45] *See Bessinger*, 305 F. Supp. 2d at 580.
[46] *See id.*
[47] *See Heniford*, 471 F. Supp. at 334.
[48] *See id.* at 335; *see also* Grubb v. Donegal Mut. Ins. Co., 935 F.2d 57, 60 (4th Cir. 1991) (quoting *Heniford*).
[49] *See Bessinger*, 305 F. Supp. 2d at 580.

IV. WAIVER OF RIGHT TO REMOVE

A. Waiver by Defending

Generally a defendant that wishes to remove a case to federal court should not submit to any proceedings in state court. However, the South Carolina district court has held that a defendant's taking action in state court to set aside a default judgment does not qualify as a waiver of the right to removal.[50] According to the court, waiver requires a clear and unequivocal intent to remain in state court, and a defendant will waive his right to removal only in cases in which "he has taken some substantial affirmative or defensive action."[51] Filing responsive and defensive pleadings and motions in an effort to have a default judgment set aside does not qualify as substantial affirmative or defensive action.[52]

B. Waiver by Consent

South Carolina district courts have not addressed whether a defendant's consent to a plaintiff's filing of a suit in state court waives the defendant's right to remove.

C. Waiver by Contract

The South Carolina district courts have not addressed whether contractual waivers of removal are binding. A possibly analogous situation concerns the validity of forum selection clauses in South Carolina district court. Generally in federal court, forum selection clauses are considered presumptively valid and will be enforced unless the clause is unreasonable and unjust.[53] However, a district court should hold a forum selection clause "unenforceable if enforcement would contravene a strong public policy of the forum" where the suit is brought.[54]

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[50] *See Hawes*, 386 F. Supp. 2d at 687.
[51] *Id.*
[52] *See id.*
[53] *See* Spinks v. Krystal Co., C/A. No.: 6:07-2619-HMH, 2007 U.S. Dist. LEXIS 72244, at *5-6 (D.S.C. Sept. 26, 2007) (citing Bryant Elec. Co. v. City of Fredericksburg, 762 F.2d 1192, 1196 (4th Cir. 1985)).
[54] *Id.* at *7 (quoting The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 15 (1972)).

V. PRACTICE POINTERS

A. Successful strategies for removal and avoiding remand

The South Carolina district court recently held that the one-year statutory limitation of section 1446(b) is not jurisdictional and therefore may be waived in favor of equity when the plaintiff has acted improperly to prevent removal (i.e., by voluntarily dismissing the resident defendant more than one year after the commencement of the action).[55]

[55] *See Rauch*, 446 F. Supp. 2d at 436.

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I. POWER AND RIGHT TO REMOVE

A. The Parties

1. Defining "Parties in Interest"

Diversity jurisdiction is determined by the citizenship of the parties at the time the action commences.[1] The party seeking removal bears the burden of establishing diversity jurisdiction by a preponderance of the evidence.[2] Virginia courts must strictly construe the removal statute and resolve all doubts in favor of remanding the case to state court.[3]

"[A]ll defendants must affirmatively and unambiguously assert their desire to remove the case to federal court."[4] "An answer that is wholly silent on removal . . . falls far short of this standard . . . ."[5] The filing of an answer in federal court without any other indicia of consent is an "ambiguous act" that is not necessarily consistent with consent to removal.[6] The best practice is to have all co-defendants either join in the initial removal petition or file a separate explicit consent to removal with the federal court.

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[1] Athena Auto, Inc. v. Digregorio, 166 F.3d 288, 290 (4th Cir. 1999).
[2] Mulcahey v. Columbia Organic Chems. Co., 29 F.3d 148, 151 (4th Cir. 1994); Linnin v. Michielsens, 372 F. Supp. 2d 811, 816 (E.D. Va. 2005); Schwenk v. Cobra Mfg. Co., 322 F. Supp. 2d 676, 678 (E.D. Va. 2004).
[3] Hartley v. CSX Transp., 187 F.3d 422, 425 (4th Cir. 1999); *Mulcahey*, 29 F.3d at 151. *See also* Guyon v. Basso, 403 F. Supp. 2d 502, 505 (E.D. Va. 2005).
[4] Creekmore v. Food Lion, Inc., 797 F. Supp. 505, 509 (E.D. Va. 1992).
[5] Unicom Systems, Inc. v. National Louis Univ., 262 F. Supp. 2d 638, 642 (E.D. Va. 2003).
[6] *Id.*

2. Presence of "Doe" Defendants

Formal or nominal defendants, however, are disregarded for purposes of removal, and therefore their consent is not needed.[7]

B. The Amount in Controversy

1. Establishing the Amount in Controversy

The jurisdictional minimum amount in controversy specified by 28 U.S.C. § 1332(a) "is determined by the amount of the plaintiff's original claim, provided that the claim is made in good faith."[8] If the claim is not made in good faith, the court is not bound by the plaintiff's pleading, and may instead look at the totality of the circumstances, including the severity of the plaintiff's injuries.[9] "The party seeking removal to federal court must show at law that the amount being sought by the plaintiff could produce a sufficient award to exceed $75,000."[10]

2. Application When a Specific Dollar Amount is Not Pled

Attorney's fees may be included in calculating the jurisdictional amount when either a statute or contractual clause creates a substantive right to the fees.[11] Punitive damages may be considered part of the amount in controversy, but not if the claims stated by the plaintiff could not support such an award.[12]

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[7] Bellone v. Roxbury Homes, Inc., 748 F. Supp. 434, 436-38 (W.D. Va. 1990) (holding corporation that was not operating a business, but was still licensed, had not liquidated, and still maintained a registered agent was not a nominal defendant); Folts v. City of Richmond, 480 F. Supp. 621, 624 (E.D. Va. 1979).

[8] Cradle v. Monumental Life Ins. Co., 354 F. Supp. 2d 632, 633 (E.D. Va. 2005) (quoting Wiggins v. North Am. Equitable Life Assurance Co., 644 F.2d 1014, 1016-17 (4th Cir. 1981)).

[9] Schwenk v. Cobra Mfg. Co., 322 F. Supp. 2d 676, 678 (E.D. Va. 2004) (finding that plaintiff was not acting in good faith in demanding $74,000, and clearly intended to later amend his demand to an amount above the jurisdictional minimum).

[10] *Cradle*, 354 F. Supp. at 634.

[11] CPFilms, Inc. v. Best Window Tinting, 466 F. Supp. 2d 711, 713 (W.D. Va. 2006) (citing Springstead v. Crawfordsville State Bank, 231 U.S. 541, 542, 34 S. Ct. 195, 58 L. Ed. 354 (1913)); *Cradle*, 354 F. Supp. 2d at 635.

[12] *Cradle*, 354 F. Supp. 2d at 634.

3. Amount in Controversy Where Equitable Relief is Sought

If equitable relief is sought, "the amount in controversy is measured by the amount of the object of the obligation."[13] "The amount in controversy in a declaratory judgment action 'is not necessarily the money judgment sought or recovered, but rather the value of the consequences which may result from the litigation.'"[14] The Fourth Circuit has stated that "the amount in controversy is the pecuniary result to *either party* which that judgment would produce . . . ."[15]

4. Defeating Removal by Amending Relief Sought

Once a case has been properly removed, a subsequent reduction of the plaintiff's demand to an amount below the $75,000 jurisdictional threshold will not oust diversity jurisdiction.[16]

C. Timing of Existence of Grounds for Removal

1. Event Triggering Thirty-Day Period for Actions Initially Removable

"A notice of removal must be filed within thirty days of receipt by the defendant through formal service of the state court process."[17]

2. Event Triggering Thirty-Day Period for Actions Not Initially Removable

If the initial pleading is not removable,

> . . . a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.[18]

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[13] Hunt v. Washington State Apple Ad. Comm'n, 432 U.S. 333, 347-48, 53 L. Ed. 2d 383, 97 S. Ct. 2434 (1977). *See also* M.C. Constr. Corp. v. Gray Co., 17 F. Supp. 2d 541, 545 (W.D. Va. 1998).

[14] *M.C. Constr. Corp.*, 17 F. Supp. 2d at 545 (quoting Beacon Constr. Co., v. Matco Elec. Co., 521 F.2d 392 (2d Cir. 1975)).

[15] Government Employees Ins. Co. v. Lally, 327 F.2d 568, 569 (4th Cir. 1964); Dixon v. Edwards, 290 F.3d 699, 670 (4th Cir. 2002).

[16] Centennial Broad., LLC v. Burns, No. 6:06cv6, 2006 U.S. Dist. LEXIS 70974 at *27 (W.D. Va. Sept. 29, 2006) (citing St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 288-89, 58 S. Ct. 586, 82 L. Ed. 845 (1938)).

[17] White v. Lively, 304 F. Supp. 2d 829, 830 (W.D. Va. 2004) (citing Murphy Bros, Inc. v. Michetti Pipe Stringing, Inc., 526 U.S. 344, 347-48, 143 L.Ed. 2d 448, 119 S.Ct. 1322 (1999) (holding that receipt of "courtesy copy" of suit papers does not start thirty-day period)). *See also* Morton v. Meagher, 171 F. Supp. 2d 611, 616-17 (E.D. Va. 2001).

[18] 28 U.S.C. § 1446(b).

Accordingly, "a defendant need not receive notice that the case has become removable by service of a formal court document; rather, notice may occur 'otherwise' by the receipt of '*other paper*' from which the defendant may ascertain that the case has become removable."[19]

The Fourth Circuit broadly defines "other paper," stating that this requirement "is broad enough to include any information received by the defendant, 'whether communicated in a formal or informal manner.'"[20] To constitute "other paper," the document need not be part of the state court record.[21] Using this standard, both the Eastern and Western Districts of Virginia have held that settlement offers above the $75,000 statutory minimum communicated to defense counsel constitute "other paper" sufficient to render a case removable under section 1446(b) if it the case previously did not meet the $75,000 jurisdictional minimum.[22]

Regardless of what form it takes, "an amended pleading, motion, order or other paper must be 'unequivocally clear and certain' to start the 30-day time limit running for a notice of removal under the second paragraph of section 1446(b)."[23] In either case, in the Fourth Circuit the thirty-day period begins to run only if the grounds for removal are "apparent within the four corners of the initial pleading or subsequent paper."[24] Virginia federal courts should not "inquire into the subjective knowledge of the defendant," but may "rely on the face of the initial pleading

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[19] US Airways, Inc. v. PMA Capital Ins. Co., 340 F. Supp. 2d 699, 703 (E.D. Va. 2004).
[20] Yarnevic v. Brink's Inc., 102 F.3d 753, 755 (4th Cir. 1996).
[21] *Id.*
[22] Ford-Fisher v. Stone, Civ. Action No. 2:06cv575, 2007 U.S. Dist. LEXIS 4354 at *16 (E.D. Va. Jan. 22, 2007) (holding that pre-suit $300,000 written settlement demand was sufficient to render case removable once filed); Rodgers v. Northwestern Mut. Life Ins. Co., 952 F. Supp. 325, 328 (W.D. Va. 1997) (same). *See also* Schwenk v. Cobra Mfg. Co., 322 F. Supp. 2d 676, 680 (E.D. Va. 2004) (finding that plaintiff's refusal to admit or stipulate that the amount in controversy did not exceed $75,000 was the "other paper" by which defendant first learned that case was removable). *See also* Lovern v. General Motors Corp., 121 F.3d 160, 161 (4th Cir. 1997) (finding a police report and interrogatory answers demonstrating diversity to be within the definition of "other paper"); Zukor v. Inova Health Care Servs., CA-99-01909-A, 2000 U.S. Dist. LEXIS 21998 at *16 (E.D. Va. Feb. 23, 2000) (finding removal triggered by defendants' receipt of plaintiff's designation of expert witnesses, and stating that although discovery responses may trigger removal, "a discovery request usually will not").
[23] *US Airways*, 340 F. Supp. 2d at 703-04.
[24] *Lovern*, 121 F.3d at 162.

and on the documents exchanged in the case by the parties to determine when the defendant had notice of the grounds for removal . . . ."[25] "In short, the thirty-day clock begins ticking upon an objective indication of removability – whenever that may occur."[26]

If there are multiple defendants, Virginia courts and the Fourth Circuit follow the "intermediate" rule with regard to removal. Specifically, the first-served defendant must file a notice of removal within 30 days of the date it first receives the initial pleading.[27] If the first-served defendant meets this requirement, later-served defendants that are served within 30 days from the date the first-served defendant was served have their own 30-day window in which to join in removal.[28] If they do not join, the removal is invalid.[29]

"[A]llegations of jurisdiction imperfectly stated in the original petition for removal may be amended even after expiration of the 30-day removal period," but "missing allegations may not be supplied nor new allegations furnished."[30] In that regard, the allegation that a party was fraudulently joined must be timely stated in a petition for removal.[31]

II. FRAUDULENT JOINDER

A. Test for Fraudulent Joinder

A party that has been fraudulently joined need not consent to removal, because they are not considered a party in interest for purposes of evaluating diversity. "In order to establish that a non-diverse defendant has been fraudulently joined, the removing party must establish either: That there is *no possibility* that the plaintiff would be able to establish a cause of action against the in-state defendant in state court; or [t]hat there has been outright fraud in the plaintiff's

[25] *Id.*
[26] *Zukor*, 2000 U.S. Dist. LEXIS 21998 at *16.
[27] Guyon v. Basso, 403 F. Supp. 2d 502, 507-10 (E.D. Va. 2005).
[28] *Id.*
[29] *Id.*
[30] Richmond, F. & P. R. Co. v. Intermodal Servs., Inc., 508 F. Supp. 804, 805 (E.D. Va. 1981). *See also* Tincher v. Insurance Co. of Pennsylvania, 268 F. Supp. 2d 666, 667 (E.D. Va. 2003).
[31] *Tincher*, 268 F. Supp. 2d at 667.

pleading of jurisdictional facts."[32] "The burden on the defendant claiming fraudulent joinder is heavy: the defendant must show that the plaintiff cannot establish a claim against the nondiverse defendant even after resolving all issues of fact and law in the plaintiff's favor."[33] Moreover, "[a] claim need not ultimately succeed to defeat removal; only a possibility of a right to relief need be asserted."[34]

Although the "no possibility" test for fraudulent joinder "seems straightforward, it is not, as there is an inherent tension in the standard between whether courts should simply determine whether 'no cause of action is stated' or whether the plaintiff has 'no real intention to get a joint judgment.'"[35] Accordingly, federal courts in Virginia apply the test "not rigidly but reasonably."[36] In effect, the test for fraudulent joinder in Virginia is whether there is a "*reasonable* basis for the district court to predict that the plaintiff might be able to recover against an in-state defendant."[37]

B. Evidence of Fraudulent Joinder

Application of this test is more akin to that of a motion for summary judgment than motion to dismiss.[38] In making a determination of fraudulent joinder on a motion to remand, the court may "look beyond the pleadings and consider summary-judgment type evidence, such as the affidavits and the depositions accompanying either a notice of removal or a motion to remand.[39]

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[32] Marshall v. Manville Sales Corp., 6 F.3d 229, 232 (4th Cir. 1993) (internal quotations omitted) (emphasis added).
[33] *Id.*
[34] *Id.*
[35] Linnin v. Michielsens, 372 F. Supp. 2d 811, 818 (E.D. Va. 2005) (quoting AIDS Counseling & Testing Ctrs. v. Group W Television, Inc., 903 F.2d 1000, 1003 (4th Cir. 1990).
[36] *Id.*
[37] *Id.* (emphasis added). *See also* Cordill v. Purdue Pharma, L.P., 2002 U.S. Dist. LEXIS 21476 (W.D. Va. Nov. 5, 2002) (holding that the test is whether there "is no 'reasonable basis' for predicting liability on the claims alleged").
[38] *Linnin*, 372 F. Supp. 2d at 818.
[39] *Id.* at 819.

III. VOLUNTARY/INVOLUNTARY RULE

A. "Voluntary" Dismissal

It is well-established in Virginia that "a federal court cannot exercise diversity jurisdiction over a case that becomes removable because of the involuntary dismissal of all non-diverse defendants, as opposed to some voluntary action on the part of the plaintiff."[40] "The reason for the 'voluntary-involuntary' rule is that the non-diverse defendants are not truly removed from the case because the order dismissing them could be overturned on appeal, and they could be reinstated, thereby destroying complete diversity."[41] This is true even if a plaintiff amends his complaint following a successful demurrer dismissing the non-diverse defendants.[42]

IV. WAIVER OF RIGHT TO REMOVE

A. Waiver by Defending

Virginia federal courts recognize that defendants may in fact waive their right to removal. The question of whether a party has waived its right to removal is a factual one, reversible only if clearly erroneous.[43] However, a defendant waives its right to removal only by "demonstrating a clear and unequivocal intent to remain in state court," and waiver will only be found in extreme circumstances.[44]

Clear intent to remain in state court is evidenced when a defendant takes "substantial defensive action" in the state court *before* petitioning for removal.[45] Virginia district courts have held that if a party files a notice of removal just prior to filing a third party complaint in the state

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[40] Wingfield v. Franklin Life Ins. Co., 41 F. Supp. 2d 594, 597 (E.D. Va. 1999) (citing American Car & Foundry Co. v. Kettelhake, 236 U.S. 311, 316-17, 59 L. Ed. 594, 35 S. Ct. 355 (1915); Higgins v. E.I. Dupont de Nemours & Co., 863 F.2d 1162, 1166 (4th Cir. 1988)).
[41] *Id.*
[42] *Id.*
[43] Aqualon Co. v. MAC Equip., Inc., 149 F.3d 262, 264 (4th Cir. 1998).
[44] Grubb v. Donegal Mut. Ins. Co., 935 F.2d 57, 59 (4th Cir. 1991). *See also* Krasnow v. Texaco, Inc., 773 F. Supp. 806, 808 (E.D. Va. 1991).
[45] *Aqualon Co.*, 149 F.3d at 264.

forum, there is no waiver.[46] Similarly, merely filing a demurrer in state court will not constitute waiver.[47] However, if the defendant takes some further action leading to a decision on the merits in state court, such as briefing the demurrer or asking the court for a ruling, removal may be waived.[48] Similarly, if a defendant files a cross-claim or counterclaim prior to filing a notice of removal, removal may be waived.[49]

B. Waiver by Contract

There is no reported Fourth Circuit or Virginia federal court decision addressing the issue of contractual waiver. However, the Western District of North Carolina has recognized that removal can be waived by contract, and in evaluating such clauses the "clear and unequivocal" test does not apply.[50]

V. PRACTICE POINTERS

Counsel seeking to remove a case from a Virginia state court should be mindful of the differing time limits for filing an answer in Virginia state courts and for filing for removal under 28 U.S.C. § 1446(b). In Virginia state courts, a defendant has 21 days after service to file a responsive pleading.[51] If a responsive pleading is not filed during this time period and no extension is granted, the defendant is in default.[52] However, 28 U.S.C. § 1446(b) allows for removal within 30 days after receipt of the initial pleading. In *Levine v. Lacy*,[53] the defendant did not file a responsive pleading in state court or file a notice of removal within 21 days, but did

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[46] *Id.*
[47] *Krasnow*, 773 F. Supp. at 808-09; Sayre Enter, Inc. v. Allstate Ins. Co., 448 F. Supp. 2d 733, 736 (W.D. Va. 2006) (finding that filing answer and grounds of defense, demurrer, and objections to plaintiff's discovery did not constitute waiver of removal).
[48] *Id.*; Grover v. Comdial Corp., 3:01cv35, 2001 U.S. Dist. LEXIS 23994 at *17-18 (W.D. Va. July 24, 2001).
[49] *See* Baldwin v. Perdue, Inc., 451 F. Supp. 373 (E.D. Va. 1978) and Sood v. Advanced Computer Techniques Corp., 308 F. Supp. 239 (E.D. Va. 1969).
[50] Welborn v. Classic Syndicate, Inc., 807 F. Supp. 388 (W.D.N.C. 1992).
[51] Sup. Ct. Va. Rule 3:8(a).
[52] Sup. Ct. Va. Rule 3:19(a).
[53] 204 Va. 297, 130 S.E.2d 443 (1963).

file a notice of removal within the statutory 30-day period. The case was subsequently remanded, and because the defendant had not filed a responsive pleading in state court within 21 days and had not requested an extension, the state court held that the defendant was in default.[54] Accordingly, when removing an action from Virginia state court it is always best to file a notice of removal within 21 days of service, or at the very least, to file an answer in state court within 21 days before filing a notice of removal within the 30-day window.

[54] *Id.* at 300-01. *See also* Wynn v. Allstate Life Ins. Co., 69 Va. Cir. 55, 2005 Va. Cir. LEXIS 347 (Va. Cir. Ct. June 16, 2005).

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I. POWER AND RIGHT TO REMOVE

"A defendant may remove any action from a state court to a federal court if the case could have originally been brought in federal court."[1] "The burden of establishing federal jurisdiction is placed upon the party seeking removal."[2] West Virginia courts must strictly construe questions of removal.[3]

Removal is generally appropriate in three circumstances, demonstration of which is the burden of the party seeking removal.[4] "First, a defendant may remove a case to federal court if the parties are diverse and meet the statutory requirements for diversity jurisdiction."[5] "Since

[1] Spencer v. Harris, 394 F. Supp. 2d 840, 843 (S.D.W. Va. 2005) (quoting Yarnevic v. Brink's, Inc., 102 F.3d 753, 754 (4th Cir.1996)).
[2] *Id.* (quoting Mulcahey v. Columbia Organic Chems. Co., Inc., 29 F.3d 148, 151 (4th Cir. 1994)).
[3] *See id.*; *See also* Hartley v. CSX Transp., 187 F.3d 422, 425 (4th Cir. 1999).
[4] *See* Mulcahey v. Columbia Organic Chems. Co., 29 F.3d 148, 151 (4th Cir. 1994).
[5] Lontz v. Tharp, 413 F.3d 435, 439 (4th Cir. 2005) (citations omitted).

diversity always vests original jurisdiction in the district courts, diversity *also* generates removal jurisdiction."[6]

"Second, removal is appropriate if the face of the complaint raises a federal question."[7] "Under the firmly settled well-pleaded complaint rule, however, merely having a federal defense to a state law claim is insufficient to support removal, since it would also be insufficient for federal question jurisdiction in the first place."[8] "Thus, the Supreme Court unwaveringly has maintained that to bring a case within § 1441, a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action."[9]

"The third justification for removal is actually a narrow exception to the well-pleaded complaint rule."[10] "Known as the 'complete preemption' doctrine . . . it provides that if the subject matter of a putative state law claim has been totally subsumed by federal law-such that state law cannot even treat on the subject matter-then removal is appropriate.[11] Although completely preempted claims are rare, they are held to satisfy the well-pleaded complaint requirements . . . ."[12]

"The district court may assert subject matter jurisdiction under Section 1332 in removed cases only if complete diversity of citizenship between the parties on either side of the dispute existed at the time of removal."[13]

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[6] *Id.*
[7] *Id.* (citations omitted).
[8] *Id.* (citations omitted).
[9] *Id.* (quoting Gully v. First Nat'l Bank, 299 U.S. 109, 112 (1936)).
[10] *Id.*
[11] *Id.* (citations omitted).
[12] *Id.* at 440.
[13] Baisden v. Bayer Corp., 275 F. Supp. 2d 759, 761 (S.D.W. Va. 2003) (citing Rowland v. Patterson, 882 F.2d 97, 99 (4th Cir.1989)).

If federal jurisdiction is doubtful, remand is necessary.[14] "The burden of establishing federal jurisdiction is upon the party seeking removal."[15] "The [removing party] bears the burden of demonstrating federal jurisdiction under the preponderance of evidence standard."[16] With that being said, "[r]emoval jurisdiction is strictly construed, and, if federal jurisdiction is in doubt, remand is necessary."[17]

A. The Parties

1. Defining "Parties in Interest"

West Virginia courts "must disregard nominal or formal parties and rest jurisdiction only upon the citizenship of real parties to the controversy."[18] "It is . . . well settled that courts should disregard nominal parties when determining whether diversity jurisdiction exists, and look instead to the real parties in interest in the controversy.[19] "[N]ominal or formal parties, being neither necessary nor indispensable, are not required to join in the petition for removal."[20]

In determining whether one is a real party in interest, West Virginia courts examine, among other things, the substantiality of one's stake in the action and one's level of control over the course of the litigation.[21] However, West Virginia courts have emphasized that there is no bright line rule in this regard, hinting that fine-line factual distinctions may carry the day.[22]

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[14] *Spencer*, 394 F. Supp. 2d at 843 (citations omitted).
[15] Thomas v. Brooks Run Mining Co., 504 F. Supp. 2d 121, 123 (S.D.W. Va. 2007) (citing Mulcahey v. Columbia Organic Chems. Co., 29 F.3d 148, 151 (4th Cir.1994)).
[16] *Spencer*, 394 F. Supp. 2d at 843 (citing Landmark Corp. v. Apogee Coal Co., 945 F. Supp. 932, 935, n. 2 (S.D.W. Va. 1996)).
[17] *Id.*
[18] Kidd v. Gilfilen, 170 F. Supp. 2d 649, 651 (S.D.W. Va. 2001) (citations omitted).
[19] Martin Sales & Processing, Inc. v. West Virginia Dept. of Energy, 815 F. Supp. 940, 942 (S.D.W. Va. 1993); *See also* State of West Virginia v. Morgan Stanley & Co., Inc., 747 F. Supp. 332, 336 (S.D.W. Va. 1990) ("It is equally well settled, however, that in determining diversity jurisdiction, the court will disregard the citizenship of nominal or formal parties and look to the citizenship of the 'real and substantial parties to the controversy.").
[20] Mullins v. Hinkle, 953 F. Supp. 744, 750 (S.D.W. Va. 1997) (quoting Tri-Cities Newspapers, Inc. v. Tri-Cities Printing Pressmen and Assistants Local 349, 427 F.2d 325, 327 (5th Cir. 1970)).
[21] *See* Kidd, 170 F. Supp. 2d at 651.
[22] *See id.* at 651, n.2.

In *Kidd*, The court noted that the plaintiff, an uninsured motorist, had not appeared, had not exercised any control or decision-making in the course of the litigation, and was "likely" judgment proof, all of which made her stake in the litigation "minimal at best."[23] The court found that the plaintiff was "named only as a means to a more substantial end, namely the establishment of her liability for resulting damages to the [plaintiffs] so as to trigger State Farm's inchoate obligation to pay on its motorist coverage."[24] The court disregarded the defendant's citizenship but stated in a footnote that "[i]t is conceivable in a future uninsured motorist coverage action that the uninsured motorist might retain counsel and demonstrate the requisite stake and control to qualify as the real party in interest."[25]

In *Spencer v. Harris*, on the other hand, the United States District Court for the Southern District of West Virginia held that an uninsured motorist was a real party in interest.[26] Even though the motorist did not possess assets of particular value, had not entered appearance, and was not represented by counsel, the motorist testified at deposition that he had not struck pedestrian, and motorist's employment record suggested that pedestrian, in event of favorable judgment, might have opportunity to garnish his wages to obtain partial satisfaction of judgment.[27] Based on the motorist's exercise of decision-making and apparent interest in the outcome of the litigation, the Court held that the motorist was a real party in interest for purposes of removal jurisdiction.[28]

[23] *Id.* at 651-52.
[24] *Id.* at 652.
[25] *See Id.* at 651, n.2.
[26] Spencer v. Harris, 394 F. Supp. 2d 840, 845-46 (S.D.W. Va. 2005).
[27] *Id.*
[28] *Id.*

B. The Amount in Controversy

1. Establishing the Amount in Controversy

West Virginia courts "must determine whether the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs."[29] West Virginia courts "have adopted a preponderance of the evidence standard to determine whether the amount in controversy exceeds $75,000."[30] "The defendant therefore bears the burden of proving by a preponderance of the evidence that the amount in controversy exceeds $75,000."[31] "To do so, the defendant must offer more than a bare allegation that the amount in controversy exceeds $75,000."[32]

"The test to determine the amount in controversy is not the sum ultimately awarded to the plaintiff, but the sum that is demanded by the plaintiff when the complaint is filed."[33] "If the amount in controversy in diversity cases is in doubt, the United States Supreme Court has drawn a sharp distinction between original jurisdiction and removal jurisdiction."[34] "For cases brought in federal court, it must appear to a legal certainty that the plaintiff's claim is really for less than the jurisdictional amount to justify dismissal."[35] "For cases instituted in state court and removed, a strong presumption arises that the plaintiff has not claimed an amount large enough to confer jurisdiction on a federal court."[36]

West Virginia Courts have held that an amount in controversy is determined by evidence beyond the amount requested in the Complaint. "In general, courts treat the amount requested by

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[29] Green v. Metal Sales Mfg. Corp., 394 F. Supp. 2d 864, 866 (S.D.W. Va. 2005) (quoting 28 U.S.C. 1332(a)).
[30] *Id.* (citing McCoy v. Erie Ins. Co., 147 F. Supp. 2d 481, 489 (S.D.W.Va.2001); Sayre v. Potts, 32 F. Supp. 2d 881, 885 (S.D.W.Va.1999)).
[31] *Id.*
[32] *Id.* (quoting Sayre, 32 F. Supp. 2d at 886).
[33] Evans v. CDX Services, LLC, 2007 WL 30312, *5 (S.D.W. Va. January 4, 2007) (citation omitted); *See also* Asbury-Castro v. GlaxoSmithKline, Inc., 352 F. Supp. 2d 729, 733 (N.D.W. Va. 2005) ("The amount in controversy is determined by considering the judgment that would be entered if the plaintiff prevailed on the merits of his case as it stands at the time of removal.").
[34] *Id.*
[35] *Id.* (citing St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 288-89 (1938)).
[36] *Id.*

the plaintiff in the state court as the amount in controversy."[37] However, the United States District Court for the Northern District of West Virginia has noted, "[t]his rule can be problematic . . . in states, such as West Virginia, where recovery in the courtroom is not limited to the amount demanded in the complaint.[38] The *Virden* Court noted:

> In West Virginia, a plaintiff is not bound by the *ad damnum* clause and may seek to amend it after final judgment to conform to the evidence. Therefore, absent a binding stipulation signed by [plaintiff] that he will neither seek nor accept damages in excess of $75,000, the Court must independently assess whether the defendants have proven by a preponderance of the evidence that [plaintiff's] complaint seeks damages in excess of $75,000.[39]

2. Application When a Specific Dollar Amount is Not Pled

Additionally, "[i]f the state court complaint is uncertain or silent as to the amount of plaintiff's claim, then the defendant bears the burden of actually proving the facts to support jurisdiction, including the jurisdictional amount."[40] "The United States District Court for the Southern District of West Virginia has adopted the preponderance of the evidence standard, which defendants must meet in order to avoid remand."[41] "Under this standard, the removing party must establish that it is more likely than not that the amount in controversy exceeds the jurisdictional amount."[42] "When no specific amount of damages is set forth in the complaint, the

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[37] Virden v. Altria Group, Inc., 304 F. Supp. 2d 832, 847 (N.D.W. Va. 2004) (citation omitted); Sayre v. Potts, 32 F. Supp. 2d 881, 884 (S.D.W. Va. 1999) (noting "a plaintiff's good-faith claim for specific monetary damages in the complaint binds the defendant").
[38] *Id.*
[39] *Id.* (internal citation omitted); *See also* Strawn v. AT&T Mobility, Inc., 513 F. Supp. 2d 599, 603 (S.D.W. Va. 2007).
[40] Evans v. CDX Services, LLC, 2007 WL 30312, at *5 (citing Landmark Corp. v. Apogee Coal Co., 945 F. Supp. 932, 935 (S.D.W. Va. 1996)).
[41] *Id.* (citing Patton v. Wal-Mart Stores, 2005 WL 2352298, at *2 (S.D.W. Va. Sept. 26, 2005); McCoy v. Erie Ins. Co., 147 F. Supp. 2d 481, 486-89 (S.D.W.Va.2001); Weddington v. Ford Motor Credit Co., 59 F. Supp. 2d 578, 583 (S.D.W.Va.1999); Whitney v. State Farm Mut. Auto Ins. Co., 1998 U.S. Dist. LEXIS 22247, at *6 (S.D.W. Va. June 29, 1998); Sayre v. Potts, 32 F. Supp. 2d 881, 883-84 (S.D.W.Va.1999); and Landmark Corp., 945 F. Supp. at 935)).
[42] *Id.* (citing *Weddington*, 59 F. Supp. 2d at 583).

Court may consider the entire record before it and may conduct its own independent inquiry to determine whether the amount in controversy satisfies the jurisdictional minimum."[43]

In discussing the amount in controversy requirement, the United States District Court for the Southern District of West Virginia has noted, "[b]inding precedent establishes the futility of a post-removal attempt by a plaintiff to manipulate the amount in controversy."[44]

It is worth noting that post-removal "binding representations" and stipulations seemingly do not carry great weight in determining the amount in controversy for jurisdictional purposes. On the other hand, a formal, binding, pre-removal stipulation signed by counsel and his client explicitly limiting recovery and filed contemporaneously with the complaint, containing a sum-certain prayer for relief may be sufficient to limit the amount.[45]

Rather, West Virginia courts looks to a variety of other factors in determining whether the jurisdictional amount is satisfied:

> the type and extent of the plaintiff's injuries and the possible damages recoverable therefore, including punitive damages if appropriate. The possible damages recoverable may be shown by the amounts awarded in other similar cases. Another factor for the court to consider would be the expenses or losses incurred by the plaintiff up to the date the notice of removal was filed. The defendant may also present evidence of any settlement demands made by the plaintiff prior to removal although the weight to be given such demands is a matter of dispute among courts.[46]

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[43] Ponko v. Kaminsky, Slip Copy, 2007 WL 3244623, at *2 (N.D.W. Va. Nov. 1, 2007) (citing Mullins v. Harry's Mobile Homes, Inc., 861 F. Supp. 22, 23 (S.D.W. Va. 1994)).

[44] Campbell v. Restaurants First/Neighborhood Restaurant, Inc., 303 F. Supp. 2d 797, 798 (S.D.W. Va. 2004) (citing Hutchens v. Progressive Paloverde Insurance Co., 211 F. Supp. 2d 788, 791 (S.D.W.Va.2002) ("Plaintiff's affidavit, filed after Progressive removed this action, averring that he will neither *see*k nor accept more than $74,500 is unavailing."); McCoy v. Erie Ins. Co., 147 F. Supp. 2d 481, 486 (S.D.W. Va. 2001) ("A binding pre-removal stipulation should alleviate un*see*mly forum gaming, which has occurred frequently in the wake of Adkins' relaxed approach.")).

[45] *See* McCoy v. Erie Ins. Co., 147 F. Supp. 2d 481, 485-86 (S.D.W. Va. 2001) (citations omitted).

[46] *Campbell*, 211 F. Supp. 2d at 798-99 (quoting *McCoy*, 147 F. Supp. 2d at 489).

"Although settlement offers are not determinative of the amount in controversy, they do count for something."[47]

"Further, in reaching a conclusion with regard to the amount in controversy based upon this evidence, [West Virginia courts are] not required to leave its common sense behind."[48] In fact, West Virginia Courts have come to different conclusions based on strikingly similar evidence.[49]

Additionally, "[a]ttorney's fees are included in the calculation of the jurisdictional amount . . . only if they are specifically provided for in the state statute at issue."[50] In addition, "[a] good faith claim for punitive damages may augment compensatory damages in determining the amount in controversy unless it can be said to a legal certainty that plaintiff cannot recover punitive damages in the action."[51]

3. Amount in Controversy Where Equitable Relief is Sought

With regard to injunctive relief, a party must present concrete evidence of the value of such relief, and the Court will not speculate as to an amount.[52]

C. Time of Existence of Grounds for Removal

1. Event Triggering Thirty-Day Period for Actions Initially Removable

"Defendants generally must file for removal within 30 days of receiving the initial pleading."[53] "[T]he thirty-day period for removal is statutory and is to be strictly construed . . .

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[47] *Ponko*, Slip Copy, 2007 WL 3244623, at *3 (citation omitted).
[48] *Id.*
[49] *Compare Campbell*, 211 F. Supp. 2d at 797 (considering the jurisdictional amount to be met due to the amount requested in a demand letter and the uncertain nature of pain and suffering damages) *with* Ponko v. Kaminsky, Slip Copy, 2007 WL 3244623 (considering the jurisdictional amount not to be met in case involving pain and suffering damages due to settlement offers from plaintiff below the jurisdictional amount).
[50] *Virden*, 304 F. Supp. 2d at 850 (citations omitted).
[51] Bryant v. Wal-Mart Stores East, Inc., 117 F. Supp. 2d 555 (S.D.W. Va. 2005) (citations omitted).
[52] *See Virden*, 304 F. Supp. 2d at 850-51 ("[Defendants] have not presented any concrete evidence as to the value or nature of the alleged claim for injunctive relief, however, and the Court declines to speculate about the cost of injunctive relief in its calculation of the amount in controversy.").

."[54] "This 30-day period begins to run only where an initial pleading reveals a ground for removal."[55] "Where such details are obscured, omitted, or misstated, the defendant has 30 days from the revelation of the grounds for removal in an amended pleading, motion, order, or other paper."[56]

West Virginia courts have held, however, that "a written order is not necessarily a paramount consideration in determining whether a case is ripe for removal."[57] The *McMahon* Court noted:

> More recently, this Court observed in *Hibbs v. Consolidation Coal Co.*,[58] that "it is not the 'written' order which makes the case removable, but the pronouncement by the state judge during a proceeding of record in which he consents to a motion to amend. This avoids speculation about whether the requested relief will be granted." Case law from other courts within the Fourth Circuit similarly recognizes that a defendant may be put on notice that a case has become removable even in the absence of a court order.[59] Indeed, the Fourth Circuit has determined that, at least in certain circumstances, the motion, order, or other paper from which it may be ascertained that a case has become removable need not necessarily even be part of the state court record.[60]

2. Event Triggering Thirty-Day Period for Actions Not Initially Removable

In West Virginia, there appears to be no duty to scrutinize a complaint in order to determine if diversity exists.[61] Rather, the test, in West Virginia, is whether the grounds for removal are "apparent within the four corners of the initial pleading or subsequent paper."[62] "In

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[53] Shonk Land Co., LLC v. Ark Land Co., 170 F. Supp. 2d 660, 662 (S.D.W. Va. 2001) (citing 28 U.S.C. § 1446(a)).
[54] *See* Fleming v. United Teachers Associates Ins. Co., 250 F. Supp. 2d 658, 661 (S.D.W. Va. 2003).
[55] *Id.* (citing Lovern v. General Motors Corp., 121 F.3d 160, 162 (4th Cir.1997)).
[56] *Id.* (citing 28 U.S.C. § 1446(b)).
[57] McMahon v. Advance Stores, Co., Inc., Slip Copy, 2008 WL 183715 (N.D.W. Va. 2008) (quoting King v. Kayak Mfg. Corp., 688 F. Supp. 227, 229 (N.D.W. Va. 1988).
[58] 842 F. Supp. 215 (N.D.W. Va. 1994).
[59] *See e.g.,* Allison v. Meadows, 2005 WL 2016815 (S.D.W. Va. Aug.22, 2005).
[60] *See* Yarnevic v. Brink's, Inc., 102 F.3d 753 (4th Cir.1996) (internal citations included).
[61] *See* Shonk Land Co., LLC v. Ark Land Co., 170 F. Supp. 2d 660, 662 (S.D.W. Va. 2001) (citing Lovern v. Gen'l Motors Corp., 121 F.3d 160, 162 (4th Cir. 1997)).
[62] *Id.* (quoting Lovern, 121 F.3d at 162); *But see* King, 688 F. Supp. at 229-30 (suggesting that a removing party has a duty to inquire about the removability of an action).

examining the timeliness of a motion to remove, the court may rely on the face of the initial pleading and on the documents exchanged in the case by the parties."[63]

Additionally, activities that occur prior to service of process seemingly do not serve to trigger the clock for purposes of removal jurisdiction.[64] Rather, the clock will not begin to run until the plaintiff actually files a Complaint.[65] In *Burgess*, the plaintiff's pre-filing courtesy copy of the complaint, informal discussions and demand letter did not operate to start the clock ticking under section 1446(b).[66] The Court interpreted Fourth Circuit authority to require actual filing of the Complaint.[67]

Finally, the United States District Court for the Southern District of West Virginia has explained, in the context of voluntary dismissal, "[u]nfortunately, there is no bright-line rule to determine when, prior to the state court's entering a final dismissal order, a case . . . becomes removable."[68] "[W]hen ruling on the timeliness of removals, courts generally are not inclined to be so rigid, instead emphasizing substance over form."[69] The *Allison* Court went on to find:

> [t]hat for a case to become removable as a consequence of a settlement between the plaintiff and the only nondiverse party, a defendant must be able to establish with a reasonable degree of certainty that dismissal of the nondiverse defendant is an inevitability. Settlement negotiations are fraught with uncertainty and are often thwarted by a last minute change of heart or a debate over minutiae at the signing table. An opposing party's assertion that they will soon settle with another defendant, without more, falls short of the kind of assurance needed to inform the remaining defendant/s that the case has become removable. Thus, this court FINDS that the receipt of unsigned drafts of settlement documents, accompanied by a letter indicating an intent to release all claims against the nondiverse defendant, is not a sufficiently certain indication that the case is one which is or has become removable.[70]

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[63] *Id.* (quoting *Lovern*, 121 F.3d at 162).
[64] *See* Burgess v. Gateway Communications, Inc.- WOWK TV, 984 F. Supp. 980, 982 (S.D.W. Va. 1997).
[65] *See id.*
[66] *See id.*
[67] *See id.*
[68] Allison v. Meadows, 2005 WL 2016815, at *2 (S.D.W. Va. 2005).
[69] *Id.*
[70] *Id.* at *3.

Indeed, the Fourth Circuit has held, "[a] defendant has 30 days to file a notice of removal, starting from the date the defendant receives the complaint or from the date "it may first be ascertained that the case is one which is or has become removable."[71] Thus, where a plaintiff pleads facts, which if true, would establish a cause of action against one or more non-diverse defendants, the time for seeking removal does not commence until the defendant can first ascertain that the plaintiff's cause of action against the non-diverse defendant's will fail.[72]

II. FRAUDULENT JOINDER

A. Test for Fraudulent Joinder

"In order to establish that a nondiverse defendant has been fraudulently joined in an attempt to defeat removal, the removing party must establish either: (1) outright fraud in the plaintiff's pleading of jurisdictional facts or (2) that there is *no possibility* that plaintiff would be able to establish a cause of action against the in-state defendant in state court."[73] Additionally, "[t]he party alleging fraudulent joinder bears a significant burden of proof."[74] In fact, the Fourth Circuit Court of Appeals has held that the fraudulent joinder standard is even more favorable to the plaintiff than the standard for ruling on a motion to dismiss under Fed.R.Civ.P. 12(b)(6).[75]

"To show fraudulent joinder, the removing party must demonstrate either 'outright fraud in the plaintiff's pleading of jurisdictional facts' or that 'there is no possibility that the plaintiff would be able to establish a cause of action against the in-state defendant in state court.'"[76] "The party alleging fraudulent joinder bears a heavy burden: it must show that the plaintiff cannot establish a claim [against the non-diverse defendant] even after resolving all issues of law and

[71] Boss v. Nissan North America, Inc., 228 Fed. Appx. 331(4th Cir. 2007).
[72] *See id.*
[73] Long v. Long, 509 F. Supp. 2d 568, 572 (N.D.W. Va. 2007) (quoting Marshall v. Manville Sales Corp., 6 F.3d 229, 232 (4th Cir.1993)).
[74] *Id.* (citing Hartley v. CSX Transp., Inc., 187 F.3d 422, 424 (4th Cir.1999)).
[75] *See* Baisden, 275 F. Supp. 2d at 761 (citations omitted).
[76] *Baisden*, 275 F. Supp. 2d at 761 (quoting Marshall v. Manville Sales Corp., 6 F.3d 229, 232 (4th Cir.1993)).

fact in the plaintiff's favor."[77] "A claim [against the non-diverse defendant] need not succeed to defeat removal; only a possibility of a right to relief need be asserted."[78] Though this is a lenient standard for plaintiffs to meet, the Complaint must clearly state all grounds for relief on its face.[79]

B. Evidence of Fraudulent Joinder

"In deciding whether fraudulent joiner has been committed, the court need not limit its jurisdictional inquiry to the facts alleged in the pleadings; the entire record may be considered as a whole in determining whether there is a basis for joinder."[80] "The removing party bears the burden of showing that the district court has original jurisdiction."[81] "Courts should resolve all doubts about the propriety of removal in favor of retained state court jurisdiction."[82]

Finally, West Virginia courts have held that fraudulent joinder also applies to "misjoined" plaintiffs, *i.e.*, removal jurisdiction will not be vitiated by plaintiffs who fraudulently misjoin non-diverse plaintiffs.[83] The United States District Court for the Southern District of West Virginia has held that "when faced with removed, non-diverse, misjoined plaintiffs, the proper course of action for a district court is to sever the claims of the non-diverse plaintiffs so as to protect the right of the removing defendant to litigate in a federal forum."[84]

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[77] *Id.*
[78] *Id.*
[79] *See id.* at 763.
[80] Evans v. CDX Services, LLC, 2007 WL 30312, *5 (S.D.W. Va. January 4, 2007) (citation omitted).
[81] *Id.* (citation omitted).
[82] Lawson v. Amer. Gen'l Assurance Co., 455 F. Supp. 2d 526, 529 (S.D.W. Va. 2006) (quoting Hartley v. CSX Transp., Inc., 187 F.3d 422, 425 (4th Cir.1999)).
[83] *See* Grennell v. Western Southern Life Ins. Co., 298 F. Supp. 2d 390, 395-96 (S.D.W. Va. 2004).
[84] *Id.* (citations omitted).

III. VOLUNTARY/INVOLUNTARY RULE

A. "Voluntary Dismissal

In West Virginia, "[i]t is well-established that the removability of a case depends on the character of the nondiverse defendant's dismissal."[85] "[I]f the dismissal is voluntary, the action may be removed; if involuntary, removal is improper."[86] "If the dismissal occurred at the instance of the plaintiff, it is 'voluntary;' if at the instance of the defendant or the court, it is 'involuntary.'"[87] "Hence, [for example] if the state trial judge's pronouncement that the resident defendant was no longer a party resulted from a directed verdict over Plaintiff's objection, the action [is] not removable."[88]

"One reason for the distinction is that an involuntary dismissal subsequently may be appealed by the plaintiff to a state appellate court and reversed. This would destroy the diversity of the parties, make any action of the federal court a nullity, and offend, thereby, traditional notions of judicial economy."[89]

In sum, "[g]enerally, only a voluntary act on the part of a plaintiff can render an initially unremovable action removable under the second paragraph of 28 U.S.C. § 1446(b)."[90]

B. Exceptions

In Arthur, the United States District Court for the Southern District of West Virginia stated, "a claim of fraudulent joinder is a 'well-established exception to the voluntary-involuntary rule."[91]

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[85] Arthur v. E.I. DuPont, 798 F. Supp. 367, 368 (S.D.W. Va. 1992).
[86] Lewis v. Armstrong Steel Erectors, Inc., 992 F. Supp. 842, 844 (S.D.W. Va. 1998) (quoting *Arthur*, 798 F. Supp. at 368).
[87] *Arthur*, 798 F. Supp. at 368 (citations omitted).
[88] King v. Kayak Mfg. Corp., 688 F. Supp. 227, 229 (N.D.W. Va. 1988).
[89] *Id.* at 368-69 (citations omitted).
[90] *King*, 688 F. Supp. at 229 (citations omitted).
[91] Lewis v. Armstrong Steel Erectors, Inc., 992 F. Supp. 842, 844 (S.D.W. Va. 1998) (quoting Arthur v. E.I. DuPont, 798 F. Supp. 367, 368 (S.D.W. Va. 1992)).

IV. WAIVER OF RIGHT TO REMOVAL

A. Waiver by Defending

The question of waiver in the context of removal is a factual one, reversible only if clearly erroneous.[92] A defendant waives his right to removal by "demonstrating a clear and unequivocal intent to remain in state court."[93] Waiver will only be found in extreme circumstances.[94]

Upon filing a removal petition, a defendant may waive the right to raise any matter not originally contained in the petition. In West Virginia, "amendment of removal petitions after the deadlines prescribed by the relevant statutes have passed is limited to those instances involving only minor technical corrections as opposed to substantive revisions."[95] In fact, there is some suggestion that filing a supplemental petition to add such technical corrections is prudent.[96] However, a party seeking to amend his or her petition to include substantive revisions, such as a new claim of fraudulent joinder, will likely be found to have waived the right to raise such a claim.[97]

B. Waiver by Consent

"Although not expressly stated within the statute, it is well established that, in cases involving multiple defendants, each must join in the petition for removal."[98] "Over the years, this uncodified axiom has come to be known as the rule of unanimity."[99] "Although this rule does not require each defendant (or its counsel) to sign the joint notice of removal individually, it

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[92] Aqualon Co. v. MAC Equip., Inc., 149 F.3d 262, 264 (4th Cir. 1998).
[93] Grubb v. Donegal Mut. Ins. Co., 935 F.2d 57, 59 (4th Cir. 1991).
[94] *See id.*
[95] Castle v. Laurel Creek Co., Inc., 848 F. Supp. 62, 64 (S.D.W. Va. 1994) (citations omitted).
[96] *See* Yarnevic v. Brink's, Inc., 102 F.3d 753, 755 (4th Cir. 1996).
[97] *See Castle*, 848 F. Supp. at 64.
[98] Stonewall Jackson Memorial Hosp. v. American United Life Ins. Co., 963 F. Supp. 553 (N.D.W. Va. 1997) (citations omitted).
[99] *Id.*

does require each to register to the Court its official and unambiguous consent to a removal petition filed by a co-defendant within the thirty day window afforded by 28 U.S.C. § 1446(b)."[100] Each defendant must "either sign the notice of removal, file its own notice of removal, or file a written consent or written joinder to the original notice of removal.[101] Moreover, each defendant must act directly or through his own attorney, not through another attorney.[102]

Despite the rule of unanimity, if a first-served defendant in a multi-defendant action fails to timely seek removal, a later-served defendant's right to removal is not necessarily waived in West Virginia. In multi-defendant cases, West Virginia courts seem to follow a version of the "later-served defendant" rule. The United States District Court for the Southern District of West Virginia has held:

> [T]he clock for removal begins to run only when any later-served defendant receives formal service of process. If a party is not required to take action in litigation until formal service of process, it follows that the removal rights of later-served defendants cannot be forfeited before being brought into litigation. The time limitation on seeking removal begins to run when the defendant is properly served in the state court action, not when the state court action is commenced. In applying Murphy Brothers to multi-defendant lawsuits, this court finds that it is following Supreme Court precedent as well as Congress's intent to assure defendants adequate time to remove an action to federal court.[103]

[100] *Id.*
[101] *Id.*
[102] *See id.*
[103] Ratliff v. Workman, 274 F. Supp. 2d 783, 790 (S.D.W. Va. 2003).

C. Waiver by Contract

Finally, while there appears to be no Fourth Circuit or West Virginia federal court decision addressing the issue of contractual waiver, the Western District of North Carolina has recognized that removal can be waived by contract.[104] In evaluating such clauses the "clear and unequivocal" test seemingly does not apply.[105]

V. PRACTICE POINTERS

Though not specifically stated, there is some suggestion that West Virginia courts take into account a removing party's "good faith" and the prejudice to the non-moving party in deciding removal questions where the removing party has failed to give timely notice to the opposing party that removal is being sought.[106] In holding removal to be procedurally effective, the *Arnold* Court noted:

> Here, there is no question defendant acted in good faith. A proper notice was mailed to plaintiffs' counsel on the day before the removal petition was filed with the court. The notice was mailed to the correct address. Another copy was mailed to plaintiffs' attorneys as soon as The Greenbrier's lawyers learned the first had not been received. Likewise, there is no prejudice to plaintiffs. Plaintiffs received actual notice of the removal one week after the removal petition was filed. No significant action took place in state court in the interim. The case is young and there is ample time to develop it in the normal course before trial. The delay of no more than one week has not harmed plaintiffs at all.[107]

Thus, it is likely best practice in West Virginia to avoid delay in providing notice to an opposing party and to refrain from further action in state court in the interim.

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[104] *See* Welborn v. Classic Syndicate, Inc., 807 F. Supp. 388 (W.D.N.C. 1992).
[105] *See id.*
[106] *See* Arnold v. CSX Hotels, Inc., 212 F .Supp. 2d 634 (S.D.W. Va. 2002).
[107] *Id.*

5TH CIRCUIT

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I. POWER AND RIGHT TO REMOVE

A. The Parties

1. Defining "Parties in Interest"

The real party in interest is the person holding the substantive right sought to be enforced, and not necessarily the person who will ultimately benefit from the recovery. A federal court sitting in diversity must look to state law to determine which party holds the substantive right. [1]

2. Presence of "Doe" Defendants

There is no clear guidance on this issue in Louisiana. However, the courts appear to follow 28 U.S.C.A. §§ 1441(a) which disregards fictitious names for the purposes of removal.[2]

3. Diversity for Putative Class Actions

When determining diversity of citizenship in putative class action, court considers domicile of plaintiff class representative, rather than all class members, and so long as no defendant is domiciled in same state as any class representatives, there is sufficient diversity of citizenship to allow removal of action.[3]

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[1] *See* Farrell Const. Co. v. Jefferson Parish, La., 896 F.2d 136 (5th Cir.1990). *See also* New Orleans Public Service, Inc. v. United Gas Pipe Line Co., 732 F.2d 452, 466 (5th Cir.1984), *cert. denied*, 469 U.S. 1019, 105 S.Ct. 434, 83 L.Ed.2d 360 (1984).
[2] Tompkins v. Lowe's Home Center, Inc., 847 F. Supp. 462 (E.D.La. 1994).
[3] 28 U.S.C.A. §§ 1332(a), 1441(a). Ren-Dan Farms, Inc. v. Monsanto Co., 952 F. Supp. 370 (W.D.La. 1997).

B. The Amount in Controversy

1. Establishing the Amount in Controversy

Louisiana law prohibits plaintiffs from specifying numerical value of claimed damages in a civil suit, defendant removing on diversity grounds must prove by a preponderance of the evidence that amount in controversy exceeds $75,000.[4]

2. Application When a Specific Dollar Amount is Not Pled

To remove a civil case on diversity grounds from state court, where Louisiana law prohibits plaintiffs from specifying numerical value of claimed damages in a civil suit, a defendant may prove amount in controversy either by demonstrating that claims are likely above $75,000 in sum or value, or by setting forth the facts in controversy that support a finding of the requisite amount.[5]

3. Amount in Controversy Where Equitable Relief is Sought

Louisiana has not addressed this topic to date.

4. Defeating Removal by Amending Relief Sought

Once the district court's jurisdiction on diversity grounds is established, subsequent events that reduce the amount in controversy to less than $75,000 generally do not divest the court of jurisdiction.[6]

[4] 28 U.S.C.A. §§ 1332, 1441; LSA-C.C.P. art. 893. Gebbia v. Wal-Mart Stores, Inc., 233 F.3d 880 (5th Cir. 2000).
[5] 28 U.S.C.A. §§ 1332, 1441; LSA-C.C.P. art. 893. Simon v. Wal-Mart Stores, Inc., 193 F.3d 848 (5th Cir. 1999).
[6] 28 U.S.C.A. §§ 1332. Thompson v. Radosta, 895 F. Supp. 113 (E.D.La. 1995), *reconsideration denied*, 906 F. Supp. 367 (E.D.La. 1995).

C. Time of Existence of Grounds for Removal

1. Event Triggering Thirty-Day Period for Actions Initially Removable

Under the removal statute, notice of removal could be filed by defendant within 30 days after receipt by defendant of copy of initial pleading.[7]

2. Event Triggering Thirty-Day Period for Actions Not Initially Removable

If the case not removable on the initial pleading, §1441 provides that, "a notice of removal may be filed within thirty days of receipt by defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may be first ascertained that case is one which is, or has become removable…"

Requirements of filing defendant's petition for removal with clerk of state court, and of giving notice to adverse parties, are not merely modal or formal, but, rather, constitute mandatory conditions precedent to termination of jurisdiction of the state court and assumption of jurisdiction by federal court.[8] Words "receipt by the defendant, through service or otherwise" in statue governing time for filing of removal petition means receipt by service or some action, which is equivalent of service.[9]

There is no clear guidance from Louisiana district courts regarding what constitutes "other paper."

A response in which a plaintiff denied the defendant's request for admission that the plaintiff would not seek damages against any defendant in its state court action in excess of amount-in-controversy requirement for exercise of diversity jurisdiction was "other paper" from which it could be ascertained that action was removable, so that receipt of response began 30-day

[7] 28 U.S.C.A. §§ 1446(b). New York Life Ins. Co. V. Deshotel, 142 F.3d 873 (5th Cir. 1998).
[8] 28 U.S.C.A. §§ 1446(e). State v. Butler 405 So.2d 836 (La. 1981.)
[9] 28 U.S.C.A. §§ 1446(b). Skinner v. Old Southern Life Ins. Co., 572 F. Supp. 811 (W.D.La. 1983).

period during which defendant could remove action.[10] A deposition was not found to be "other paper", because a deposition was not a voluntary act.[11]

II. FRAUDULENT JOINDER

A. Test for Fraudulent Joinder

In assessing claims of fraudulent joinder to defeat removal based on diversity jurisdiction, Louisiana district courts are not to determine whether the plaintiff will actually or even probably prevail on merits of a claim against nondiverse a defendant, but should look only for a possibility that the plaintiff might do so. 28 U.S.C.A. §§ 1332(a), 1441.[12]

B. Evidence of Fraudulent Joinder

In determining whether nondiverse parties were fraudulently joined to defeat removal based on diversity jurisdiction, courts may "pierce the pleadings," and consider affidavits and deposition testimony in a summary judgment-type fashion. 28 U.S.C.A. §§ 1332(a), 1441.[13] District court may also use factual allegations of the state court petition, to determine whether the nonremoving party has a legitimate claim against a nondiverse party under applicable law.[14]

III. VOLUNTARY/INVOLUNTARY RULE

This rule provides that a defendant may remove a qualified diversity action from state to federal court after dismissal of non-diverse defendant only if the plaintiff voluntarily dismisses non-diverse defendant.

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[10] 28 U.S.C.A. §§ 1446. Freeman v. Witco, Corp, 984 F. Supp. 443 (E.D.La. 1997).
[11] Rivers v. International Matex Tank Terminal, 864 F. Supp. 556 (E.D.La. 1994.)
[12] Washington v. Mother Works, Inc. 197 F.Supp.2d 569 (E.D.La. 2002).
[13] *Id.*
[14] Pate v. Adell Compounding, Inc. 970 F.Supp. 542 (M.D.La. 1997.)

A. "Voluntary" Dismissal

In Louisiana voluntary dismissal requires an overt act that reflects the plaintiff's desire to dismiss a non-defendant.[15]

B. Exceptions

Louisiana recognizes that there is an exception to the voluntary-involuntary rule when defendants are improperly, though not fraudulently joined.[16] .

III. WAIVER OF RIGHT OF REMOVAL

A. Waiver by Defending

Generally, a party who participates in proceedings in district court will be precluded from objecting to removal.[17] Proceeding to defend an action or otherwise invoking the processes of a court may waive the right of removal.[18] However, Louisiana courts have said that answering a petition does not qualify as a waiver of removal. Waiver must be clear and unequivocal.[19]

B. Waiver by Consent

This issues has not been addressed in Louisiana courts as of yet.

C. Waiver by Contract

In Louisiana a contractual waiver may be binding, but it must give a "clear and unequivocal" waiver. A party may waive its rights by explicitly stating that it is doing so, by allowing the party the right to choose venue, or by establishing an exclusive venue within the contract.[20]

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[15] Green v. City Services Refinery Slip Copy, 2007 WL 2008526 (W.D.La. 2007).
[16] Booth v. Louisiana Citizens Coastal Plan Slip Copy, 2007 WL 933665 (W.D.La. 2007).
[17] Harris v. Edward Hyman Co., 664 F.2d 943 (5thCir.1981).
[18] Brown v. Demco, Inc., 792 F.2d 478, 481 (5thCir.1986).
[19] Morgan Dallas Corp. v. Orleans Parish School Board, 302 F.Supp. 1208, 1209 (E.D.La.1969).
[20] McDermott Int'l, Inc. v. Lloyds Underwriters, 944 F.2d 1199 (5thCir.1991); Waters v. Browning-Ferris Indus., Inc., 252 F.3d 796 (5thCir.2001).

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I. POWER AND RIGHT TO REMOVE

A. The Parties

1. Defining "Parties in Interest"

The user or consumer who has allegedly suffered physical injury or injury to his property caused by the defective and unreasonably dangerous condition of the product is the real party in interest with the right to bring a products liability claim. The Mississippi Supreme Court has recognized the definition of "real party in interest" as follows:

> Person who will be entitled to the benefits of action if successful**,** that is, the one who is actually and substantially interested in subject matter as distinguished from one who has only a nominal, formal, or technical interest in or connection with it. Under the traditional test, a party is a "real party in interest" if it has the legal right under the applicable substantive law to enforce the claim in question . . . .[1]

Under the Mississippi Product Liability Act ("MPLA"),[2] individual consumers are the only persons "entitled to the benefits" of an action seeking damages for personal injuries caused by an allegedly-defective product, and, as such, are the only plaintiffs with standing to sue under the MPLA. Because of the collateral source rule, the allegedly injured party has the right to seek

[1] Sneed v. Ford Motor Co., 735 So. 2d 306, ¶ 21 (Miss. 1999) (quoting BLACK'S LAW DICTIONARY 874 (6th ed. 1990)).
[2] Miss Code Ann. § 11-1-63 (2007).

recovery for *all* of his damages even if he has been reimbursed by an unrelated third party such as an insurance company.[3]

The Mississippi Supreme Court has held that Medicaid payments on behalf of individuals, like other third-party sources of payment for medical treatment, are subject to the "collateral source rule."[4]

In *Owens Corning v. R.J. Reynolds Tobacco Co.*,[5] the Mississippi Supreme Court rejected a direct action by a third party for unreimbursed expenses in the treatment of injured persons and held that such actions must be brought as subrogation actions rather than direct actions.[6]

2. Presence of "Doe" Defendants

"Doe" defendants are not considered for diversity purposes and do not affect a defendant's ability to remove a case.[7] The Fifth Circuit in Doleac went on to hold, however, that the citizenship of an actual party substituted for a "Doe" defendant is considered for diversity purposes and can destroy diversity and require remand.[8]

3. Diversity for Putative Class Actions

Mississippi state court procedure does not provide for class actions, so the issue of diversity in class actions is not an issue for removal in Mississippi.

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[3] Busick v. St. John**,** 856 So. 2d 304, 309 (Miss. 2003) (recovery of insurance proceeds is not a bar to recovery by the plaintiff).
[4] *See* Wal-Mart Stores, Inc. v. Frierson, 818 So. 2d 1135, 1140 (Miss. 2002) ("[t]here is no reason why Medicaid benefits should be treated any differently than insurance payments, and they should be subject to the collateral source rule."); *Brandon HMA, Inc. v. Bradshaw*, 809 So. 2d 611, 619 (Miss. 2001) ("we hold that Medicaid payments are subject to the collateral source rule.").
[5] 868 So. 2d 331 ¶ 18 (Miss. 2004).
[6] *Id.* at 338.
[7] *See* Doleac *ex rel.* Doleac v. Michalson, 264 F.3d 470, 475 (5th Cir. 2001) (quoting 28 U.S.C. § 1441(a)).
[8] *Id.* at 477. *See* Smith v. Catosouth, LLC, 432 F. Supp. 2d 679, 680-82 (S.D. Miss. 2006) (court allowed amendment to substitute non-diverse defendant in place of fictitious defendant pursuant to 28 U.S.C. § 1447(e) and then remanded case for lack of diversity jurisdiction).

B. The Amount in Controversy

1. Establishing the Amount in Controversy

Plaintiffs are generally masters of their complaint and can choose whether to plead damages either above or below the $75,000 threshold for federal diversity jurisdiction. The amount claimed by the plaintiff generally controls if made in good faith.[9] Punitive damages are included in the computation of the amount in controversy and federal courts in Mississippi have routinely held that an unspecified claim for punitive damages is sufficient to meet the $75,000 amount in controversy requirement regardless of the amount of the actual damages alleged in the complaint.[10]

2. Application When a Specific Dollar Amount is Not Pled

If no amount of damages is pled in the complaint, a removing defendant must demonstrate by a preponderance of the evidence that the amount in controversy is in excess of $75,000.[11] The defendant can meet this burden by "demonstrating that the claims are likely above $75,000 in sum or value, or by setting forth the facts in controversy that support a finding of the requisite amount."[12] In *Easterling v. Smithkline Beecham*,[13] the Court found that the removing defendant adequately demonstrated that the amount in controversy exceeded $75,000 where the plaintiff sought in the complaint an unspecified sum in a products liability action for serious physical and mental injuries.[14] The court stated that its conclusion was "buttressed by the

[9] De Aguilar v. Boeing Co., 47 F.3d 1404, 1408 (5th Cir. 1995).
[10] Ross v. First Family Financial Services, Inc., 2002 U.S. Dist. LEXIS 23212 at *27 (N.D. Miss. August 29, 2002)(citing Marcel v. Pool Co., 5 F.3d 81, 84-85 (5th Cir. 1993))(court found amount in controversy in excess of $75,000 because of punitive damage claim even though no damage amount alleged in complaint).
[11] Gebbia v. Wal-Mart Stores, Inc., 233 F.3d 880, 883 (5th Cir. 2000).
[12] *Id.*
[13] 2006 U.S. Dist. LEXIS 41622 (S.D. Miss. June 2, 2006)
[14] *Id.* at *6.

panoply of similar pharmaceutical cases cited in the defendants' brief and from the experiences of this court in dealing with these types of cases."[15]

3. Amount in Controversy Where Equitable Relief is Sought

When the claim in the suit is for equitable relief, the amount in controversy is measured by the value of the right to be protected or the injury to be prevented.[16] In *Cooper v. Gateway Companies, Inc.*,[17] the court denied a motion to remand where the plaintiff sought injunctive relief to stay payments that exceeded the $75,000 jurisdictional amount. In *Ear, Nose, and Throat Consultants of North Mississippi, PLLC v. State Auto Insurance*,[18] the court held that in a suit where the plaintiff was requesting that the court appoint an arbitrator to determine a damage claim, the amount in controversy was determined by the value of the damages sought in the arbitration proceedings.

4. Defeating Removal by Amending Relief Sought

A plaintiff cannot deprive the federal court of jurisdiction by amending the complaint after removal to seek damages of less than $75,000.[19] If the amount in controversy is not clear, the plaintiff can procure remand by submitting affidavits clearly limiting the amount that the plaintiff is seeking and will accept to less than $75,000.[20] On the other hand, if the amount in controversy clearly exceeds $75,000, the court will not consider affidavits from the plaintiff seeking to reduce the amount of damages sought in the complaint.[21]

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[15] *Id*. at *6-7.
[16] Webb v. Investacorp, Inc., 89 F.3d 252, 256 (5th Cir. 1996).
[17] 2002 U.S. Dist. LEXIS 27643 (S.D. Miss. July 18, 2002).
[18] 2006 U.S. Dist. LEXIS 22708 (N.D. Miss. April 21, 2006).
[19] McKelroy v. Harley E. Wood and Little Falls Freight Co., Inc., 2007 U.S. Dist. LEXIS 60978, *2 (N.D. Miss. August 17, 2007)(quoting Gebbia v. Wal-Mart Stores, Inc., 233 F.3d 880, 883 (5th Cir. 2000)).
[20] Haley v. Ford Motor Co., 398 F. Supp. 2d 522, 528 (S.D. Miss. 2005).
[21] Irons v. Glaxco Welcome, Inc., 2006 U.S. Dist. LEXIS 47102, *7 (S.D. Miss. May 9, 2006).

In *Smith v. Wal-Mart Stores, Inc.*,[22] the court granted a motion to remand in a case where the amount of damages sought was ambiguous and the plaintiff submitted an affidavit limiting the amount the plaintiff would seek and accept to less than $75,000. The court noted that in states like Mississippi where the plaintiff's potential recovery is not limited to the amount pled in the complaint that there is a greater potential for jurisdictional manipulation by the plaintiff seeking to amend the amount sought after procuring a remand by stating in an affidavit that the amount sought is less than $75,000.[23] The court discussed the case of *Wilson v. GMAC*,[24] where a plaintiff had procured a remand with an affidavit that he was seeking less than $75,000, but later amended his complaint in state court to seek and recover a jury award of $2,500,000.[25] To avoid the potential for manipulation by the plaintiff seeking to amend after procuring a remand, the court stated how it was proper to allow a remand only if the plaintiff would submit an affidavit that it would not accept any damage award in excess of $75,000.[26]

C. Time of Existence of Grounds for Removal

1. Event Triggering Thirty-Day Period for Actions Initially Removable

A notice of removal must be filed within thirty days of service of the complaint on the first served defendant.[27] All properly served defendants must join in the removal within thirty days of service of the complaint on the first served defendant.[28] Fraudulently joined defendants are not required to join in the removal, however.[29] These time and joinder requirements are

[22] 489 F. Supp. 2d 600 (N.D. Miss. 2007)
[23] *Id.* at 602.
[24] 883 So. 2d 56 (Miss. 2004).
[25] *Smith*, 489 F. Supp. 2d at 602.
[26] *Id.* at 602-03.
[27] Getty Oil Corp. v. Insurance Company of North America, 841 F.2d 1254, 1263 (5th Cir. 1988).
[28] *Id*.
[29] Jernigan v. Ashland Oil, Inc., 989 F.2d 812, 815 (5th Cir.), *cert. denied*, 510 U.S. 868 (1993).

procedural, however, and are waived if not raised in a motion to remand within thirty days after the removal.[30]

2. Event Triggering Thirty-Day Period for Actions Not Initially Removable

A settlement letter from plaintiff's counsel received by the defendant's counsel can be an "other paper" that triggers a new thirty-day removal period only if the letter is received after the defendant receives the initial pleading.[31] A settlement letter from plaintiff's counsel received after the defendant has received the complaint can constitute an "other paper" which begins the thirty-day period for removal.[32] While the "other paper" must be in writing to trigger the thirty-day period, defendant's receipt of the "other paper" can be by either formal or informal means.[33]

In *Thompson v. Southern National Financial Corp.*,[34] the court stated how an "other paper" must (1) "result from the voluntary act of a plaintiff which gives the defendant notice of the changed circumstances an which now support federal jurisdiction," and (2) "not be plainly a sham."[35] The court concluded that interrogatory answers stating the plaintiff was seeking damages that totaled in excess of $75,000 when the complaint clearly sought less constituted an "other paper" that allowed for removal.[36] In *Estate of Bloodworth v. Illinois Central Railroad Co.*,[37] the court concluded that discovery responses can constitute an "other paper" allowing

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[30] *See* Best v. Albritton, 2007 U.S. Dist. LEXIS 56522, *3 (S.D. Miss. August 2, 2007) (quoting Schexnayder v. Entergy La., Inc., 394 F.3d 280, 284 (5th Cir. 2004) ("[A] motion for remand based on procedural defects that is brought more than 30 days after the removal of the action, is outside of the district court's power to grant.")).
[31] Chapman v. Polymatic, Inc., 969 F.2d 160, 164 (5th Cir. 1992) (letter received by defendant before receipt of the complaint cannot be an "other paper").
[32] Addo v. Globe Life and Accident Insurance Co, 230 F.3d 759, 761-62 (5th Cir. 2002).
[33] Sunburst Bank v. Summit Acceptance Corp., 878 F. Supp. 79, 81-82 (S.D. Miss. 1995) (actual written notice "may be communicated in a formal or informal manner.").
[34] 2006 U.S. Dist. LEXIS 23505 (S.D. Miss. April 12, 2006).
[35] *Id*. at *6.
[36] *Id*. at *5. *See also* Jackson v. Mississippi Farm Bureau Mut. Ins. Co., 947 F. Supp. 252, 254 (S.D. Miss. 1996) (unsigned interrogatory responses constituted "other paper").
[37] 2007 U.S. Dist. LEXIS 4891 (N.D. Miss. January 23, 2007).

removal, but only when the suit was not previously removable. The court remanded the case because the defendant could have removed based on the original pleading.[38]

In *Addo*,[39] the Fifth Circuit held that a post-complaint settlement letter constituted an "other paper" that allowed removal. In *Dozier v. Kentucky Finance Co, Inc.*,[40] the court recognized that a post-complaint settlement letter can constitute an "other paper" removal, but not where the letter does not clearly state a settlement demand for an amount in excess of $75,000. A deposition answer can also constitute an "other paper" removal if the case is removed within thirty days of the deposition.[41] The "other paper" must be a paper in the action itself and not a pleading or other paper in a separate action.[42]

II. FRAUDULENT JOINDER

A. Test for Fraudulent Joinder

To demonstrate fraudulent or improper joinder by the plaintiff of a non-diverse defendant in an attempt to prevent removal, the defendant must prove either "(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 party in state court."[43]

A defendant can establish the second test for fraudulent or improper joinder by demonstrating "there is no reasonable basis for predicting that plaintiff might establish liability . . . against the in-state defendants" on the pleaded claims in state court.[44] Thus, "[a] 'mere theoretical possibility of recovery under local law' will not preclude a finding of improper

[38] *Id*. at *6.
[39] 230 F.3d at 761-62.
[40] 319 F. Supp. 2d 716 (S.D. Miss. 2003),
[41] Ameen v. Merck & Co., Inc., 226 Fed. Appx. 363, 368 (5th Cir. March 29, 2007).
[42] Danks v. Ernster, 2007 U.S. Dist. LEXIS 72977 *18 (S.D. Miss. September 30, 2007) (court found that pleading filed in a separate action could not constitute "other paper" and remanded case to state court).
[43] Crockett v. R.J. Reynolds Tobacco Co., 436 F.3d 529, 532 (5th Cir. 2006).
[44] Badon v. RJR Nabisco Inc., 224 F.3d 382, 393 (5th Cir. 2000).

joinder."[45] Instead, there must be a "*reasonable* basis" for recovery from the non-diverse defendant.[46]

The Fifth Circuit has held, however, that there is no improper joinder when the defense that precludes a claim against the non-diverse defendant is common to all defendants.[47] When a defense or factual situation "compels a holding that there is no reasonable basis for predicting that state law would allow the plaintiff to recover against the in-state defendant necessarily compels the same result for the nonresident defendant, there is no improper joinder; there is only a lawsuit lacking merit."[48] The common defense holding in *Smallwood* is not applicable, however, if the common defense proffered as the basis for improper joinder would not dispose of all claims against all defendants.[49]

When considering fraudulent or improper joinder, the court can allow limited discovery on the removal issues and pierce the pleadings to consider summary judgment-type evidence.[50] This inquiry is limited, however. "[A] summary inquiry is appropriate only to identify the presence of discrete and undisputed facts that would preclude plaintiff's recovery against the in-state defendant."[51]

A defendant may be able to remove on the basis of fraudulent misjoinder of claims that together destroy diversity. In *Jones v. Nastech Pharmaceutical*,[52] the court found that multiple plaintiffs' claims were misjoined under Miss. R. Civ. P. 20 and severed claims, retaining

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[45] Smallwood v. Ill. Cent. R.R. Co., 385 F.3d 568, 573 n.9 (5th Cir. 2004) (en banc), *cert. denied*, 544 U.S. 992 (2005) (quoting *Badon*, 224 F.3d at 286 n.4).
[46] Griggs v. State Farm Lloyds, 181 F.3d 694, 699-701 (5th Cir. 1999) (emphasis added); *see also Badon*, 224 F.3d at 393 (holding that the "mere assertion of metaphysical doubt as to the material facts i[s] insufficient" to establish a reasonable basis for predicting recovery under state law) (quoting Jernigan v. Ashland Oil Inc., 989 F.2d 812, 816 (5th Cir. 1993)) (internal quotation marks omitted).
[47] Smallwood v. Ill. Cent. R.R. Co., 385 F.3d 568, 574 (5th Cir. 2004) (en banc), *cert. denied*, 544 U.S. 992 (2005).
[48] *Id*.
[49] McDonal v. Abbott Labs., 408 F.3d 177, 184 (5th Cir. 2005).
[50] Cavallini v. State Farm Mutual Auto Ins. Co. 44 F.3d 256, 263 (5th Cir. 1995).
[51] *Smallwood*, 385 F.3d at 573-74. *See also Ameen,* 226 Fed. Appx. 363 at 369 (deposition testimony of plaintiff properly considered by the court as establishing the basis for removal).
[52] 319 F. Supp. 2d 720 (S.D. Miss. 2004).

jurisdiction for claims for which there was diversity and remanding claims for which there was not.[53]

B. Evidence of Fraudulent Joinder

Fraudulent joinder of the non-diverse resident defendant can be demonstrated in various ways. For example, the court has held a local defendant seller of a product to be improperly joined in a product liability suit because under the Mississippi Product Liability Act, Miss. Code Ann. § 11-1-63(h) (2007) a seller of a product cannot be held liable merely for selling the product.[54] The court has held that a resident health care provider was improperly joined where the plaintiff failed to meet procedural notice requirements prior to filing suit.[55] In *McDonal*, the Fifth Circuit affirmed the district court's denial of a motion to remand where claims against vaccine manufacturers and vaccine administrators were barred as a matter of federal law. *McDonal*, 408 F.3d at 185.

III. VOLUNTARY / INVOLUNTARY RULE

A. "Voluntary" Dismissal

In *Estate of Martineau v. ARCO Chemical Company*, 203 F.3d 904 (5th Cir. 2000), the Fifth Circuit reaffirmed the well-established law that "[a] case may be removed based on any voluntary act of the plaintiff that eliminates that non-diverse defendant from the case."[56] The Fifth Circuit held that a non-diverse defendant was voluntarily eliminated from the lawsuit for purposes of diversity jurisdiction when the plaintiff unequivocally agreed to abandon the lawsuit

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[53] *Id*. at 728. *See also* Smith v. Nationwide Insurance Company, 286 F. Supp. 2d 777, 781 (S.D. Miss. 2003) (court severed plaintiff's contract claims against diverse defendant from tort claims against non-diverse defendant as misjoined and retained jurisdiction over claims for which there was diversity).

[54] Willis v. Kia Motor Corp., 2007 U.S. Dist. LEXIS 46393 (N.D. Miss. June 26, 2007) (court found that Miss. Code Ann. § 11-1-63(h) protected seller from product liability and breach of implied warranty claims and concluded that Mississippi citizen seller had been improperly joined and denied motion to remand).

[55] Estate of Brown v. Mariner Health Care, Inc., 2006 U.S. Dist. LEXIS 41621, 2006 WL 1579702 (N.D. Miss. May 31, 2006) (denying plaintiff's motion to remand and dismissing non-diverse defendant for plaintiff's failure to give statutory sixty days' notice).

[56] *Id.* at 910.

against the non-diverse Defendant in a binding settlement agreement even though the Order of Dismissal had not yet been entered.[57] In *Engler v. Winfrey*,[58] the Fifth Circuit ruled that a federal court properly retained jurisdiction over a case after a non-diverse defendant was voluntarily dismissed even though the case had been improperly removed. The Court found that later dismissal of the non-diverse party allowed the trial court to retain jurisdiction and proceed with the case.[59]

B. Exceptions

The Fifth Circuit has recognized an exception to the voluntary dismissal rule when the state court finds misjoinder and severs the plaintiff's claims against the non-resident defendants. In *Crockett v. R.J. Reynolds Tobacco Co.*,[60] the Court addressed a situation where the defendant had previously removed on the basis of fraudulent joinder, but the case had been remanded because the defendant had not met its burden of demonstrating fraudulent joinder. Nevertheless, the court denied a motion to remand of the second removal after severance in state court. The Court concluded "that removal on the basis of an unappealed severance, by a state court, of claims against improperly joined defendants is not subject to the voluntary-involuntary rule."[61]

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[57] *Id.* at 911–12.
[58] 201 F.3d 680 (5th Cir. 2000).
[59] *Id.* at 686–87.
[60] 436 F.3d 529 (5th Cir. 2006).
[61] *Id.* at 533. *See also* Farmer v. St Paul Fire & Marine Insurance Co., 2006 U.S. Dist. LEXIS 23966 (N.D. Miss. April 24, 2006) (court denied motion to remand where defendant removed case after severance of non-diverse defendant by state court)

IV. WAIVER OF RIGHT TO REMOVE

A. Waiver by Defending

A defendant can waive its right to removal by submitting the case to the state court for adjudication on the merits, but seeking procedural relief such as moving to transfer venue and moving for confidentiality has been held not to constitute waiver of the right to seek removal.[62]

B. Waiver by Consent

A party may contractually waive his right to removal without using words explicitly waiving the right to remove. However, "contractual clauses purporting to waive federal jurisdiction must be mandatory and not merely permissive.[63] A contractual consent to jurisdiction and venue in a particular state court does not waive the right to remove if the consent is not mandatory.[64]

C. Waiver by Contract

A clear and unequivocal contractual waiver of the right to remove because of a forum selection clause is binding, but will not be enforced if the party resisting waiver can establish that the choice of forum was not reasonable.[65] A remand order based on a contractual provision is appealable.[66]

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[62] Tedford v. Warner-Lambert Co., 327 F.3d 423, 428-29 (5th Cir. 2003).
[63] Collin County, Texas v. Siemens Business Services, Inc., 2007 U.S. App. LEXIS 23327, *13, *21-22 (5th Cir. October 3, 2007)(court affirmed order of remand because of waiver of right to remove where contract contained mandatory forum selection clause requiring suit to be filed in a court in a county where there was no federal courthouse).
[64] City of New Orleans v. Municipal Administrative Services, Inc., 376 F.3d 501, 505-06 (5th Cir. 2004).
[65] *In re* Fireman's Fund Ins. Cos., 588 F.2d 93, 95 (5th Cir. 1979).
[66] Southland Oil Co. v. Mississippi Insurance Guaranty Association, 182 Fed. Appx. 358, 360 (5th Cir. 2006).

V. PRACTICE POINTERS

The most important strategy when removing a case is to answer the case at the same time it is removed. By answering the case, the defendant prevents the plaintiff from unilaterally dismissing the suit under Fed. R. Civ. P. 41(a). Otherwise, the plaintiff can dismiss the suit after it is removed, but before the answer is served, and then re-file in state court after reformulating the complaint in a manner to resist removal more effectively.

TEXAS

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I. POWER AND RIGHT TO REMOVE

A. The Parties

1. Defining "Parties in Interest"

Diversity is defined in terms of the citizenship of the parties to the action. The court can disregard a named party because it is not the "real party in interest".[1]

In the 5th Circuit, a 3rd party defendant can remove an action. The 3rd party proceeding is treated as separate and independent and the 3rd party is a "defendant" entitled to removal.[2]

2. Presence of "Doe" Defendants

Texas rules do not permit plaintiff to sue a party under a "Doe" because under this "misidentification" the proper party has not been served and put on notice of the suit.[3] Moreover, fictitious names are not considered in determining citizenship for removal.[4] But the court will consider the citizenship of the party once the John Doe is identified.[5]

[1] *See* Lincoln Prop. Co. v. Roche, 546 U.S. 81, 126 S. Ct. 606 (2005).
[2] *See* Carl Heck Engineers, Inc. v. Lafourche Parish Police Jury, 622 F2d133, 135 (5th Cir. 1980).
[3] *See* Riston v. Doe, 161 S.W.3d 525 (Tex. App.-Houston [14th Dist.] 2004).
[4] Doleac v. Michalson, 264 F.3d 470, 475 (5th Cir. 2001).
[5] *Doleac*, 264 F3d at 476 n.5.

3. Diversity for Putative Class Action

In a class action where jurisdiction is not based on 28 U.S.C. sec. 1332(d), in looking at diversity, the court will only consider the citizenship of the named parties or class representative.[6]

B. The Amount in Controversy

1. Establishing the Amount in Controversy

The amount in controversy at the time of removal must exceed $75,000, excluding interest and costs. Defendant can rely on the amount asserted in the complaint to meet the jurisdictional amount.[7]

2. Application When a Specific Dollar Amount is Not Pled

The removing defendant should state in its notice of removal that the amount in controversy exceeds $75,000 and provide evidence in support of that stated amount.[8] The parties may submit affidavits and stipulations and conduct discovery to support jurisdiction as to the amount in controversy.[9]

In the Fifth Circuit, the Defendant must prove existence of the jurisdictional amount by a preponderance of the evidence (more likely than not).[10]

3. Amount in Controversy Where Equitable Relief is Sought

The amount in controversy is usually measured by the value of the right sought to be protected by the equitable relief. If plaintiff did not plead an amount, the court may look outside the pleadings for proof of damages.[11]

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[6] Aetna Cas. & Sur. Co. v. Iso-Tex, Inc., 75 F.3d 216, 218 (5th Cir. 1996).
[7] S.W.S. Erectors, Inc. v. Infax, Inc., 72 F.3d 489, 492 (5th Cir. 1996).
[8] St. Paul Reinsurance Co. v. Greenberg, 134 F3d 1250, 1253-54 (5th Cir. 1998).
[9] Marcel v. Pool Co., 5 F3d 81, 84-85 (5th Cir. 1993).
[10] H & D Tire & Automotive–Hardware, Inc. v. Pitney Bowes Inc., 227 F3d 326, 328, fn 2 (5th cir. 2000).
[11] United Food & Commercial Workers Un. V. CenterMark Props. Meriden Square, Inc., 30 F.3d 298, 305 (2d Cir. 1994).

4. Defeating Removal by Amending Relief Sought

After removal and upon motion by plaintiff to amend its pleading, the court will take into consideration in its ruling on jurisdiction and ruling on the motion to amend pleadings: (1) whether the primary purpose of amendment is to defeat jurisdiction; (2) whether the plaintiff was diligent in requesting the amendment; (3) whether the plaintiff will be prejudiced if the amendment is denied, and (4) other factors bearing on the equities.[12] If the amendment is more than one year after commencement of the action, removal would not be timely. (Except see IIA below.)

C. Time of Existence of Grounds for Removal

1. Event Triggering Thirty-Day Period for Actions Initially Removable

If the suit is removable when it is filed, the defendant must file the notice of removal within 30 days of receiving both the summons and a copy of the complaint. The 5th Circuit has held that the failure of the first-served defendant to file a notice of removal within 30 days of service prevents all later-served defendants from removing the action, unless the plaintiff intentionally delayed naming other defendants in a bad-faith attempt to prevent removal.[13]

2. Event Triggering Thirty-Day Period for Actions Not Initially Removable

If the case is not removable on the initial pleading, §1441 provides that, "a notice of removal may be filed within thirty days of receipt by defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may be first ascertained that case is one which is, or has become removable…"

[12] *See* Hensgens v. Deere & Co., 833 F.2d 1179, 1182 (5th Cir. 1987).
[13] Brown v. Demco, Inc., 792 F.2d 478, 481-82 (5th Cir. 1986).

In Texas the defendant must be served the summons and petition either in person or by certified or registered mail and other means.[14] A defendant may also accept service or waive service of process.[15] Substituted service on the secretary of state is also allowed which starts the time running.[16]

If the information supporting removal is included in a copy of an amended pleading, motion, order, or "other paper," the information must be "unequivocal" to start the time limit for a notice of removal under 28 U.S.C. sec 1446(b).[17]

The petition in state court may not contain information as to the parties' citizenship. In Texas, if one of the defendants is a health care provider, the Chapter 74 of CPRC prohibits the plaintiff from pleading the amount of damages; the amount in controversy must be supplied by a letter from plaintiff to defendant health care provider and could be "other papers" for purpose of removal. (This does not apply to a manufacturer of a medical product.) Therefore, service of discovery answers may constitute "other papers" for the first notice of removability.[18]

II. FRAUDULENT JOINDER

A. Test for Fraudulent Joinder

A nondiverse defendant is fraudulently joined if there is no reasonable basis for the court to predict that Plaintiff might be able to recover against the in state defendant.[19]

The defendant has a heavy burden in proving fraudulent removal. A summary judgment standard applies such that all legal and factual issues must be resolved in Plaintiff's favor.[20]

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[14] TRCP 536.
[15] TRCP 119.
[16] Tex. Civ. Prac. & Rem. Code 17.044.
[17] Bosky v. Kroger Tex., LP, 288 F.3d 208, 211 (5th Cir. 2002). Addo v. Globe Life & Acc. Ins., Co., 230 F.3d 759, 761-62 (5th Cir. 2000) (letter post filing); Chapman v. Powermatic, Inc., 969 F.2d160, 164 (5th Cir. 1992) (answer to interrogatory but not prefiling demand letter); Green v. R.J. Reynolds Tobacco Co., 274 F.3d 263, 267-68 (5th Cir. 2001) (other court decision involving same defendant and similar fact situations).
[18] Chapman v. Powermatic, Inc., 969 F2d160, 164 (5th Cir. 1992).
[19] Dodson v. Spiliada Maritime Corp., 951 F2d40, 42 (5th Cir. 1992). *See also* Smallwood v. Illinois Cent. R.R., 385 F.3d 568 (5th Cir. 2004) (there is no fraudulent joinder, "there is only a lawsuit lacking in merit").

Since a defendant may be unaware of the "sham" joinder until the lawsuit is underway, the 30-day removal period runs from the time defendant first knew or should have known that the nondiverse party had been "fraudulently" joined and there is a basis for removal.[21]

An "equitable extension" past the 1-year deadline for removal has been recognized in the 5th circuit.[22]

B. Evidence of Fraudulent Joinder

The district court may use a summary-judgment-like procedure and consider affidavits and other evidence outside the pleadings represented by defendant in its notice of removal.[23]

III. VOLUNTARY/INVOLUNTARY RULE

This rule provides that a defendant may remove a qualified diversity action from state to federal court after dismissal of non-diverse defendant only if the plaintiff voluntarily dismisses non-diverse defendant.

A. "Voluntary" Dismissal

Under the federal rule, the Plaintiff must do something voluntary to change the nature of the case and render it removable. In Texas State court, a Plaintiff has an unqualified right to dismiss a case or take a nonsuit at any time before plaintiff has introduced all of his evidence other than rebuttal evidence.[24] A nonsuit under this state rule of a defendant would constitute a

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[20] Rudd v. Beverly Enterprises-Mississippi, Inc., 390 F3d 400, 405 (5th Cir. 2004).
[21] Jernigan v. Ashland Oil, 989 F2d 812, 817 (5th Cir. 1993); Delaney v. Viking Freight, Inc., 41 F.Supp. 2d 672, 675 (ED Tex. 1999) (The removal time limit began to run when Defendant received deposition transcript containing admissions showing no claim could be maintained against co-defendant).
[22] *See* Tedford v. Warner-Lambert Co., 327 F3d 423, 427 (5th Cir. 2003); Davis v. Merck & Co., Inc., 357 F. Supp. 2d 974, 978 (ED Tex. 2005).
[23] Hart v. Bayer, 199 F.3d 239,246-47 (5th Cir. 2000); Cavalline v. State Farm Mut. Auto Ins. Co., 44 F3d 256, 263 (5th Cir. 1995).
[24] Tex. R. Civ. Pro. 162.

voluntary dismissal. An involuntary dismissal of a nondiverse defendant would not be a voluntary change.[25]

B. Exceptions

If the plaintiff joined a nondiverse defendant against whom it has no possibility of recovery, the court may disregard that defendant's citizenship when considering whether diversity exists.[26]

Later amendments to the Petition in State court do not revive the 30-day removal period except where they so change the nature of the action as to be a "substantially new suit" or "an entirely new and different suit."[27] Caution: an attorney who files a removal notice that appears untimely runs the risk of sanctions including paying opposing counsel's attorneys fees.[28]

IV. WAIVER OF RIGHT TO REMOVE

C. Waiver by Defending

Can a defendant waive its right to removal by proceeding to defend an action in state court or otherwise invoking processes of that court? If the defendant could have removed, but proceeds to defend the action in state court, it may waive its right to remove to federal court.[29] However, a defendant's intent to waive the right to remove must be "clear and unequivocal."[30]

In addition, a Defendant cannot experiment with rulings in the state court and then remove the case if it does not like the state court result.[31]

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[25] Wheems v. Louis Dreyfus Corp., 380 F2d 545, 547 (5th Cir. 1967).
[26] Dodson v. Spiliada Mar. Corp., 951 F2d 40, 42-43 (5th Cir. 1992).
[27] Johnson v. Heublein Inc., 227 F3d 236, 241 (5th Cir. 2000).
[28] Davis v. Veslan Enterprises, 765 F2d 494, 497 (5th Cir. 1985). *See also* IIA *infra*.
[29] Brown v. Demco, Inc., 792 F.2d 478, 481 (5th Cir. 1986).
[30] *See* Beighley v. FDIC, 868 F.2d 776, 782 (5th Cir. 1989).
[31] *Id.*

D. Waiver by Consent

Does a defendant's consent to plaintiff's filing of a suit in state court waive the defendant's right to remove? A party can contract to waive removal rights, but the agreement must be "clear and unequivocal."[32]

E. Waiver by Contract

Yes. *See* B above.

V. PRACTICE POINTERS

Successful strategies for removal and avoiding remand. In Texas, the Northern District (LR 81.1), Eastern District (LRCV-81) and the Southern District (LR 81) have Local Rules dealing with removal. The Western district at the time of this writing did not have a Local Rule affecting removal. In addition, some district courts have their own local rules that may affect removals and remands. Therefore, always check the local rules of the district and individual courts before removal.

[32] Waters v. Browning-Ferris Indus., 252 F.3d 796, 797 (5th Cir. 2001).

6TH CIRCUIT

KENTUCKY

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I. POWER AND RIGHT TO REMOVE

A. The Parties

Only true defendants can remove a case.[1] Third-party defendants are not "true" defendants for purposes of the removal statute and, therefore, third party defendants cannot remove a case.[2] Plaintiffs may never remove a case, even when they are defending against a counterclaim.[3]

All defendants who have been "served or otherwise properly joined in the action must either join in the removal, or file a written consent to the removal."[4] A removing defendant "need not obtain the consent of parties who are fraudulently joined."[5]

1. Defining "Parties in Interest"

A defendant can remove an action on the basis of diversity of citizenship 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."[6] Kentucky federal courts have not specifically defined "parties in

[1] 28 U.S.C. § 1441(a).
[2] *First Nat'l Bank v. Curry*, 301 F.3d 456, 461-67 (6th Cir. 2002).
[3] 14C Charles Alan Wright, et al., *Federal Practice & Proc.*, § 3731 at 253 (3d ed. 1998).
[4] *Brierly v. Alusuisse Flexible Packaging, Inc.*, 184 F.3d 527, 533-34 n.3 (6th Cir. 1999), *cert. denied* 528 U.S. 1076 (2000).
[5] *Anderson v. Merck & Co.*, 417 F. Supp 2d 842, 845 n.3 (E.D. Ky. 2006).
[6] 28 U.S.C. § 1441(b).

interest" for purposes of this provision. But for purposes of determining diversity generally, courts disregard the citizenship of third-party defendants,[7] fraudulently joined parties,[8] and nominally or formally joined parties.[9]

2. Presence of "Doe" Defendants

No. Courts disregard any defendant sued under a fictitious name for purposes of determining diversity.[10]

3. Diversity for Putative Class Actions

For putative class actions in which the Class Action Fairness Act ("CAFA") applies, federal courts have jurisdiction if there is minimal diversity, generally meaning that the citizenship of any member of the class of plaintiffs is different from the citizenship of any defendant.[11] CAFA provides several mandatory and discretionary exceptions, including some based on the citizenship of the plaintiffs and defendants.[12] At least one Kentucky federal court has determined that the plaintiff has the burden of proving that an exception applies for remand.[13]

For putative class actions in which CAFA does not apply, there must be complete diversity between the named plaintiffs and the named defendants.[14]

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[7] *Becker v. Crounse Corp.*, 822 F Supp. 386, 390 (W.D. Ky. 1993).
[8] *Norman v. Sundance Spas, Inc.*, 844 F. Supp. 355, 360 (W.D. Ky. 1994).
[9] *Bedell v. H.R.C. Ltd.*, 522 F. Supp. 732, 736 (E.D. Ky. 1981).
[10] *Alexander v. Electronic Data Sys. Corp.*, 13 F.3d 940, 948 (6th Cir. 1994); 28 U.S.C. § 1441(a).
[11] 28 U.S.C. § 1332(d)(2); *Kendrick v. Standard Fire Ins. Co.*, 2007 U.S. Dist. LEXIS 28461 at *8 (E.D. Ky. Mar. 31, 2007).
[12] 28 U.S.C. § 1332(d)(3), (4); *see also Adams v. Federal Mat'ls Co.*, 2005 U.S. Dist. LEXIS 15324 at *16-17 (W.D. Ky. July 28, 2005).
[13] *Kendrick*, 2007 U.S. Dist. LEXIS 28461 at *15-16.
[14] *Snyder v. Harris*, 394 U.S. 332 (1969).

B. Amount in Controversy

1. Establishing the Amount in Controversy

The amount in controversy is the "value of the rights" the plaintiff seeks to protect.[15] The amount in controversy is determined at the time of removal.[16]

2. Application When a Specific Dollar Amount is Not Pled

When a plaintiff does not plead a specific dollar amount, the defendant has the burden of proving that it is "more likely than not" that the plaintiff's claims meet the amount in controversy requirements.[17] The same standard applies even if a plaintiff specifically disclaims damages greater than the federal jurisdictional amount, as long as there is some means by which the plaintiff might nevertheless seek and recover damages greater than $75,000.[18]

3. Amount in Controversy Where Equitable Relief is Sought

In cases seeking declaratory or injunctive relief, the amount in controversy is determined by the "value of the object of the litigation."[19] There is a split of authority as to whose viewpoint should be considered in assessing the "value of the object of the litigation," and the Sixth Circuit has specifically declined to take a position on the issue.[20] Kentucky federal courts assess the "value of the object of the litigation" from the viewpoint of the party seeking to invoke federal jurisdiction, meaning the defendant in removal cases.[21] Assessing the "value of the object of the litigation" from the defendant's viewpoint generally means considering the defendant's cost of compliance with the requested injunctive or declaratory relief.[22]

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[15] *Pennsylvania R. Co. v. Girard*, 210 F.2d 437, 439 (6th Cir. 1954).
[16] *Rogers v. Wal-Mart Stores, Inc.*, 230 F.3d 868, 871(6th Cir. 2000).
[17] *Gafford v. General Elec. Co*., 997 F.2d 150, 158 (6th Cir. 1993).
[18] *Ratliff v. Merck SC Co.*, 359 F. Supp. 2d 571, 575 (E.D. Ky. 2005).
[19] *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 347 (1977).
[20] *Everett v. Verizon Wireless, Inc.*, 460 F.3d 818, 829 (6th Cir. 2006).
[21] *Bedell*, 522 F. Supp. at 735.
[22] *Petrey v. K. Petroleum Inc.*, 2007 U.S. Dist. LEXIS 51556 at *6 (E.D. Ky. July 16, 2007).

4. Defeating Removal by Amending Relief Sought

Jurisdiction is determined as of the time of removal. Therefore, a plaintiff cannot defeat federal jurisdiction by agreeing to seek less than the federal jurisdictional amount after removal.[23]

C. Time of Existence of Grounds for Removal

1. Event Triggering Thirty-Day Period for Actions Initially Removable

The thirty-day removal period begins running after proper service of the first pleading or paper setting out a removable claim.[24] In cases with more than one defendant, a defendant who receives notice later than the others has thirty days from the date of receipt to remove.[25]

2. Event Triggering Thirty-Day Period for Actions Not Initially Removable

Kentucky federal courts do not appear to have addressed this issue, but generally the notice can be communicated either formally or informally.[26]

"Other paper" includes "any other document that is part and parcel of the state court proceedings."[27] At least one Kentucky federal court has ruled that even a paper filed in a collateral proceeding is sufficient to trigger the thirty-day time limit.[28]

II. FRAUDULENT JOINDER

A. Test for Fraudulent Joinder

The doctrine of fraudulent joinder is applicable in three situations: "(1) when there is no colorable basis for a claim against the non-diverse defendant, (2) when a plaintiff engages in outright fraud in pleading jurisdictional allegations, and (3) when the plaintiff joins a defendant

[23] *Rogers*, 230 F.3d at 872.
[24] *Murphy Bros. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, (1999); *Von Wiegen v. Koch*, 2007 U.S. Dist. LEXIS 52424 at *4 (E.D. Ky. July 19, 2007).
[25] *Brierly*, 184 F.3d at 533.
[26] 14C Charles Alan Wright, et al., *Federal Practice & Proc.* § 3732 at 310 (3d ed. 1998).
[27] *Queen v. Dobson Power Line Const. Co.*, 414 F. Supp. 2d 676, 679 (E.D. Ky. 2006)
[28] *Hamilton v. Hayes Freight Lines, Inc.*, 102 F. Supp. 594, 596 (E.D. Ky. 1952).

who has no joint, several or alternative liability with a diverse defendant (and there is no nexus between the claims against the diverse and non-diverse defendant)."[29] A court must examine the plaintiff's claim against the non-diverse defendant under the substantive state law to assess whether a colorable cause of action exists.[30] The operative question is "whether there is arguably a reasonable basis for predicting that state law might impose liability on the facts involved."[31]

B. Evidence of Fraudulent Joinder

The plaintiff's motives for suing the non-diverse defendant are irrelevant.[32] State law controls in determining whether plaintiff has a colorable claim against the non-diverse defendant.[33] If a defendant can prove fraudulent joinder, the one-year limit on removal in 28 U.S.C. § 1446(b) does not bar removal more than one year after the case commenced, as long as the defendant otherwise complies with the removal requirements.[34]

III. VOLUNTARY/INVOLUNTARY RULE

A. "Voluntary" Dismissal

A dismissal is voluntary when it results from an action by the plaintiff which permanently removes the non-diverse defendant from the case.[35] "The rationale and meritorious purpose of the voluntary-involuntary test is the prevention of premature removals in cases where the issue of

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[29] *Salisbury v. Purdue Pharma, LP*, 166 F.Supp.2d 546, 548 (E.D. Ky. 2001) (citing *Jerome Duncan, Inc. v. Auto-By-Tel, LLC*, 176 F.3d 904 (6th Cir. 1999)).
[30] *Id.* at 549.
[31] *Alexander*, 13 F.3d at 949; *see also Coyne v. Am. Tobacco Co.*, 183 F.3d 488, 493 (6th Cir. 1999).
[32] *Jerome-Duncan, Inc. v. Auto-By-Tel, L.L.C.*, 176 F.3d 904, 907 (6th Cir. 1999).
[33] *Id.*
[34] *Hardy v. Ajax Magnathermic Corp.*, 122 F. Supp. 2d 757, 759 (W.D. Ky. 2000).
[35] *Saylor v. General Motors Corp.*, 416 F. Supp. 1173, 1175 (E.D. Ky. 1976); *CIT Group/Consumer Finance, Inc. v. Landamerica*, 2006 U.S. Dist. LEXIS 77474 at *4-6 (E.D. Ky. Oct. 24, 2006).

the resident defendant's dismissal has not been finally determined in the state court."[36] Thus, for example, default judgments are not "voluntary" dismissals by the plaintiff.[37]

B. Exceptions

Yes. The rule does not apply in the case of fraudulent joinder.[38]

IV. WAIVER OF RIGHT TO REMOVE

A. Waiver by Defending

Yes, a defendant can waive the right to removal by "taking actions in state court, after it is apparent that the case is removable, that manifest the defendant's intent to have the case adjudicated in state court and abandon the right to a federal forum."[39] There are no bright line rules defining which actions will constitute a waiver. However, the defendant's intent to waive the right to remove must be "clear and unequivocal."[40] Defensive actions, "short of proceeding to an adjudication on the merits," generally will not constitute a waiver.[41] But, for example, arguing and losing on a dispositive issue – such as a plaintiff's motion for summary judgment – can constitute a waiver.[42]

B. Waiver by Contract

Contractual waivers of the right to remove *can* be binding, but the waiver must be "clear and unequivocal."[43] With regard to contracts involving foreign states, the Sixth Circuit has gone so far as to state that the waiver must be "explicit."[44]

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[36] *Saylor*, 416 F. Supp. at 1175.
[37] *Id.*; *CIT Group/Consumer Finance, Inc.*, 2006 U.S. Dist. LEXIS 77474 at *4-6.
[38] *Saylor*, 416 F. Supp. at 1175.
[39] *Queen*, 414 F. Supp. 2d at 678.
[40] *In re Delta Am. Re Ins. Co.*, 900 F.2d 890, 892 (6th Cir. 1990); *Bedell*, 522 F. Supp. at 738.
[41] *Id*.
[42] *Queen*, 414 F. Supp. 2d at 678-79.
[43] *In re Delta Am. Re Ins. Co.*, 900 F.2d at 892-94.
[44] *Id*. at 894.

MICHIGAN

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I. POWER AND RIGHT TO REMOVE

A. The Parties

1. Defining "Parties in Interest"

Federal courts have jurisdiction over controversies between "citizens of different states" by virtue of 28 U.S.C. § 1332(a)(1).[1] The U.S. Supreme Court established early on that the "citizens" requirement in 28 U.S.C. § 1332(a)(1) upon whose diversity a plaintiff grounds jurisdiction must be real and substantial parties to the controversy.[2] In determining the "parties in interest," the inquiry turns on the distinction between "real and substantial parties to the controversy" and nominal or formal parties."[3]

"[T]he real party in interest is the person who is entitled to enforce the right asserted under the governing substantive law."[4] "In contrast to a 'real party in interest,' a formal or

[1] Navarro Sav. Ass'n v. Lee, 446 U.S. 458, 460 (1980).
[2] *Id*.
[3] Northland Insurance Co. v. Arthur Hill & Associates, 126 F. Supp. 2d 1066 (E.D. Mich. 2001) (held that the court must determine the citizenship by reference to each member of each participating syndicate).
[4] Certain Interested Underwriters at Lloyd's of London v. Layne, 26 F.3d 39, 42-43 (6th Cir. 1994).

nominal party is one who has no interest in the result of the suit and need not have been made a party thereto."[5]

2. Presence of "Doe" Defendants

In the Eastern District of Michigan, "where a Doe defendant has been named the matter is not removable until that defendant is dismissed."[6] "A Jane Doe case may not be removed until the plaintiff files an amendment in state court substituting the names of real parties and the defendant seeking removal thereafter establishes diversity of citizenship between the plaintiffs and all named defendants."[7]

"Doe" defendants may be disregarded in determining the propriety of removal, however, if they are merely sham parties against whom no real relief is sought.[8] However, "as long as a proper cause of action is stated against a resident Doe defendant, the case should not be removed until the plaintiff dismisses the action against that defendant, or actually commences the trial without having served him."[9]

3. Diversity for Putative Class Actions

The Class Action Fairness Act of 2005 ("CAFA"), expands federal diversity jurisdiction over class actions by creating an exception to the general requirements of complete diversity and by allowing class action plaintiffs to aggregate their claims to meet the amount in controversy requirements.[10] The CAFA added section 28 U.S.C. § 1332(d)(2), which provides: "[t]he district courts shall have original jurisdiction of any civil action in which the matter in controversy

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[5] Grant County Deposit Bank v. McCampbell, 194 F2d 469, 472 (6th Cir. 1952).
[6] Dewyer v. Gaudette Machinery Movers, 1988 U.S. Dist. Lexis 18237 at 3 (E.D. Mich. 1988) (citing Holloway v. Pacific Indemnity, Co. 422 F. Supp. 1036, 1041 (E.D. Mich. 1976)).
[7] Mullins v. King's Entertainment Co., 663 F. Supp. 61, 63 (E.D. Mich. 1987).
[8] *Holloway*, 422 F.Supp. at 1038.; *See Mullins*, 663 F. Supp. at 63 ("a court may permit removal if the plaintiff's joinder of Doe defendants was fraudulent or such defendants are merely nominal parties against whom no real relief is sought.")
[9] *Holloway*, 422 F.Supp. at 1041.
[10] *Hall v. State Farm Mutual Automobile Insurance Co*., 215 Fed. Appx. 423, 424 (6th Cir. 2007); *see also* 28 U.S.C. § 1332(d).

exceeds the sum or value of $ 5,000,000, exclusive of interest and costs, and is a class action in which any member of a class of plaintiffs is a citizen of a State different from any defendant."[11]

B. The Amount in Controversy

1. Establishing the Amount in Controversy

Pursuant to 28 U.S.C. § 1332(a), federal courts have jurisdiction over disputes between citizen of different states where the amount in controversy, exclusive of interest, "exceeds the sum or value of $75,000."[12] In determining the amount in controversy, a court may consider other possible damage components, including, under Michigan law, exemplary damages and, in some circumstances, the amount of a potential award of attorney's fees.[13]

With regard to removal based on diversity, "in assessing whether the amount-in-controversy requirement is met a court must determine: (1) the proper measure of the amount-in-controversy; and (2) whether the defendants have carried their burden.[14] Normally, in determining the amount in controversy "the sum claimed by the plaintiff controls" for purposes of the jurisdictional amount.[15]

2. Application When a Specific Dollar Amount is Not Pled

A defendant wishing to remove a case bears the burden of satisfying the amount-in-controversy requirement.[16] Normally, "the sum claimed by the plaintiff[s] controls," but where plaintiffs seek to recover some unspecified amount that is not self-evidently greater or less than

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[11] Price v. Berkeley Premium Nutraceuticals, Inc., 2005 U.S. Dist. LEXIS 41706 at 9-10 (E.D. Mich. 2005).
[12] Southern States Police Benevolent Association, Inc., v. Second Chance Body Armor, Inc., 336 F. Supp. 2d 731, 733 (W.D. Mich. 2004).
[13] Southern States Police Benevolent Association, Inc. v. Second Chance Body Armor, Inc., 336 F. Supp. 2d 731, 734 (W.D. Mich. 2004).
[14] Crestmark Bank v. Goldleaf Financial Solutions, Inc., 2007 U.S. Dist. Lexis 66910 at 8 (E.D. Mich. 2007).
[15] *Crestmark Bank*, 2007 U.S. Dist. Lexis 66910 at 8-9 (citing Everett v. Verizon Wireless, 460 F.3d 818, 822 (6th Cir. 2006)).
[16] Everett v. Verizon Wireless, Inc., 460 F.3d 818 (6th Cir. 2006) (citing Gafford v. Gen. Elec. Co., 997 F.2d 150, 155 (6th Cir. 1993)); CMS North Am., Inc. v. De Lorenzo Marble & Tile, Inc., 2007 U.S. Dist. LEXIS 75071 at 4 (W.D. Mich. 2007).

the federal amount-in-controversy requirement, the defendant satisfies its burden when it proves that the amount in controversy "more likely than not" exceeds $ 75,000.[17] In gauging the amount in controversy, courts view the claims from the vantage point of the time of removal.[18]

3. Amount in Controversy Where Equitable Relief is Sought

In an action seeking injunctive relief, a court determines whether the jurisdictional requirement is met by considering the value of the right sought to be protected by the equitable relief or the extent of the injury to be prevented.[19] Courts have generally taken three approaches in determining the point of view from which injunctive relief should be valued: (1) the value from the plaintiff's point of view; (2) the value from the defendant's point of view; and (3) the value from either viewpoint.[20] The rule in the Sixth Circuit is that a request for injunctive relief must be valued from the plaintiff's viewpoint in determining the amount in controversy.[21] In other words, "the amount in controversy must be determined based upon the value of the rights Plaintiffs seek to protect."[22]

4. Defeating Removal by Amending Relief Sought

Although there appears to be no case law directly on point, as a general rule, "the law in the Sixth Circuit is that a court is to determine jurisdiction at the time of removal in deciding remand motions, not at post-removal events."[23] As such, a defendant would have a solid

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[17] *Id.*; Crestmark Bank v. Goldleaf Financial Solutions, Inc., 2007 U.S. Dist. Lexis 66910 at 8 (E.D. Mich. 2007).
[18] *Id.*
[19] Southern States Police Benevolent Association, Inc., v. Second Chance Body Armor, Inc., 336 F. Supp. 2d 731, 734 (W.D. Mich. 2004).
[20] *Id.*
[21] *Southern States Police Benevolent Association, Inc.*, 336 F. Supp. 2d at 737.
[22] *Id.*; *See* Crestmark Bank v. Goldleaf Financial Solutions, Inc., 2007 U.S. Dist. Lexis 66910 at 8 (E.D. Mich. 2007) ("the value of the object of litigation is to be measured by the cost of compliance from the plaintiff's point of view, and [when removing the] defendant must prove that this amount exceeds the jurisdictional amount by a preponderance of the evidence").
[23] *See, e.g.*, Rogers v. Wal-Mart Stores, Inc., 230 F.3d 868, 872-73 (6th Cir. 2000).

argument that federal court jurisdiction cannot be defeated by a subsequent amendment of the amount sought.

C. Time of Existence of Grounds for Removal

1. Event Triggering Thirty-Day Period for Actions Initially Removable

"The statutory provision 28 U.S.C. § 1446(b) states that 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."[24]

"The 30-day period for removal runs from the service of the summons on each defendant."[25] In cases with multiple defendants served at different times, a later-served defendant has 30 days from the date of service to remove a case to federal district court, with the consent of the remaining defendants.[26]

"In cases of fraudulent joinder, where a defendant seeks to remove an action that ostensibly is not removable under the literal allegations of the complaint, courts hold that removal must be sought within 30 days, or at most a 'reasonable time,' after a defendant discovers that a non-diverse co-defendant has been fraudulently joined in the action."[27] "In diversity cases where the complaint does not expressly allege an amount in controversy in excess of the $75,000 jurisdiction threshold, courts impose upon the removing defendant a duty to

[24] Iulianelli v. Lionel, L.L.C, 183 F. Supp. 2d 962, 964 (E.D. Mich. 2002).
[25] *Iulianelli*, 183 F. Supp. 2d at 965; Campbell v. Johnson, 1999 U.S. App. Lexis 34041 at 6 (6th Cir. 1999); Murphy Bros. v. Michetti Pipe Stringing, Inc, 526 U.S. 344 (1999).
[26] *Id.*; Brierly v. Alusuisse Flexible Packaging, Inc., 184 F.3d 527, 533 (6th Cir. 1999).
[27] *Iulianelli*, 183 F. Supp. 2d at 967.

inquire, and to act within 30 days after obtaining information that the prerequisites from removal are satisfied."[28]

2. Event Triggering Thirty-Day Period for Actions Not Initially Removable

In *Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc.*,[29] the U.S. Supreme Court explained the meaning of "through service or otherwise." The Court held that "removal is triggered by simultaneous service of the summons and complaint, or receipt of the complaint, 'through service or otherwise,' after and apart from service of the summons, but not by mere receipt of the complaint unattended by any formal service."[30] "If the summons and complaint are served together, the 30-day period for removal runs at once."[31] "If the defendant is served with the summons but the complaint is furnished sometime after, the period for removal runs from the defendant's receipt of the complaint."[32] If the defendant is served with the summons and the complaint is filed in court and under local rules service of the complaint is not required, then the removal period runs from the date the complaint is made available through filing.[33] "Finally, if the complaint is filed prior to any service, the removal period runs from the service of the summons."[34]

Although service by a designated agent falls under "service or otherwise" and starts the thirty-day period, receipt by persons unauthorized to accept service is not sufficient.[35]

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[28] *Id.*
[29] 526 U.S. 344 (1999).
[30] *Id* at 348.
[31] *Id* at 354.
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *See* Helfman v. GE Group Life Assurance Company, 2006 U.S. Dist. Lexis 71934 (E.D. Mich 2006) (holding that plaintiff's service at address of registered agent for sister company did not constitute "service or otherwise" even though the corporation failed to list a local resident agent).

A defendant's knowledge of facts unambiguously indicating that the case is removable, when derived from papers within its sole possession, triggers the thirty-day period.[36] Courts have recognized that discovery responses may qualify as "other paper[s]" that permit the removal of a case that was not initially removable.[37]

The statute itself, draws no distinction between papers that are attributable to the voluntary action of a plaintiff and those that are the product of factors beyond the plaintiff's control, and it does not appear that the Sixth Circuit has relied upon this "voluntary-involuntary" rule in any of its published decisions.[38]

II. FRAUDULENT JOINDER

A. Test for Fraudulent Joinder

The substantial burden of proving fraudulent joinder of a non-diverse defendant is on the removing party.[39] The removing defendant must show that there is no reasonable basis for a claim against the non-diverse defendant in state court on the facts alleged.[40] "The question is whether there is arguably a reasonable basis for predicting that the state law might impose

[36] Holdson v. Carolina Freight Carriers Corp., 1991 U.S. App. Lexis 14129 at 16 (6th Cir. 1991) ("We hold that 1441(b) starts the thirty-day period running from the date that a defendant has solid and unambiguous information that the case is removable.").
[37] Jhohman, L.L.C. v. United States Security Associates, 2007 U.S. Dist. Lexis 74755 at 7 (E.D. Mich. 2007) ("holding that the statutory requirement of 'receipt' of a 'paper' mandates some sort of written notice that a case has become removable, as opposed to a defendant's mere acquisition of such knowledge though other means.").
[38] *See* Hollenbeck v. Burroughs Corp., 664 F. Supp. 280, 281 (E.D. Mich. 1987) (holding that a Supreme Court decision in another case did not qualify as "paper"); *See also* Haber v. Chrylser Corp., 958 F. Supp. 321, 326 (E.D. Mich. 1997) (observing, in support of a ruling that the plaintiff's responses to deposition questioning qualified as a "paper," that "[d]eposition responses are no less voluntary than other written discovery responses"); Peters v. The Lincoln Electric Company, 285 F.3d 456, 466 (6th Cir. 2002) ("Plaintiff's responses to deposition questioning may constitute an 'other paper'").
[39] Wiacek v. Equitable Life Assurance Soc., 795 F. Supp. 223, 225 (E.D. Mich. 1992).
[40] PSA Quality Systems (Toronto), Inc., v. Sutcliffe, 256 F. Supp. 2d 698 (E.D. Mich. 2003) (citing Alexander v. Electronic Data Sys. Corp., 13 F.3d 940, 949 (6th Cir. 1994)).

liability on the facts involved."[41] "Any disputed questions and fact[s] and ambiguities in the controlling state law [should be resolved] . . . in favor of the non-removing party."[42]

B. Evidence of Fraudulent Joinder

Existing Sixth Circuit guidance on determining the propriety of removal instructs that the district court must "look to the complaint as it existed at the time the petition for removal was filed to determine the matter of federal jurisdiction raised by the defendant's notice of removal."[43] However, when a defendant alleges that there has been fraudulent joinder, the court may pierce the pleadings, consider the entire record, and determine the basis of joinder by any means available.[44] If the plaintiff has raised a "colorable claim" against the defendant under Michigan law, then joinder is not fraudulent and the removal is improper.[45]

III. VOLUNTARY / INVOLUNTARY RULE

A. "Voluntary" Dismissal

The rule provides that a defendant may remove a qualified diversity action from state to federal court after dismissal of non-diverse defendant only if the plaintiff voluntarily dismisses the non-diverse defendant. Federal Courts have long distinguished between the voluntary and involuntary dismissal of a non-diverse defendant when considering the propriety of removal.[46] This voluntary/involuntary distinction is grounded in the observation that when a non-diverse party is eliminated from an action pursuant to court order (i.e., involuntarily), the order of dismissal may be the subject of appeal; consequently, although diversity may temporarily exist

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[41] *Id.*
[42] *Id.*
[43] Alexander v. Electronic Data Sys. Corp., 13 F.3d 940, 946 (6th Cir. 1994).
[44] Beesley v. Accuride, 1999 U.S. Dist. Lexis 14475 at 5 (E.D. Mich. 1999) (citing Rose v. Giamatti, 721 F.Supp. 906, 914 (S.D. Ohio 1989)).
[45] *Beesley*, 1999 U.S. Dist. Lexis 14475 at 5.; *See* Coyne v. American Tobacco. Co., 183 F.3d 488, 493 (6th Cir. 1999) ("If there is a colorable basis for predicting that a plaintiff may recover against non-diverse defendants, this Court must remand the action to state court.").
[46] Wiacek v. Ewuitable Life Assurance Society of the United States, 795 F. Supp. 223, 225 (E.D. Mich 1992) (citing Great No. Ry. Co. v. Alexander, 246 U.S. 276, 281 (1918)).

between the parties, federal jurisdiction might ultimately be destroyed if the state appellate court reverses the order of dismissal.[47] In contrast, a voluntary dismissal demonstrates a plaintiff's permanent intention not to pursue the case against the non-diverse defendant.[48] As a result, unlike a involuntary dismissal, a voluntary dismissal does not present a threat to continued diversity, and courts will generally permit removal.[49]

B. Exceptions

In essence, a successful fraudulent joinder claim functions as an exception to the exception; that is, if defendants can show that a non-diverse defendant was fraudulently joined, then removal is permitted, regardless of whether the dismissal was *voluntary* or *involuntary*.[50] The fraudulent joinder "exception to the exception" makes sense because, for purposes of establishing federal jurisdiction, a fraudulently joined defendant is completely disregarded.[51]

IV. WAIVER OF RIGHT TO REMOVE

A. Waiver by Defending

"A defendant who has a right to remove an action to federal court may waive that right by actions indicating that he has submitted to the jurisdiction of the state court."[52] Such a waiver, however, must be clear and unequivocal.[53] A defendant may indicate that he is submitting to the jurisdiction of the state court by making affirmative use of the processes of the

[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] Wiacek v. Ewuitable Life Assurance Society of the United States, 795 F. Supp. 223, 226 (E.D. Mich 1992) (citing Poulos v. Naas Foods, Inc., 959 F.2d 69, 73 (7th Cir. 1992)).
[51] *Id.*
[52] McKinnon v. Doctor's Associates, Inc., 769 F. Supp. 216, 217 (E.D. Mich. 1991) (citing Bolivar Sand Co., Inc. v. Allied Equipment, Inc., 631 F. Supp. 171 (W.D. Tenn. 1989)).
[53] Regis Associates v. Rank Hotels Ltd., 894 F.2d 193, 195 (6th Cir. 1990).

state court.[54] "The basis of this rule of law is that it is unfair to permit a party to experiment with his case in state court."[55]

B. Waiver by Consent

The test of whether or not a defendant has waived its right of removal is whether or not such defendant sought affirmative relief or took affirmative action resulting in an adjudication on the merits.[56] The mere filing or raising of defense is insufficient.[57] There must be further action on the part of the defendant, resulting in a decision on the merits of the defense to waive the right to remove.[58]

C. Waiver by Contract

Although the right of removal is a statutory right, a forum selection clause in the agreement between the disputing parties may waive that right.[59] "Case law makes it clear that such waiver must be clear and unequivocal."[60] For purposes of determining if a defendant has waived their right of removal, "[a] forum selection clause . . . is part of a contract, and principles of contract interpretation apply."[61] When interpreting a contract "the language being interpreted should be given its ordinary meaning.[62]

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[54] *McKinnon*, 769 F. Supp. 216 at 217 (citing Rose v. Giamatti, 721 F. Supp. 906, 922 (S.D. Ohio 1989)).
[55] *Id.*
[56] *McKinnon*, 769 F. Supp. at 220.
[57] *Id.*
[58] *Id.*
[59] Titan Finishes Corp. v. Spectrum Sales Group, 452 F. Supp. 2d 692, 694 (E.D. Mich. 2006) (citing Regis Assocs. v. Rank Hotels Ltd., 894 F.2d 193 (6th Cir. 1990)).
[60] *Titan Finishes Corp*., 452 F. Supp. 2d at 694 quoting *In Re* Delta America Re Insurance Co., v. National Distillers & Chemical Corporation, 900 F.2d 890 (6th Cir. 1990).
[61] *Id.*
[62] *Id.*

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I. POWER AND RIGHT TO REMOVE

A. The Parties

1. Defining "Parties in Interest"

A defendant is a "real party" for purposes of establishing diversity jurisdiction where, by substantive law, the defendant has the duty sought to be enforced or enjoined.[1] In contrast to "a real party in interest," a formal or nominal party is one who, in a genuine legal sense, has no interest in the result of the suit, or no actual interest or control over the subject matter of the litigation.[2] In order for a defendant to be a nominal party, or not a party in interest for removal purposes, it must have no real interest in the outcome of the case; it must be of no moment to defendant which side succeeds in the controversy.[3] The court must turn "to the realities of the record" to determine the real parties to a controversy.[4]

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[1] *Rose v. Giamatti*, 721 F. Supp. 906, 914 (S.D. Ohio 1989).
[2] *Id*. (citations omitted).
[3] *Barrientos v. UT-Battelle, LLC*, 284 F. Supp. 2d 908, 913 (S.D. Ohio 2003) (finding citizenship of Ohio entity must be considered in determining presence of diversity jurisdiction where plaintiff alleged entity was mere shell through which shareholders conducted business).
[4] *Rose*, 721 F. Supp. at 914 (focusing on "principal purpose of the suit" and concluding neither the Reds nor Major League Baseball was real party in interest because neither had right or duty to prevent Commissioner Giamatti from conducting hearings concerning whether Rose bet on baseball, which was the purpose of Rose's lawsuit).

The substantive law underlying a claim determines whether a party is a real party in interest, and the governing substantive law in diversity actions is state law.[5]

2. Presence of "Doe" Defendants

Ohio federal district courts adhere to 28 U.S.C. § 1441(a), which states that for purposes of removal under Chapter 28, the citizenship of defendants sued under fictitious names shall be disregarded.[6]

3. Diversity for Putative Class Actions

The Class Action Fairness Act ("CAFA"), enacted February 18, 2005, gives federal courts jurisdiction to hear class action lawsuits involving minimally diverse parties and more than five-million dollars in controversy. CAFA grants original jurisdiction to the federal courts in class actions in which "any member of the class of plaintiffs" possesses the requisite diversity with respect to "any defendant."[7]

The law prior to CAFA was that, in a federal class action, "the citizenship of the named class representatives must be [completely] diverse from that of the defendants."[8]

Furthermore, under 28 U.S.C. 1453(b), a class action may now be removed to federal court without regard to whether any defendant is a citizen of the state in which the action is brought, and any defendant can remove the action without the consent of the other defendants.[9]

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[5] *Smith v. Nelson*, 86 F. Supp. 2d 787, 788 (N.D. Ohio 2000) (*citing Certain Interested Underwriters v. Layne*, 26 F.3d 39 (6th Cir. 1994)).

[6] *See Stayrook v. Horizon Wireless Services, LLC*, Case No. 1:06cv2049, 2007 U.S. Dist. LEXIS 38718, at *7-8, (N.D. Ohio May 29, 2007); *In Re Ford Motor Co. Crown Victoria Police Interceptor Products Liab. Litig*., 2004 U.S. Dist. LEXIS 29971, at *45-46 (N.D. Ohio May 19, 2004); *Derungs v. Wal-Mart Stores, Inc.*, 162 F. Supp. 2d 861, 863 n.4 (S.D. Ohio 2001) (disregarding citizenship of unnamed defendants because, "[a]lthough it is extremely likely that the five John Doe Defendants are citizens of Ohio, given that they work in Dayton-area stores, they remain unidentified in the Plaintiffs' amended complaint") (*citing Alexander v. Electronic Data Systems Corp.*, 13 F.3d 940, 948 (6th Cir. 1994). *But see Staybrook*, 2007 U.S. Dist. LEXIS 38718, at *9 (stating it is unclear whether fictitious defendant may not be considered for purposes of diversity jurisdiction "when the complaint alleges specific information about the John Doe defendant, including his place of residence").

[7] *Ford Motor Credit Co. v. Jones*, Case No. 1:07 CV 728, 2007 U.S. Dist. LEXIS 55336, at *6 (N.D. Ohio 2007) (*citing* 28 U.S.C. § 1332(d)). *See also Pittman v. Chase Home Fin., LLC*, No. 1:05cv2470, 2007 U.S. Dist. LEXIS 53859, at *7 (N.D. Ohio 2007).

[8] *In re Welding Fume Prods. Liab. Litig.*, 245 F.R.D. 279, 288 n.39 (N.D. Ohio 2007) (citations omitted).

B. The Amount in Controversy

1. Establishing the Amount in Controversy

To remove a case to federal court based on diversity jurisdiction, the amount in controversy must exceed $75,000.[10] The amount in controversy includes compensatory damages; the value of declaratory, equitable, and injunctive relief;[11] and punitive damages.[12] Attorneys' fees may be counted for purposes of establishing the amount in controversy requirement only if such fees are expressly available under statute or contract with respect to the causes of action pleaded in the complaint.[13]

Plaintiffs with separate and distinct claims cannot aggregate their respective matters in dispute to establish federal jurisdiction. Plaintiffs can only combine their damage claims to meet the jurisdictional requirement when they share a common and undivided interest in them.[14]

If the plaintiff's prayer for damages specifically requests less than the federal amount-in-controversy requirement the case is generally not removable.[15] A plaintiff may disclaim any recovery amount over the jurisdictional amount in order to remain in state court.[16]

"When a complaint is filed initially in federal court, and a question arises about whether the amount in controversy requirement has been satisfied, the Court is required to accept that the amount claimed by a plaintiff is the amount actually in controversy 'unless it appears to a legal certainty that the claim is for less than the jurisdictional amount.'"[17]

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[9] *Ford Motor Credit*, 2007 U.S. Dist. LEXIS 55336, at *7.
[10] 28 U.S.C. § 1332(a).
[11] *In re Ford Motor Co. Crown Victoria Police Interceptor Prods. Liab. Litig.*, 2004 U.S. Dist. LEXIS 2991, at *51.
[12] *Everett v. Verizon Wireless, Inc*., 460 F.3d 818, 827 (6th Cir. 2006).
[13] *Midwest Motor Supply Co., Inc. v. Addis*, Case No. 2:05-cv-0733, 2006 U.S. Dist. LEXIS 4663, at * 12 (S.D. Ohio Jan. 23, 2006)(citations omitted).
[14] *Everett*, 460 F.3d at 823-24.
[15] *In re Ford Motor Co. Crown Victoria Police Interceptor Prods. Liab. Litig*., 2004 U.S. Dist. LEXIS 29971, at *49 (*quoting Gafford v. Gen'l Electric Co*., 997 F.2d 150, 157-58 (6th Cir. 1993)).
[16] *Id.*
[17] *Midwest Motor Supply Co, Inc. v. Addis*, 2006 U.S. Dist LEXIS 4663, at *5 (*quoting Rosen v. Chrysler Corp.*, 205 F.3d 918, 921 (6th Cir. 2000)).

2. Application When a Specific Dollar Amount is Not Pled

When the underlying complaint seeks an indeterminate amount of damages, the removing defendant has the burden of demonstrating, by a preponderance of the evidence, that the amount in controversy requirement has been met.[18]

Failure to adequately plead the amount in controversy requirement may be cured by the presence of clear allegations that the case involved a sum well in excess of the $75,000 minimum.[19] Examples of proper considerations and evidence presented to determine whether jurisdiction exists may include the plaintiff's motives,[20] similar lawsuits between other parties,[21] common sense,[22] party affidavits,[23] demand in a prior action based on the same events as the present action, [24] and pretrial testimony that plaintiff's claims would exceed amount in controversy requirement.[25]

3. Amount in Controversy Where Equitable Relief is Sought

In valuing injunctive relief for jurisdictional purposes, the U.S. District Court for the Southern District of Ohio focuses on the economic value of the rights which the plaintiff seeks to protect through injunctive relief rather than upon the economic cost to the defendant if an injunction were granted.[26] According to the Sixth Circuit, however, whether to determine the

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[18] *Brown v. Jackson Hewitt, Inc*., No. 1:06-cv-2632, 2007 U.S. Dist. LEXIS 13328, at *5 (N.D. Ohio 2007) (*citing Hayes v. Equitable Energy Resources Co*., 266 F.3d 560, 572 (6th Cir. 2001); *Gafford v. Gen'l Elec. Co.*, 997 F.2d 150, 158 (6th Cir. 1993)).
[19] *Richmond v. Populous Group, LLC*, No. 4:05 CV 01900, 2005 U.S. Dist. LEXIS 20934, at *4 (N.D. Ohio Sept. 23, 2005) (*citing Hayes v. Equitable Energy Resources Co*., 266 F.3d 569, 572 (6th Cir. 2001).
[20] *Brown v. Jackson Hewitt, Inc*., Case No.1:06-cv-2632, 2007 U.S. Dist. LEXIS 13328, at * 13 (citations omitted).
[21] *Id*.
[22] *Id*.
[23] *Richmond*, 2005 U.S. Dist. LEXIS 20934, at *4 (*citing United States v. A.D. Roe Co*., 186 F.3d 717, 722 n.4 (6th Cir. 1999)).
[24] *Richmond*, 2005 U.S. Dist. LEXIS 20934, at *4 (*citing Szalay v. Yellow Freight Sys*., 999 F. Supp. 972, 974 (N.D. Ohio 1996)).
[25] *Richmond*, 2005 U.S. Dist. LEXIS 20934, at *5 (*citing Gafford*, 997 F.2d at 160-61).
[26] *Midwest*, 2006 U.S. Dist. LEXIS 4663 at *12 (*citing Buckeye Recyclers v. Chep USA*, 228 F. Supp. 2d 818 (S.D. Ohio 2002)).

amount in controversy from the perspective of either party, or whether a court may consider only the plaintiff's viewpoint, is an open question.[27]

4. Defeating Removal by Amending Relief Sought

Like a post-removal stipulation reducing the amount in controversy below the jurisdictional limit, plaintiff's post-removal amendment to the complaint does not defeat diversity jurisdiction.[28]

C. Time of Existence of Grounds for Removal

1. Event Triggering Thirty-Day Period for Actions Initially Removable

A later-served defendant has 30 days from the date of service to remove a case to federal district court, with the consent of the remaining defendants.[29] A first-served defendant can consent to a later-served defendant's removal petition, despite having already failed in its own efforts to remove. Given the rule of unanimity, holding otherwise would vitiate the removal application of the later-served defendants and thereby nullify [the Sixth Circuit's] holding that later-served defendants are entitled to remove the case . . . ."[30]

2. Event Triggering Thirty-Day Period for Actions Not Initially Removable

In an unreported (and therefore not binding) decision, the Sixth Circuit held that § 1446(b) starts the 30-day period running from the date the defendant has solid and unambiguous information that the case is removable, even if that information is solely within the defendant's possession.[31] The court analyzed the structure of § 1446(b) and recognized that a defendant could not "serve" itself; nor could a defendant "receive" a pleading, summons, motion,

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[27] *Everett v. Verizon Wireless, Inc.*, No. 05-3557, 460 F.3d 818, at *29 (6th Cir. Aug. 28, 2006).
[28] *See Rogers v. Wal-Mart Stores, Inc*., 230 F.3d 868, 873 (6th Cir. 2000).
[29] *Callahan v. Callahan*, 247 F. Supp. 935, 941 (S.D. Ohio 2002); *Brierly v. Alusuisse Flexible Packaging, Inc.*, 184 F.3d 527, 533 (6th Cir. 1999).
[30] *Brierly*, 184 F. Supp.3d at 533.
[31] *Holston v. Carolina Freight Carriers Corp*., No. 90-1358, 1991 U.S. App. LEXIS 14129, at *7 (6th Cir. June 26, 1991).

order, or other paper from itself. Nevertheless, the court rejected that line of reasoning: "The fact that an 'other paper' received 'otherwise' than by service triggers the thirty-day period leaves open the possibility that such facts can come to the defendant by a myriad of means not squarely contemplated by the drafters of § 1446(b). Such means can obviously include papers discovered by the defendant during its trial preparation."[32]

In *Praisler v. Ryder Integrated Logistics, Inc.*, the U.S. District Court for the Northern District of Ohio noted that the Sixth Circuit has not taken an explicit position on whether a defendant's subjective knowledge can start the removal clock.[33] Nevertheless, the Sixth Circuit holds that "the removability of the action must be readily ascertainable from the face of the pleading.[34]

In *Praisler*, the defendant employer filed a second removal petition based on the co-defendant employee's testimony at deposition that he resided out-of-state. The court remanded, finding the defendant employer and counsel (which employer shared with its employee) were required to "intelligently ascertain" the citizenship of defendant's employee at the time the case was filed. Moreover, the first removal petition was itself a "pleading, motion, order or other paper" that started the removal clock, as defendants joining in a removal petition can be expected to ask each other their citizenship.

A plaintiff's responses to deposition questioning may constitute an "other paper" under Section 1446(b).[35]

A court decision in an unrelated case does not constitute a motion, order, or other paper for 28 U.S.C.S. §1446.[36] A defendant only "receives" an order or other paper if he or she is a

[32] *Holston*, 1991 U.S. App. LEXIS 14129, at 8-10 (holding defendant had unambiguous knowledge of facts leading to removal as of date on which it amended answer raising federal pre-emption defense filed by stipulation).
[33] *Praisler v. Ryder Integrated Logistics, Inc*., 417 F. Supp. 2d 917, 920-21 (N.D. Ohio 2006).
[34] *Id*. (*citing Tech Hills II Assoc. v. Phoenix Home Mut. Ins. Co*., 5 F.3d 963, 968 (6th Cir. 1993).
[35] *Peters v. Lincoln Elec. Co.*, 285 F.3d 456, 466 (6th Cir. 2002).

party to the given case. The one exception to that rules is if the two cases at issue involve the 1) same defendant, 2) similar facts, and 3) a court order for defendants to remove the other case.[37]

In *Ritchie v. Williams*, the Sixth Circuit held plaintiff's production of a Songwriter's Agreement triggered 30-day window for timely removal under § 1446(b)'s "other paper" provision where state law claims were preempted by federal Copyright Act and hence removable to federal court as presenting federal copyright issues.[38]

II. FRAUDULENT JOINDER

A. Test for Fraudulent Joinder

Ohio's district courts follow the Sixth Circuit test for fraudulent joinder: To prove fraudulent joinder, the removing party must "present sufficient evidence that a plaintiff could not have established a cause of action against non-diverse defendants under state law.[39] If there is a colorable basis for predicting a plaintiff may recover against the non-diverse defendants, the case must be remanded to state court.[40] An action is "colorable" if it is reasonable but speculative, that is, if there is a reasonable basis for predicting the state law might impose liability on the defendant under the facts alleged.[41]

In evaluating fraudulent joinder, the district court must resolve "all disputed questions of fact and ambiguities in the controlling . . . state law in favor of the non-removing party."[42] However, the district court may not find fraudulent joinder based on the court's view of the

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[36] *Burns v. Prudential Securities, Inc.*, 450 F. Supp. 2d 808, 813 (N.D. Ohio 2006) (citations omitted).
[37] *Id*. (*citing Young v. Chubb Group of Ins. Cos*., 295 F. Supp. 806, 808 (N.D. Ohio 2003) (noting courts within Sixth Circuit have been much more willing to consider defendant's subjective knowledge than courts in other jurisdictions, even on issues which require significant inquiry such as the jurisdictional damage threshold).
[38] *Ritchie v. Williams*, 395 F.3d 283, 287 at n.2 (6th Cir. 2005).
[39] *West v. Visteon Corp.*, 367 F. Supp. 2d 1160, 1162 (N.D. Ohio 2005); *Wiseman v. Universal Underwriters Co.*, 412 F. Supp. 2d 801, 802-803 (S.D. Ohio 2005) (*citing Coyne v. American Tobacco Co.*, 183 F.3d 488, 493 (6th Cir. 1994)).
[40] *Id*. *See also Benincasa v. Flight Systems Automotive Group LLC*, 242 F. Supp. 2d 529, 537 (N.D. Ohio 2002) (concluding plaintiff did not have colorable claims against non-diverse defendants).
[41] *Wiseman*, 412 F. Supp. 2d at 803. *See also Alexander v. Elec. Data Sys. Corp.*, 13 F.3d 940, 949 (6th Cir. 1994).
[42] *West*, 367 F. Supp. 2d at 1163, *Wiseman*, 412 F. Supp. at 803 *(citing Coyne*, 183 F.3d at 493).

merits of the claims or defenses.[43] As the district court in *Little v. Purdue Pharma, L.P.*, observed, the underlying inquiry into fraudulent joinder is similar to the inquiry into a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), but is even more deferential to the plaintiffs.[44] Given the deference in a fraudulent joinder inquiry, the *Little* Court held that a colorable claim existed if there was a basis for the claim in the laws of the state where the claim was brought.[45] The inquiry into whether facts of the case actually support the claim is not a jurisdictional issue, but is "more appropriately left for the court which ultimately takes control of the case."[46]

B. Evidence of Fraudulent Joinder

While the determination as to the propriety of removal is based upon the plaintiff's pleadings at the time of removal, the court may pierce the pleadings and consider "summary judgment-type" evidence such as affidavits and deposition testimony in determining whether the standard for fraudulent joinder has been met.[47] Ohio federal district courts have "wide discretion to allow affidavits, documents and even a limited evidentiary hearing to resolve disputed jurisdictional facts."[48]

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[43] *Wiseman*, 412 F. Supp. 2d at 803 (citations omitted).
[44] *See Little v. Purdue Pharma, L.P.*, 227 F. Supp. 2d 838, 845-46 (S.D. Ohio 2002) (*quoting Batoff v. State Farm Ins. Co.*, 977 F.2d 848, 852 (3d Cir. 1992), in stating that a 12(b)(6) inquiry is "more searching than permissible" under a fraudulent joinder evaluation).
[45] *Little*, 227 F. Supp. 2d at 847.
[46] *Id.*
[47] *Coyne v. The American Tobacco Co., Inc.*, No. 1:96 CV 2247, 1997 U.S. Dist. LEXIS 23758 (N.D. Ohio Nov. 3, 1997) (*citing Cavallini v. State Farm Mut. Ins. Co.*, 44 F.3d 256, 263 (9th Cir. 1995)). *See also Goodman v. Verizon Wireless Services, LLC*, No. 1:07 CV 2697, 2007 U.S. Dist. LEXIS 89568 (N.D. Ohio Dec. 5, 2007) (considering affidavits and construing all disputed facts in favor of plaintiff).
[48] *Nat'l Mgmt. Ass'n v. Transamerica Fin. Res., Inc.*, 197 F. Supp. 2d 1016, 1018 (S.D. Ohio 2002).

III. VOLUNTARY / INVOLUNTARY RULE

A. "Voluntary" Dismissal

The reason for the distinction between voluntary and involuntary dismissal was set forth in *Wiacek v. Equitable Life Assur. Soc. of U.S.*[49]:

> This voluntary/involuntary distinction is grounded in the observation that when a non-diverse party is eliminated from an action pursuant to court order (i.e., involuntarily), the order of dismissal may be the subject of appeal; consequently, although diversity may temporarily exist between the parties, federal jurisdiction might ultimately be destroyed if the state appellate court reverses the order of dismissal. In contrast, a voluntary dismissal demonstrates a plaintiff's permanent intention not to pursue the case against the non-diverse defendant. As a result, unlike an involuntary dismissal, a voluntary dismissal does not present a threat to continued diversity, and courts will generally permit removal.[50]

Ohio district courts have not provided a specific definition of "voluntary dismissal." Dismissal following settlement is clearly voluntary.[51]

B. Exceptions

Neither the Sixth Circuit nor the Ohio district courts explicitly recognize an exception to the rule.[52]

IV. WAIVER OF RIGHT TO REMOVE

A. Waiver by Defending

The law is clear that a defendant may, by making affirmative use of the processes of the state court, waive the right to remove the action to federal court.[53] The basis for that rule of law

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[49] *Wiacek v. Equitable Life Assur. Soc. of U.S.*, 795 F. Supp. 223, 225 (E.D.Mich. 1992).

[50] *Allen v. Independent Concrete Pipe Co.*, Case No. 3:04CV7053, 2004 U.S. Dist. LEXIS 3580, at *2 (N.D. Ohio Mar. 9, 2004). *See also Davis v. Customized Transportation, Inc.*, 854 F. Supp. 513, 517 (*citing Poulos v. Naas Foods, Inc.*, 959 F.2d 69, 72 (7th Cir. 1992) and holding case was improperly removed because it was dismissed by state court judge and not plaintiff)).

[51] *Allen*, 2004 U.S. Dist. LEXIS 3580, at *3.

[52] *But see Little v. Purdue Pharma, L.P.*, 227 F. Supp.2d 838, 846, n.8 (S.D. Ohio 2002) (noting "The irony of denying a motion to remand on the basis of fraudulent joinder is that it is not tantamount in itself to a motion to dismiss with respect to the non-diverse defendants. Thus, non-diverse defendants remain in the case even though the federal courts lack diversity jurisdiction over them . . . . The Fifth Circuit has taken note of the irony of a federal court assuming jurisdiction over an individual over which it has no jurisdiction, and subsequently dismissing the claim against him pursuant to Rule 12(b)(6), despite not having jurisdiction to do so.").

is that it is unfair to permit a defendant to experiment with his case in state court, and, upon adverse decision, remove the case for another try in federal court.[54] Any intent to waive the right to remove, however, must be evidenced by "clear and unequivocal" action.[55]

Generally, "actions which are preliminary and not conclusive in character and which do not actually submit the merits of a claim for a binding decision do not constitute a waiver of defendant's right to remove.[56] Simply put, a defendant's actions which maintain the status quo in the state court do not evidence a clear and unequivocal intent on the part of the defendant to remain in state court, and therefore do not waive defendant's right to remove.[57]

Waiver will occur if the defendant files a permissive pleading seeking affirmative relief or takes affirmative action resulting in an adjudication on the merits of an issue which could result in the dismissal of the action in whole or in part.[58] However, the mere *filing* in the state court of a pleading raising a defense which might be conclusive of the merits is insufficient for waiver. There must be further action on the part of the defendant resulting in a decision on the merits of the defense.[59]

In *Rose v. Giamatti*, the defendants did appear and contest Rose's entitlement to a temporary restraining order and, after the order was issued, sought appellate review of the issuance of that order.[60] That activity related to preservation of the *status quo* pending an adjudication of the merits of the underlying claims. The discovery that was conducted was taken

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[53] *Rose v. Giamatti*, 721 F. Supp. 906 (S.D. Ohio 1989) (citations omitted).
[54] *Id*. (*citing Bolivar Sand Co., Inc. v. Allied Equip., Inc.*, 631 F. Supp. 171, 172 (W.D. Tenn.1986)).
[55] *Rose*, 721 F. Supp. at 922 (*citing Bedell v. H.R.C. Ltd.*, 522 F. Supp. 732, 738 (E.D. Ky. 1981) (footnote omitted)).
[56] *Louis Trauth Dairy LLC v. The Risers Corp.*, No. C2-02-935, 2002 WL 31951268, at *1 (S.D. Ohio Dec. 10, 2002) (*citing Bedell*, 522 F. Supp. at 738).
[57] *Id*. (citations omitted).
[58] *Rose*, 721 F. Supp. at 923; *Trauth*, 2002 WL 31951268, at *2 (*citing Bedell*, 522 F. Supp. at 738) (holding that defendant's serving and filing answer and compulsory counterclaims does not display willingness to submit to jurisdiction of state court and therefore does not waive right to removal).
[59] *Rose*, 721 F. Supp. at 923.
[60] *Id.* at 922.

for purposes of the preliminary injunction hearing. There was no indication in the record of bad faith, or that any of the defendants ever made a clear and unequivocal statement that removal would not be sought. Defendants did not utilize any remedy available in state court for purposes unrelated to the preliminary relief sought by Rose, nor unduly delay filing the removal petition. The petition for removal was clearly timely. Under those circumstances, and giving deference to the principle that a court should be reluctant to imply a waiver, the court concluded that no waiver of the right of removal had occurred.[61]

B. Waiver by Consent

Ohio's federal district courts have not addressed this issue directly.

C. Waiver by Contract

A defendant's prerogative to remove a case may be waived through a valid forum selection clause.[62] The Sixth Circuit requires that a waiver of a defendant's right to remove an action to federal court be both clear and unequivocal.[63]

V. PRACTICE POINTERS

Where the complaint seeks an unspecified amount of damages, give careful attention to proving it is more likely than not that the amount-in-controversy is met. Do not place all your eggs in the "common sense" basket. Minimize speculation by presenting evidence of verdicts in factually analogous cases, offering evidence of attorney's fees, etc. For practical suggestions for

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[61] *Rose*, 721 F. Supp. at 923.
[62] *Regis Assoc. v. Rank Hotels, Ltd.*, 894 F.2d 193, 195 (6th Cir. 1990).
[63] *In re Delta America Re Ins. Co.*, 900 F.2d 890, 894 (6th Cir. 1990) (holding any claimed waiver of right of removal stemming from contractual language must be explicit and holding language agreeing to submission to jurisdiction of any court of competent jurisdiction within United States and application of law and procedures of such court did not waive jurisdiction); *Regis*, 894 F.2d at 195 (holding waiver of right of removal must be clear and unequivocal and holding agreement to submit to jurisdiction of Michigan courts and to have case determined under laws of Michigan did not preclude removal). *See also Power Marketing Direct, Inc. v. Pagnozzi*, Slip Copy, No. C2-05-766, 2006 WL 1321029, at *2 (S.D. Ohio May 12, 2006) (holding clause requiring that case be "filed in state court does not specify that any dispute be litigated to its conclusion and resolved by that court.").

proving estimated damages, see *Brown v. Jackson Hewitt*, Case No. 1:06-cv-2632, 2007 U.S. Dist. LEXIS 13328 (N.D. Ohio Feb. 27, 2007).

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I. POWER AND RIGHT TO REMOVE

A. The Parties

1. Defining "Parties in Interest

"Diversity jurisdiction in the district court requires complete diversity, i.e., none of the defendants can be citizens of the same state as any of the plaintiffs…In determining whether complete diversity exists, 'a federal court must disregard nominal or formal parties and rest jurisdiction only upon the citizenship of the real parties to the controversy…The real party in interest is the person who is entitled to enforce the right asserted under the governing substantive law… In contrast to a real party in interest,' a formal or nominal party 'is one who has no interest in the result of the suit and need not have been made a party thereto.'"[1]

2. Presence of "Doe" Defendants

The presence of unnamed or "Doe" defendants does not destroy diversity.[2]

3. Diversity for Putative Class Actions

Class actions in excess of $5,000,000 are governed by the Class Action Fairness Act, 28 U.S.C. § 1332(d), which creates an exception to the complete diversity rule, and permits

[1] Maiden v. N. Am. Stainless, L.P., No. 03-5740, 125 Fed. Appx. 1, 3 (6th Cir. Dec. 5, 2004) (citations omitted).
[2] Ford v. Evans Delivery, No. 05-2320, 2006 U.S. Dist. LEXIS 995, *3 n. 1 (W.D. Tenn. Jan. 4, 2006) ("Unless the court allows an amendment to the complaint to replace Doe with a real person, the allegations against Doe are surplusage and do not affect diversity.").

plaintiffs to aggregate claims to meet the amount-in-controversy requirement.[3] For class actions not governed by § 1332(d), plaintiffs may not aggregate their claims to meet the amount in controversy requirement unless "there is not only a common fund from which the plaintiffs seek relief, but…the plaintiffs also have a joint interest in that fund, such that if plaintiffs' rights are not affected by the rights of co-plaintiffs then there can be no aggregation. In other words, the obligation to the plaintiffs must be a joint one."[4] "A common interest in a litigation recovery thus represents a necessary, but by itself insufficient, ground to qualify claims for aggregation."[5]

B. The Amount in Controversy

1. Establishing the Amount in Controversy

To satisfy the amount-in-controversy requirement, a plaintiff must show that the matter in controversy exceeds $75,000.[6] For purposes of the amount-in-controversy requirement in Tennessee federal courts, the "the sum claimed by the plaintiff[s] controls."[7]

Similarly, "[i]t is generally agreed in this circuit, that the amount in controversy should be determined 'from the perspective of the plaintiff, with a focus on the economic value of the rights he seeks to protect.'"[8] Thus, though "a disclaimer in a complaint regarding the amount of recoverable damages does not preclude a defendant from removing the matter to federal court upon a demonstration that damages are 'more likely than not' to 'meet the amount in controversy

[3] *Id.*
[4] Everett v. Verizon Wireless, Inc., 460 F.3d 818, 824 (6th Cir. 2006) (citing Eagle Star Ins. Co. v. Maltes, 313 F.2d 778, 781 (5th Cir. 1963)).
[5] *Everett*, 460 F.3d at 824.
[6] 28 U.S.C. § 1332 (a).
[7] *Everett*, 460 F.3d at 822.
[8] Williamson v. Aetna Life Ins. Co., 481 F.3d 369, 376-377 (6th Cir. 2007) (citing Woodmen of the World/Omaha v. Scarbro, 129 Fed. Appx. 194, 2005 WL 873369, *2 (6th Cir. 2005)).

requirement'…it can be sufficient absent adequate proof from defendant that potential damages actually exceed the jurisdictional threshold."[9]

2. Application When a Specific Dollar Amount is Not Pled

"[W]here plaintiffs seek 'to recover some unspecified amount that is not self-evidently greater or less than the federal amount-in-controversy requirement,' the defendant satisfies its burden when it proves that the amount in controversy 'more likely than not' exceeds $75,000."[10]

Courts do not require defendants to "research, state and prove the plaintiff's claim for damages" against themselves.[11] However, courts do "require some quantum of evidence, over and above the unsupported and perfunctory prayers for relief contained in the complaint."[12]

Specifically, courts will consider statutory attorney's fees as part of the amount in controversy.[13] Punitive damages must be considered as well.[14]

3. Amount in Controversy Where Equitable Relief is Sought

If equitable relief is sought, "the costs of complying with an injunction, whether sought by one plaintiff or many plaintiffs, may establish the amount in controversy."[15] However, the law on this issue is not thoroughly developed, and the Sixth Circuit has observed that this presents a "jurisdictional morass," as it is unclear whether the "costs of compliance" may be determined from the viewpoint of either party, or whether a court may only consider the plaintiff's viewpoint.[16] In *Everett*, the Sixth Circuit found that it need not resolve the question

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[9] Smith v. Nationwide Prop. & Cas. Ins. Co., No. 07-5956, 2007 U.S. App. LEXIS 22974, *15 (6th Cir. Oct. 1, 2007).
[10] *Id.* (citing Gafford v. Gen. Elec. Co., 997 F.2d 150, 155 (6th Cir. 1993)).
[11] *Gafford*, 997 F.2d at 159.
[12] Brown v. Deutsche Bank Nat'l Trust Co., 2006 U.S. Dist. LEXIS 23967, *6 (E.D. Tenn. 2006) (emphasis in original).
[13] Walker v. Metal Mgmt., 2006 U.S. Dist. LEXIS 4097, *7 (W.D. Tenn. 2006).
[14] *Id.* at *6.
[15] *Everett*, 460 F.3d 818, 829 (6th Cir. 2006).
[16] *Id.*

because the defendant had not established on the record any estimate of the costs of compliance.[17]

4. Defeating Removal by Amending Relief Sought

No, a plaintiff may not defeat federal jurisdiction by a post-removal amendment or stipulation. "In order for a defendant to remove a case to federal court based upon diversity jurisdiction, there must be complete diversity of citizenship both at the time that the case is commenced and at the time that the notice of removal is filed."[18] In assessing the amount in controversy, "courts view the claims from the vantage point of the time of removal. Claims present when a suit is removed but subsequently dismissed from the case thus enter into the amount-in-controversy calculation."[19] Thus, even "a post-removal stipulation reducing the amount in controversy to below the jurisdictional limit does not require remand to state court."[20]

C. Time of Existence of Grounds for Removal

1. Event Triggering Thirty-Day Period for Actions Initially Removable

The defendant's 30-day time limit to file a notice of removal under § 1446 is triggered by simultaneous service of the summons and complaint, or the defendant's receipt of the complaint 'through service or otherwise' after and apart from the service of summons, but not by the defendant's mere receipt of the complaint unattended by formal service of process.[21] Alternatively, the 30-day limit will run thirty days after the service of summons upon the defendant if the initial pleading has then been filed in court and is not required to be served on

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[17] *Id.*
[18] Jerome-Duncan, Inc. v. Auto-By-Tel, L.L.C., 176 F.3d 904, 907 (6th Cir. 1999) (citing Easley v. Pettibone Mich. Corp., 990 F.2d 905, 908 (6th Cir. 1993)).
[19] *Everett*, 460 F.3d at 822.
[20] Hahn v. Auto-Owners Ins. Group, 2006 U.S. Dist. LEXIS 70299, *7 (E.D. Tenn. 2006) (citing Rogers v. Wal-Mart Stores, Inc., 230 F.3d 868, 872 (6th Cir. 2000)).
[21] Murphy Bros. v. Michetti Pipe Stringing, 526 U.S. 344, 349 (U.S. 1999); Arthur v. Litton Loan Servicing LP, 249 F. Supp. 2d 924, 928 (E.D. Tenn. 2002).

the defendant.[22] Without service, actual notice by the defendant is insufficient to trigger the 30-day time limit.[23]

It should be noted that prior to the Supreme Court's decision in Murphy Brothers, the Sixth Circuit followed the "receipt rule," which provided that "the time for filing a notice of removal pursuant to §1446(b) commenced to run when the defendant actually received a copy of the initial pleading which on its face set forth a removable claim, even though the plaintiff had not effected service of process."[24] The receipt rule was abrogated by the United States Supreme Court in the 1999 Murphy Brothers decision.[25]

2. Event Triggering Thirty-Day Period for Actions Not Initially Removable

For purposes of § 1446(b), a plaintiff's answers to depositions may constitute "other paper."[26] More generally, "the intent of § 1446(b) is to 'make sure that a defendant has an opportunity to assert the congressionally bestowed right to remove upon being given notice in the course of the case that the right exists.'"[27]

In an unpublished decision, the Sixth Circuit has stated that a defendant may "receive notice" from virtually any other source, including papers in its own possession at the time the suit was filed.[28] The thirty-day requirement is triggered whenever the defendant has actual notice of unambiguous facts indicating that the case is removable.[29] However, the Sixth Circuit

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[22] Brierly v. Alusuisse Flexible Packaging, Inc., No. 97-6190, 184 F.3d 527, 532 (6th Cir. June 10, 1999).
[23] *Arthur*, 249 F. Supp. 2d at 927.
[24] *Id.* at 928.
[25] *See* Loftis v. UPS, 342 F.3d 509, 516 (6th Cir. 2003) (holding that defendants must file a petition to remove "within thirty days of receipt of (1) a summons when the initial pleading demonstrates that the case is one that may be removed, or (2) other paper in the case from which it can be ascertained that a previously unremovable case has become removable") (citing *Murphy Bros.*, 526 U.S. at 354)).
[26] Peters v. Lincoln Elec. Co., 285 F.3d 456, 466 (6th Cir. 2002).
[27] *Id.* (citing Huffman v. Saul Holdings Ltd. P'ship, 194 F.3d 1072, 1078 (10th Cir. 1999)).
[28] Holston v. Carolina Freight Carriers Corp., No. 90-1358, 1991 U.S. App. LEXIS 14129, *9 -*10 (6th Cir. June 26, 1991).
[29] *Id.* at *15.

recognized that its reading of Section 1446(b) is against the majority of other district court authority.

II. FRAUDULENT JOINDER

A. Test for Fraudulent Joinder

The Sixth Circuit has stated that fraudulent joinder applies in three situations: "(1) when there is no colorable basis for a claim against the non-diverse defendant; (2) when a plaintiff engages in outright fraud in pleading jurisdictional allegations; and (3) when the plaintiff joins a defendant who has no joint, several, or alternative liability with a diverse defendant (and there is no nexus between the claims against the diverse and non-diverse defendant)."[30] Actual intent is irrelevant to fraudulent joinder.[31]

Several principles guide the courts' decisions in this area. First, "any disputed questions or ambiguities in the controlling state law should be resolved in favor of the nonremoving party."[32] Similarly, all doubts as to the propriety of removal are resolved in favor of remand.[33]

III. VOLUNTARY / INVOLUNTARY RULE

A. "Voluntary" Dismissal

There is little case law analyzing the voluntary/involuntary rule in the context of removal in Tennessee federal court opinions. However, the Western District of Tennessee has noted, "it does appear that the clear weight of authority is to the effect that removal is not appropriate

[30] Cox v. Old Dominion Freight Line, Inc., No. 3:06-CV-494, 2007 U.S. Dist. LEXIS 53561, *7 (E.D. Tenn. July 24, 2007) (citing Jerome-Duncan, Inc. v. Auto-By-Tel, L.L.C., 176 F.3d 904 (6th Cir. 1999).
[31] *Jerome-Duncan, Inc.*, 176 F.3d at 907.
[32] Saltire Industrial, Inc. v. Waller, Lansden, Dortch & Davis, PLLC, 491 F.3d 522, 530 (6th Cir. 2007) (citing Alexander v. EDS Corp., 13 F.3d 940 (6th Cir. 1994)).
[33] Bodor v. Greentree Servicing, No. 3:06-0723, 2006 U.S. Dist. LEXIS 64748, *3 (M.D. Tenn. 2006) (citing Coyne ex rel. Ohio v. American Tobacco Co., 183 F.3d 488, 493 (6th Cir. 1999)).

where the resident defendant was involuntarily dismissed, except where a party is merely added in order to defeat federal jurisdiction."[34]

District courts sitting in other states comprising the Sixth Circuit have explained the rule as follows:

> This voluntary/involuntary distinction is grounded in the observation that when a non-diverse party is eliminated from an action pursuant to court order (i.e., involuntarily), the order of dismissal may be the subject of appeal; consequently, although diversity may temporarily exist between the parties, federal jurisdiction might ultimately be destroyed if the state appellate court reverses the order of dismissal. In contrast, a voluntary dismissal demonstrates a plaintiff's permanent intention not to pursue the case against the non-diverse defendant. As a result, unlike an involuntary dismissal, a voluntary dismissal does not present a threat to continued diversity, and courts will generally permit removal.[35]

Accordingly, a dismissal pursuant to a motion for summary judgment is involuntary.[36] Conversely, "[d]ismissal following settlement is clearly voluntary, rather than involuntary."[37]

B. Exceptions

There is an exception to the voluntary/involuntary rule for fraudulent joinder: "A federal court may retain removal jurisdiction if a resident party was fraudulently joined, such that an unnecessary party was added merely to avoid federal jurisdiction."[38]

IV. WAIVER OF RIGHT TO REMOVE

A. Waiver by Defending

A defendant does not waive its right to remove simply by preserving the status quo in state court. "The mere filing of any answer or plea or any other defense before it is due under the law or rule of the state court is not inconsistent with the subsequent removal of the case. The

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[34] Ennis v. Queen Ins. Co., 364 F. Supp. 964 (W.D. Tenn. 1973).
[35] Allen v. Indep. Concrete Pipe Co., No. 3:04CV7053, 2004 U.S. Dist. LEXIS 3580, *2 (N.D. Ohio 2004) (citing Wiacek v. Equitable Life Assur. Soc. of U.S., 795 F. Supp. 223, 225 (E.D. Mich. 1992)).
[36] *Id.*
[37] Allen v. Indep. Concrete Pipe Co., 2004 U.S. Dist. LEXIS 3580, *3 (N.D. Ohio Mar. 9, 2004).
[38] Matthews v. Kindred Healthcare, Inc., No. 05-1091-T-An, 2005 U.S. Dist. LEXIS 38295, *5 (W.D. Tenn. Dec. 7, 2005) (citing Ennis v. Queen Ins. Co., 364 F. Supp. 964, 966 (W.D. Tenn. 1973)).

premature filing of a defense is in no sense a trial or hearing, and is not conduct establishing a waiver of the right to remove. The statute does not require the petition to be filed before any defense is filed, but only before the time when the first defense is required to be filed."[39]

Nonetheless, defendants may lose their removal rights by taking actions which evince a "clear and unequivocal" intent to waive their rights.[40] "[A]ffirmative defensive actions, such as filing of cross-claims or permissive counterclaims, have been found to waive a defendant's right to remove."[41] "Thus, if a potentially dispositive motion, such as a motion to dismiss, is made and argued by the defendant, the state court's adverse decision cannot be 'appealed' to [federal court] by way of removal."[42] The primary focus is on whether the defendant intended to have the case heard on the merits in state court.[43]

B. Waiver by Consent

As of the date of submission of this summary, there does not appear to be Sixth Circuit or Tennessee district court case law directly addressing this specific question. A defendant confronted with this situation could argue that the court should follow the same "clear and unequivocal" set out in *Regis Associates*, discussed *supra*. In that case, the court opined that "The only evidence that [defendant] waived the right to removal here is that it did not explicitly set forth the right of removal in the forum selection clause. We find this to be of no evidentiary significance under the facts of this case. The right of removal is statutory and, generally, it is the

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[39] Atlanta, K. & N. R. Co. v. Southern R. Co., 131 F. 657, 661 (6th Cir. 1904); *see also* Bolivar Sand Co. v. Allied Equipment, Inc., 631 F. Supp. 171, 173 (W.D. Tenn. 1986) ("In determining what acts constitute a 'clear and unequivocal' intent to waive a right to remove, courts have generally found that preliminary matters, such as filing an answer, will not suffice.").

[40] Whitten v. Michelin Ams. Research & Dev. Corp., No. 05-2761, 2006 U.S. Dist. LEXIS 37984, *9-*10 (W.D. Tenn. June 8, 2006) (citing Regis Associates v. Rank Hotels Ltd., 894 F.2d 193, 195 (6th Cir. 1990)).

[41] Bolivar Sand Co. v. Allied Equipment, Inc., 631 F. Supp. 171, 173 (W.D. Tenn. 1986).

[42] *Id.*

[43] *See Whitten*, 2006 U.S. Dist. LEXIS 37984, at *9-*10 (W.D. Tenn. June 8, 2006) (citing Queen v. Dobson Power Line Const. Co., 414 F. Supp. 676, 678 (E.D. Ky. 2006)).

waiver of a statutory right that must be set forth, not the intent to rely on the statute."[44] Therefore, it could be argued that a consent to be sued in state court, without more, is not a clear and unequivocal waiver of the statutory right to remove.

C. Waiver by Contract

The standard for contractual waivers of removal is the same "clear and unequivocal" standard expressed in Regis Associates.[45]

V. PRACTICE POINTERS

When calculating the period for removal, one should count from the date the complaint and summons are served upon the Secretary of State, if applicable, rather than the date that the Secretary of State sends or delivers the service materials to the registered agent for service of process. This date may be different from the service date reported by the state court clerk.

Courts in the Sixth Circuit follow the rule of unanimity, meaning that all defendants served or otherwise properly joined in the action must either join in the removal, or file a written consent to the removal. When there are multiple defendants, a best practice is for the removing defendant to obtain a written consent to removal from each of the other defendants to be filed contemporaneously with the notice of removal in federal court.

In recent years, some plaintiffs have attempted to defeat diversity in cases against pharmaceutical companies by naming as co-defendants sales representatives who reside in the same state as plaintiff. We have successfully removed such cases to district courts sitting in Tennessee by asserting that there was not a valid cause of action against those sales

[44] *Regis Associates*, 894 F.2d at 193.

[45] *Id.* at 195 ("Although the right to remove can be waived, the case law makes it clear that such waiver must be clear and unequivocal…The right of removal is statutory and, generally, it is the waiver of a statutory right that must be set forth, not the intent to rely on the statute.").

representatives and, thus, that they were fraudulently joined. On motion to remand, this position has prevailed and the actions remained in federal court.

7TH CIRCUIT

ILLINOIS

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This chapter addresses decisions by federal courts in Illinois regarding a defendant's right to remove an action from state court.

I. POWER AND RIGHT TO REMOVE

A. The Parties

1. Defining "Parties in Interest"

Title 28 U.S.C. § 1441 authorizes the removal of civil actions from state court to federal court when the state-court action is one that could have been brought, originally, in federal court. When a federal court's jurisdiction is based on diversity of citizenship, removal is permissible "only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which [the] action [was] brought."[1] A party in interest is, at its core, someone with an actual stake in the subject matter of the litigation. As one court explained:

> "[a] real party in interest is the person who, under governing substantive law, possesses the right sought to be enforced. Conversely, the person whom a right is sought to be enforced against, i.e., the person who is to be enjoined, is also a real party in interest."[2]

In contrast, a nominal party is simply a stakeholder in a lawsuit. As the District Court for the Southern District of Illinois explained, "[a] ... nominal defendant ... is a person who can be joined to aid the recovery of relief without an assertion of subject matter jurisdiction only because he

[1] 28 U.S.C. § 1441(b).
[2] International Test and Balance, Inc. v. Associated Air and Balance Council, 1998 WL 957332, at *3 (N.D. Ill. Dec. 23, 1998) (internal citations omitted).

has no ownership interest in the property which is the subject of litigation."[3] The addition of a nominal party does not affect diversity jurisdiction.[4]

2. Presence of "Doe" Defendants

Just as the addition of a nominal party will not defeat jurisdiction based on diversity, federal courts in Illinois have similarly found that "naming a John Doe defendant will not defeat the named defendants' right to remove a diversity case if their citizenship is diverse from that of the plaintiffs."[5] Indeed, the plain language of the removal statute reads: "[f]or purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded."[6]

3. Diversity for Putative Class Actions

Establishing that the parties are diverse in class actions involves a somewhat different analysis. Under the Class Action Fairness Act ("CAFA"), federal courts have diversity jurisdiction over class actions with one hundred or more class members, in which any member of the class is a citizen of a state different from that of any defendant, or any class member or any defendant is a foreign state or a citizen or subject of a foreign state. Once this "minimal diversity" standard is met, a federal court has jurisdiction if, after aggregating class members' claims, more than $5 million, exclusive of interest and costs, is in controversy.[7] Class actions filed in state court that satisfy the jurisdictional prerequisites of CAFA are subject to removal to federal court.[8]

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[3] Yount v. Shashek, 472 F. Supp. 2d 1055, 1061 (S.D. Ill. 2006) (quoting SEC v. Cherif, 933 F.2d 403, 414 (7th Cir. 1991)).
[4] Matchett v. Wold, 818 F.2d 574, 576 (7th Cir. 1987).
[5] Pace v. Gateway, 2007 WL 3037130, at *2 n.3 (S.D. Ill. Oct. 17, 2007); *see also* Howell by Goerdt v. Tribune Entm't Co., 106 F.3d 215, 218 (7th Cir. 1997) (citing 28 U.S.C. § 1441(a)).
[6] 28 U.S.C. § 1441(a). *See also* International Test and Balance, Inc. v. Associated Air and Balance Council, 1998 WL 957332, *1 (N.D. Ill. Dec. 23, 1998).
[7] *See* 28 U.S.C. § 1332(d)(5)(B), (d)(2), (d)(6).
[8] *See* 28 U.S.C. § 1453(b), (c).

CAFA does include certain exceptions that allow courts to remand actions even if these minimal diversity criteria are satisfied. Under the "local controversy" exception, a district court must decline to exercise jurisdiction over a class action if the plaintiff proves that: "(1) greater than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of the state in which the action was originally filed; (2) at least one defendant is a defendant from whom significant relief is sought, whose alleged conduct forms a significant basis for the claims asserted, and who is a citizen of the state in which the action was originally filed; (3) the principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in the state in which the action was originally filed; and (4) no other class action has been filed against any of the defendants asserting the same or similar factual allegations during the three-year period preceding the filing of the class action."[9] Similarly, the home-state exception to CAFA provides that a district court must decline jurisdiction where "[t]wo-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed."[10] Because these exceptions presuppose that jurisdiction exists, it is plaintiff's burden to show that all elements of the exception are met when requesting remand. So, for example, in *Gerstenecker v. Terminix International, Inc*., plaintiffs defined the class as all persons who owned real property "located in the State of Illinois" that had purchased pest extermination services from the defendants, and argued that "this class definition requires that its members reside in Illinois."[11] The court held that plaintiffs failed to meet their burden that a CAFA exception applied and denied the remand motion. The court found that plaintiffs' assumption that "because the real property at issue is

[9] Roche v. Country Mut. Ins. Co., 2007 WL 2003092, at *6 n.9 (S.D. Ill. July 6, 2007) (citations omitted).
[10] *Id*.
[11] 2007 WL 2746847, at *2 (S.D. Ill. Sept. 19, 2007).

located in Illinois, two-thirds of the members of the proposed class in the aggregate are citizens of Illinois," was insufficient and would require "a leap of faith this Court cannot make."[12]

Class actions that were commenced prior to the enactment of the Class Action Fairness Act on February 18, 2005, must meet the pre-CAFA requirements for removal. In those cases, the action is only removable in diversity if there is complete diversity of citizenship between the class representatives and the defendants, and at least one class representative has a claim that is worth more than $75,000, exclusive of interest and costs.[13]

B. The Amount in Controversy

1. Establishing the Amount in Controversy

The plain language of the statute governing diversity jurisdiction states that the amount in controversy must exceed $75,000, exclusive of interest and costs.[14] The amount in controversy is measured "by what the plaintiff is claiming (and thus the amount in controversy between the parties), not whether plaintiff is likely to win or be awarded everything he seeks."[15] The expected first step for federal courts to determine whether the amount in controversy is satisfied is to examine the amount alleged in the ad damnum clause of the complaint. But Illinois pleading requirements in cases involving allegations of personal injuries create particular problems for defendants attempting to establish diversity jurisdiction. Under Illinois law, plaintiffs are forbidden from pleading damages in a personal injury suit "except to the minimum extent necessary to comply with the circuit rules of assignment where the claim is filed . . ."[16] Thus in most product liability cases involving personal injuries, the initial complaint will only

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[12] *Id.*
[13] Buller Trucking Co. v. Owner Operator Independent Driver Risk Retention Group, Inc., 461 F. Supp. 2d 768, 779 (S.D. Ill. 2006).
[14] 28 U.S.C. §1332(a).
[15] Brill v. Countrywide Home Loans, Inc. 427 F.3d 446, 449 (7th Cir. 2005).
[16] 735 Ill. Comp. Stat. §75/2-604.

seek an undefined amount in excess of $50,000. Illinois law also technically bars plaintiffs from requesting punitive damages "in all actions on account of bodily injury or physical damage to property, based on negligence, or product liability based on strict tort liability,"[17] although this prohibition is often ignored. Because of these particular pleading restrictions, it is rare that a defendant seeking to remove a case involving personal injuries from an Illinois state court will be able to refer only to the ad damnum clause of the complaint to prove that the amount in controversy requirement is satisfied.[18]

2. Application When a Specific Dollar Amount is Not Pled

When a specific dollar number is not plead, a defendant can still seek to remove the case if it has a plausible, good-faith estimate that the stakes meet the $75,000 threshold, and the estimate is supported by a preponderance of the evidence.[19] In *Meridian Sec. Ins. Co. v. Sadowski*,[20] the Seventh Circuit described various ways that defendants seeking to remove could garner evidence to support jurisdiction, including "contention interrogatories or admissions in state court; by calculation from the complaint's allegations; by reference to the plaintiff's informal estimates or settlement demands; or by introducing evidence in the form of affidavits…."[21] Defendants should not, however, automatically defer filing a removal petition simply because the complaint lacks an ad damnum clause over $75,000. Courts have held that the defendant is responsible for ascertaining from "a reasonable and commonsense reading" of the complaint whether the action is removable and cannot wait until it obtains additional

[17] 735 Ill. Comp. Stat. §75/2-604.1.
[18] When punitive damages are cited to satisfy the amount in controversy, the court must first determine whether punitive damages are recoverable as a matter of state law. Del Vecchio v. Conseco, Inc., 230 F.3d 974, 978 (7th Cir. 2000); *see also* Anthony v. Security Pacific Fin. Serv., Inc., 75 F.3d 311, 315 (7th Cir. 1996) (when punitive damages make up bulk of jurisdictional amount, courts scrutinize claims closely).
[19] *See, e.g.*, Rubel v. Pfizer, Inc., 361 F.3d 1016, 1020 (7th Cir. 2004); Reason v. Wal-Mart Stores, Inc., 2008 WL 410227, at *1 (C.D. Ill. Feb. 12, 2008).
[20] 441 F.3d 536 (7th Cir. 2006).
[21] *Id.* at 541-42.

evidence that the amount in controversy is above the jurisdictional threshold.[22] For example, in *McCoy v. General Motors Corp*., the court denied removal, holding that the defendant was put on notice that plaintiffs would seek more than $75,000 where the complaint alleged that plaintiffs, two of whom were minors, suffered "severe and permanent injuries, including paralysis, and sought damages for lost income."[23]

3. Amount in Controversy Where Equitable Relief is Sought

Another way to prove that the jurisdictional amount is satisfied is to look to the cost to the defendant in complying with any requested injunctive or equitable relief. The Seventh Circuit has adopted the "either viewpoint" rule, which provides that "the jurisdictional amount should be assessed looking at either the benefit to the plaintiff or the cost to the defendant of the requested relief."[24] Defendants seeking to rely on the costs associated with complying with an injunction as grounds to satisfy the amount in controversy requirement need to remember, however, that they must offer competent proof, not unsupported allegations or estimates, to prove that their compliance costs would exceed $75,000.[25]

4. Defeating Removal by Amending Relief Sought

Once the defendant has established the requisite amount in controversy, a plaintiff can defeat jurisdiction only if "it appears to a legal certainty that the claim is really for less than the jurisdictional amount."[26] Plaintiffs cannot accomplish this, however, by a post-removal attempt to stipulate to damages beneath the jurisdictional requirement. In *Chase v. Shop 'N Save Warehouse Foods, Inc*., the Seventh Circuit affirmed that jurisdiction was proper even though

[22] McCoy v. Gen. Motors Corp., 226 F.Supp.2d 939, 942 (N.D. Ill. 2002).
[23] *Id.*
[24] Uhl v. Thoroughbred Tech. & Telecomms., Inc., 309 F.3d 978, 983 (7th Cir. 2002); Tropp v. Western-Southern Life Ins. Co., 381 F.3d 591, 595 (7th Cir. 2004).
[25] *See, e.g., In re* General Motors Corp. Dex-Cool Products Liability Litigation, 2006 WL 644793, at *3 (S.D. Ill. March 9, 2006) (finding defendants "unsupported, conclusory allegations" that it would cost "millions of dollars" to comply with a declaratory verdict insufficient to establish subject matter jurisdiction).
[26] Oshana v. Coca-Cola Co., 472 F.3d 506, 510-11 (7th Cir. 2007).

the plaintiff had, one month after removal, stipulated that she would not seek damages in excess of the jurisdictional amount. The court held that plaintiff's post-removal stipulation was a "prohibited way to manipulate the process to void the removal."[27] The *Chase* court was particularly unimpressed by the stipulation in light of the long list of damages in the complaint for, among other things, future medical cost, pain and suffering, and impairment of future earning capacity.[28]

C. Time of Existence of Grounds for Removal

1. Event Triggering Thirty-Day Period for Actions Initially Removable

The removal statute provides that a defendant must file its notice of removal within 30 days after it has received service of the summons and complaint, or, if not clear from the face of the complaint whether the prerequisites for removal exist, within 30 days after the defendant has received any "other paper" from which it becomes ascertainable that the case is removable.[29] For the complaint itself to trigger the 30 day removal clock, "receipt" ordinarily means "service," and therefore a plaintiff's informal sharing of the complaint with the defendant through courtesy copies or otherwise is generally insufficient.[30]

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[27] *Chase*, 110 F.3d 424, 429-30 (7th Cir. 1997) (internal citations omitted). *See also* Gould v. Artisoft, Inc., 1 F.3d 544, 547 (7th Cir. 1993) (in determining the existence of federal subject matter jurisdiction in a case removed from state court, "[w]e look to the facts that existed at the time of removal to determine our jurisdiction, for a plaintiff ... may not manipulate the process ... to defeat federal jurisdiction and force a remand once the case has been properly removed."); Shaw v. Dow Brands, Inc., 994 F.2d 364, 367 (7th Cir. 1993) ("[J]urisdiction depends on the situation at the time of removal, and ... once a case is successfully removed a plaintiff cannot do anything to defeat federal jurisdiction and force a remand.") (citations omitted).

[28] *Id*. at 429.

[29] 28 U.S.C. §1446(b).

[30] Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc., 526 U.S. 344 (1999).

2. Event Triggering Thirty-Day Period for Actions Not Initially Removable

Because Illinois law prevents plaintiffs in personal injury cases from expressly pleading the jurisdictional amount for diversity jurisdictions, defendants seeking to remove cases in the state often are forced to rely on the "other paper" provision of the removal statute. The Northern District of Illinois attempted to simplify this process by creating (now defunct) Local Rule 81.2. This rule established a procedure for defendants to follow when the complaint lacked clear information regarding the amount in controversy. Defendants were required to include in their notice of removal: (1) a good faith statement that the amount in controversy exceeded $75,000, and (2) a response from plaintiff to an interrogatory or request to admit that either the damages met the jurisdictional threshold or that plaintiff would not disclaim damages over the jurisdictional amount. The Northern District withdrew the rule on April 25, 2005, finding that it imposed "burdens on the manner in which lawyers practice in state courts without significant benefit and without clear authority to do so."[31] The committee did make clear, however, that defendants seeking to prove the jurisdictional amount for removal are still allowed to use traditional discovery mechanisms, but are not required to do so.[32]

There are no clear parameters for determining which documents may constitute "other paper" that can trigger the 30-day removal period. In *Hernandez v. Schering Corp.*,[33] the court, citing cases from other jurisdictions, rejected the idea that medical records could constitute "other paper" to trigger the removal statue. The court reasoned that:

[31] Northern District of Illinois Local Rules Committee Comments.
[32] *Id.*
[33] 2005 WL 1126911 (N.D. Ill. May 5, 2005).

> Courts construe the "other paper" requirement to include "papers that are part and parcel of the State Court proceedings having their origin and existence by virtue of the State Court process," and include such "papers" as a "discovery deposition," "interrogatory answers," or any "official papers," filed with the "action sub judice," or given under "oath" in connection with the action.[34]

While helpful, this definition still leaves room for debate regarding what is "part and parcel" of the state court proceeding, and defendants generally are better served to broadly construe the "other paper" provision. The Northern District of Illinois decision *Morrow v. DaimlerChrysler Corporation*[35] illustrates the risk of taking too narrow a view. In that case, plaintiff sued a car manufacturer and seat manufacturer after sustaining injuries in a car accident. The complaint, per Illinois pleading requirements, did not specify damages in excess of $75,000. Plaintiff's counsel, however, sent a settlement demand letter to the defendants seeking over $2.5 million to resolve the suit. Instead of filing a notice of removal at that point, the defendants waited seven months -- until they had plaintiff's discovery responses in hand that established that the amount in controversy was satisfied. The court denied the removal petition as untimely, finding that the settlement demand letter was "part and parcel" of the state court proceeding and constituted "other paper" to trigger the removal clock.[36]

II. VOLUNTARY / INVOLUNTARY RULE AND FRAUDULENT JOINDER

Under Seventh Circuit precedent, federal courts in Illinois hold that, with one exception discussed below, the involuntary dismissal of all non-diverse defendants cannot render a lawsuit removable.[37] The "voluntary/involuntary" rule is intended to prevent situations in which a case is removed, but subsequently diversity is destroyed upon a successful appeal of an involuntary

[34] *Id.* at *2 (internal citations omitted).
[35] 451 F. Supp. 2d 965 (N.D. Ill. 2006).
[36] *Id.* at 969. *See also*, Gallo v. Homelite Consumer Prods., 371 F. Supp. 2d 943, 947-48 (N.D. Ill. 2005) (holding that removal was untimely, notwithstanding plaintiff's admission that the jurisdictional amount for diversity purposes was satisfied, where the allegations of the complaint were sufficient to show the existence of a jurisdictionally-sufficient amount in controversy).
[37] Poulos v. Naas Foods, Inc., 959 F.2d 69, 72-73 (7th Cir. 1992).

dismissal, requiring remand. Moreover, the rule is consistent with the courts' general deference to honoring the plaintiff's choice of forum.[38]

As noted above, there is a recognized exception to the voluntary/involuntary rule: an involuntary dismissal that is based on fraudulent joinder. Fraudulent joinder occurs when the plaintiff sues a non-diverse defendant for the sole purpose of evading federal jurisdiction. In the Seventh Circuit, the "traditional test of fraudulent joinder to defeat diversity jurisdiction is whether there has been outright fraud in a plaintiff's pleading of jurisdictional facts against a non-diverse defendant or whether there is no reasonable possibility that a plaintiff can establish a cause of action against a diversity-defeating defendant under state law."[39] In *Poulos v. Naas Foods, Inc.*,[40] the Seventh Circuit described the parameters of the doctrine of fraudulent joinder, noting that the removing party bears the "heavy burden" of demonstrating, by clear and convincing evidence and after all issues of fact and ambiguous issues of law are resolved against it, that the plaintiff's claims have no chance of success.[41]

Courts generally try to limit the fraudulent joinder inquiry to a "a Rule 12(b)(6)-type analysis, looking initially at the allegations of the complaint to determine whether the complaint states a claim under state law against the in-state defendant .... Ordinarily, if a plaintiff can survive a Rule 12(b)(6) challenge, there is no [fraudulent] joinder."[42] While this test has been described as "extremely lenient for plaintiffs," defendants have prevailed when it is clear, for example, that plaintiff simply has no cause of action, as a matter of law, against the non-diverse

[38] *Id*. at 72.
[39] Sanders v. Merck & Co., 2007 WL 924497, at *6 (S.D. Ill. March 27, 2007); *see also* Vogel v. Merck & Co., Inc., 476 F. Supp. 996, 1004 (S.D. Ill. 2007)).
[40] 959 F.2d 69 (7th Cir. 1992).
[41] *Id.* at 73.
[42] Hill v. Olin Corp., 2007 WL 1431865, at *4 (S.D. Ill. May 14, 2007) (quoting Rutherford v. Merck & Co., 428 F. Supp. 2d 842, 847 (S.D. Ill. 2006).

defendants. For example, in *Sandage v. Cottrell, Inc.*,[43] the court found that the non-diverse parent company had been fraudulently joined because plaintiffs presented no evidence that the parent was involved in the activities from which plaintiffs' injuries arose and where plaintiff failed to establish that direct participation liability applied to the case.

Although courts normally make the fraudulent joinder determination by evaluating the face of the pleadings, "'[i]n a few cases, in which a plaintiff has stated a claim but has misstated or omitted discrete facts, the district court may ... pierce the pleadings and conduct a summary inquiry' as to the issue of fraudulent joinder."[44] However, "piercing the pleadings is 'a strictly circumscribed inquiry limited to uncontroverted summary evidence which establishes unmistakably that a diversity-defeating defendant cannot possibly be liable to a plaintiff under applicable state law.'"[45] An oft-cited case in Illinois removal actions in which the court undertook such an inquiry is *Faucett v. Ingersoll-Rand Min. & Machinery Company.*[46] In that case, the Seventh Circuit held it proper to disregard a non-diverse defendant's citizenship where the non-diverse defendant produced an uncontested affidavit stating that it had nothing to do with the machine that caused the plaintiff's injury and thus plaintiff had no valid claim against it.[47] Similarly, in *Bergman v. U.S. Silica,*[48] the plaintiff brought strict products liability, negligence, and breach of implied warranty claims against his employer, the manufacturer of silicosis products, and an Illinois-based trucking company, the only non-diverse defendant.[49] During discovery, the trucking company admitted it transported the products, but claimed it did not

[43] 2006 WL 2710647, at *6-7 (S.D. Ill. Sept. 20, 2006).
[44] Hill v. Olin Corp., 2007 WL 1431865, at *4 (S.D. Ill. May 14, 2007) (quoting Larroquette v. Cardinal Health 200, Inc., 466 F.3d 373, 376 (5th Cir. 2006)).
[45] *Id.* at *6 (quoting Rutherford v. Merck & Co., 428 F. Supp. 2d 842, 848 (S.D. Ill. 2006)).
[46] 960 F.2d 653 (7th Cir. 1992).
[47] *Id. at* 654- 55 (7th Cir.1992). *See also* Veugeler v. General Motors Corp., 1997 WL 160749, at *3 (N.D. Ill. Apr. 2, 1997) (fraudulent joinder established by uncontradicted affidavit stating that the non-diverse defendant never manufactured the allegedly defective airbag at issue in case).
[48] 2006 WL 2982136 (S.D. Ill. Oct. 17, 2006).
[49] *Id.* at *1.

manufacture, buy or sell them. The manufacturer removed the action to federal court claiming fraudulent joinder. The court found that under Illinois law, an entity whose role is peripheral and "not directly related to the distributive process" is not subject to strict products liability.[50] Because Illinois recognizes a transportation company as such an entity, the court found that plaintiff's claims against the trucking company had no chance of success and concluded that the non-diverse defendant had been fraudulently joined.[51] In contrast, sellers and distributors have had less luck with fraudulent joinder arguments. Although Illinois does have an "innocent seller" statute, because it only shields sellers from strict liability claims and because any dismissal of a non-manufacturing defendant under the statute is merely provisional, courts have found that it is not an appropriate basis upon which to find fraudulent joinder.[52]

III. WAIVER OF RIGHT TO REMOVE

A. Waiver by Defending

A defendant can waive its right to removal in a number of ways; any waiver, however, must be clear an unequivocal. In *Rothner v. City of Chicago,*[53] the Seventh Circuit concluded that the right of removal generally can only be waived except in extreme situations, for example, when the suit is fully tried in state court and the defendant then files a petition for removal.[54] Other actions, such as filing an answer or general defense short of the merits does not constitute a waiver. In *Inman v. Daimler-Chrysler Corporation,* the Northern District of Illinois found even the defendant's decision to file a counterclaim in state court before filing their notice of removal did not constitute a waiver.[55]

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[50] *Bergman*, 2006 WL 2982136, at *4 (citation omitted).
[51] *Id.* at *6-7.
[52] LaRoe v. Cassens & Sons, Inc., 472 F.Supp.2d 1041, 1050-53 (S.D. Ill. 2006).
[53] Rothner v. City of Chicago, 879 F.2d 1402, 1416 (7th Cir. 1989).
[54] *Id.* at 1416.
[55] Inman v. Daimler-Chrysler Corp., 2000 WL 283016, *2 (N.D. Ill. March 2, 2000); *see also* Reder v. Pearlman, 2005 WL 326983, *1 (N.D. Ill. Feb. 8, 2005) (recognizing that "the Seventh Circuit has found that waiver of the

B. Waiver by Consent / Contract

Similarly, a general consent to the jurisdiction of a particular court has not been found to constitute a waiver of defendant's right to remove.[56] For instance, in *Oberweis Dairy, Inc. v. Maplehurst Farms,*[57] the contract language at issue provided that disputes between the parties were to be brought in an Illinois court and decided pursuant to Illinois law. The Court found that the clause did not bind the defendant to the plaintiffs' choice of forum and was insufficient to demonstrate a clear waiver of defendant's right to remove.[58]

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right to remove can only justify remand in exceptional circumstances such as where a party has proceeded to fully adjudicate the case.").

[56] *See* RBC Mortg. Co. v. Couch, 274 F. Supp. 2d 965, 969 (N.D. Ill. 2003) ("Where a contract provides that the parties consent to the jurisdiction of state or federal court within a particular region, however, the agreement does not constitute a waiver of a defendant's right to remove."); *see also Cahill*, 424 F.Supp. at 1202 (defendant's mere agreement to appear in court and confess judgment did not constitute waiver of right to remove).

[57] Oberweis Dairy, Inc. v. Maplehurst Farms, Inc., 1989 WL 2078 (N.D. Ill. Jan. 10, 1989).

[58] *Id.; see also* Thomas v. Nat'l Canada Fin. Corp., 1995 WL 54479 (N.D. Ill. Feb. 7, 1995) (clause in which defendant agreed that "all legal actions or proceedings may be brought in any court of competent jurisdiction in the counties of Cook or Will in the State of Illinois and waives objections to summons, service of process, jurisdiction of the person or venue of such court" did not evidence clear intent by defendant to waive right to remove).

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Indiana's federal district courts are divided into two districts, the Northern District and Southern District. These districts are part of the United States Court of Appeals for the Seventh Circuit.

I. POWER AND RIGHT TO REMOVE

A. The Parties

1. Defining "Parties in Interest"

Pursuant to 28 U.S.C. § 1441(b), a state court action may be removed "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."[1] In a diversity action, the determination of the "parties in interest" is made based on state law.[2] Under Indiana law, "A real party in interest . . . is the person who is the true owner of the right sought to be enforced. He or she is the person who is entitled to the fruits of the action."[3]

[1] 28 U.S.C. § 1441(b).
[2] Metal Forming Tech., Inc. v. Marsh & McLennan Co., 224 F.R.D. 431, 434-35 (S.D. Ind. 2004) (citing Am. Nat'l Bank v. Weyerhaeuser Co., 692 F.2d 455, 459-60 (7th Cir. 1982)).
[3] Hammes v. Brumley, 659 N.E.2d 1021, 1030 (Ind. 1995); *see Marsh*, 224 F.R.D. at 434 (holding that plaintiff was not real party in interest after plaintiff assigned claims against defendant to third party) (internal citations omitted).

2. Presence of "Doe" Defendants

Naming a "Doe" defendant will not defeat a defendant's right to remove a diversity case so long as the named defendant's citizenship is diverse from the plaintiff.[4] Indeed, § 1441 says, "For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded."[5] Thus, naming a purported non-diverse "Doe" defendant will not preclude a diverse defendant's right to remove – provided the diverse defendant has such a right.

3. Diversity for Putative Class Actions

Determining the complete diversity requirement for a putative class actions is based on the citizenship of the named plaintiffs at the time the action is filed.[6] Accordingly, the citizenship of unnamed class members is disregarded.[7]

B. The Amount in Controversy

1. Establishing the Amount in Controversy

The amount in controversy is determined from the complaint itself, unless it is shown that the amount stated in the complaint is not claimed "in good faith."[8] The amount in controversy is the amount required to satisfy the plaintiff's demands in full on the day the suit begins.[9] Indiana district courts may take into account allegations of both punitive damages and treble damages to satisfy the amount in controversy.[10]

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[4] JPL v. Lowe's Home Ctrs., Inc., 2007 WL 3287534, *1 (S.D. Ind. 2007) (citing Howell by Gerdt v. Tribune Entm't Co., 106 F.3d 215, 218 (7th Cir. 1997); Navarro Savs. Ass'n v. Lee, 446 U.S. 458, 461 (1980)).
[5] 28 U.S.C. § 1441(a); *Lowe's*, 2007 WL 3287534, *1.
[6] *In re* AT&T Fiber Optic Cable Installation Lit., 2001 WL 1397295, *8 (S.D. Ind. 2001) (citing Gibson v. Chrysler Corp., 261 F.3d 927, 931 n. 2 (9th Cir. 2001)).
[7] *Id*. (citing Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356, 366-67 (1921)).
[8] Engron v. Homecoming Fin., 2007 WL 171981, *1 (S.D. Ind. 2007) (citing Horton v. Liberty Mut. Ins. Co., 367 U.S. 348, 353 (1961)) (internal quotations omitted).
[9] *Id*. (citing Hart v. Schering-Plough Corp., 253 F.3d 272, 273 (7th Cir. 2001)).
[10] Westfield Ins. Co. v. Barick, 2006 WL 3354693, *3 (N.D. Ind. 2006) (citing Del Vecchio v. Conseco, Inc., 230 F.3d 974 (7th Cir. 2000)) (punitive damages); Schafer v. Jeld Wen Doors/IWP Custom Door Div., 2007 WL 3407659, *1 (N.D. Ind. 2007) (treble damages); *see* Agristor Leasing v. McIntyre, 793 F. Supp. 187, 190 (S.D. Ind. 1992) (same).

2. Application When a Specific Dollar Amount is Not Pled

Indiana prohibits personal injury plaintiffs from listing dollar figures in their complaints.[11] In such cases, a removing defendant must offer "competent proof" to "a reasonable probability" that the amount in controversy exceeds $75,000, exclusive of interest and costs.[12] This does not require that the defendant establish to a reasonable probability what the plaintiff *will* collect.[13] Instead, the defendant must show the cost or value of complying with the plaintiff's demands, from either party's perspective.[14] Thus, in its removal petition, the defendant need only provide an estimate of its exposure or potential maximum loss.[15] To remove a case, therefore, a defendant need only state a basis for its estimate.[16] It can fulfill this requirement by pointing to relevant contentions, interrogatories or admissions in state court; by reference to the plaintiff's settlement demands; by calculation from the complaint's allegations; or by introducing evidence, in the form of affidavits from the defendants employees or experts, about how much it will take to satisfy the plaintiff's demands.[17]

However, a defendant may not simply "speculate" or point to the mere "possibility" that a plaintiff's claim could reach $75,000.[18] In short, it is not sufficient to simply rely upon the

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[11] *See* Ind. Tr. R. 8(A)(2).
[12] Hart v. Conagra Foods, Inc., 2007 WL 2286131, *1 (S.D. Ind. 2007) (citing Smith v. Am. Gen. Life & Acc. Ins. Co., 337 F.3d 888, 892 (7th Cir. 2003)); Trilithic, Inc. v. Wavetek U.S., Inc., 6 F. Supp. 2d 803, 808 (S.D. Ind. 1998).
[13] *Hart*, 2007 WL 2286131, *1 (citing Brill v. Countrywide Home Loans, Inc., 427 F.3d 446, 448 (7th Cir. 2005)).
[14] *Id*. (citing Meridian Sec. Ins. Co. v. Sadowski, 441 F.3d 536, 542 (7th Cir. 2006)).
[15] *Id*.
[16] *Id*.
[17] *Sadowski*, 441 F.3d at 541-42.
[18] Flannery v. Cont'l Cas. Co., 2003 WL 21180724, *5 (S.D. Ind. 2003) (failure to provide competent proof that punitive damages were likely to be three times compensatory damages and, thus, exceed $75,000, required remand) (internal citations omitted); King v. Wal-Mart Stores, Inc., 940 F. Supp. 213, 216 (S.D. Ind. 1996) (statements that "it is clear, based upon the allegations of plaintiff's complaint," including that plaintiff "suffered pain and injuries," has "incurred medical expenses," will "suffer future pain," and will "incur future medical expenses," not sufficient to defeat remand motion); Reason v. Gen. Motors Co., 896 F. Supp. 829, 834 (S.D. Ind. 1995) (citing NLFC, Inc. v. Devcom Mid-Am., Inc., 45 F.3d 231, 237 (7th Cir. 1995)) (defendant failed to provide "specific information" about plaintiff's damages to form a basis for a "meaningful comparison" to large verdicts for similar claims to defeat remand).

plaintiff's allegations as competent evidence that the value of the plaintiff's claims exceeds the jurisdictional amount.[19] The defendant has an obligation to marshal competent proof to a reasonable probability that the jurisdictional amount is satisfied.[20]

3. Amount in Controversy Where Equitable Relief is Sought

In a claim requesting equitable relief, the amount in controversy is determined by the value of the object of the litigation.[21] Courts can measure this value either from the perspective of the plaintiff, by looking to what the plaintiff stands to gain; or, the court may examine the perspective of the defendant, by analyzing the cost to the defendant of complying with the proposed relief.[22]

4. Defeating Removal by Amending Relief Sought

A plaintiff may not defeat federal diversity jurisdiction by filing a binding post-removal stipulation that the value of the controversy is below the jurisdictional minimum.[23] Instead, to be effective, the stipulation must be filed in state court before the defendant has removed the case.[24]

C. Time of Existence of Grounds for Removal

Pursuant to 28 U.S.C. § 1446(b), a notice of removal "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 . . . ."[25] If a case is not removable based on the initial pleading, § 1446 provides that a notice of removal may be filed within thirty days of receipt "through

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[19] *King*, 940 F. Supp. at 216.
[20] *Id.*
[21] Kohler v. Albright, 2003 WL 22697213, *2 (N.D. Ind. 2003) (citing Hunt v. Washington State Apple Ad. Comm'n, 432 U.S. 333, 347 (1977)).
[22] *Id.* (citing Macken v. Jensen, 333 F.3d 797, 799-800 (7th Cir. 2003)) (holding amount in controversy not met because party seeking to invoke diversity jurisdiction offered nothing to indicate that if opposing party utilized inside information it would result in monetary damages exceeding the jurisdictional amount).
[23] Huffman v. Dick's Sporting Goods, Inc., 2006 WL 2228959, *2 (S.D. Ind. 2006) (citing *In re* Shell Oil Co., 970 F.2d 355, 356 (7th Cir. 1992)).
[24] *Id.*
[25] 28 U.S.C. § 1446(b).

service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable . . . ."[26]

1. Event Triggering Thirty-Day Period for Actions Initially Removable

The initial thirty-day period for removal is triggered by formal service of both a summons and the initial pleading filed in state court instituting a state court action.[27] Depending on the type of civil action or proceeding, the "initial pleading" need not be a complaint.[28] Instead, the key is whether the filing creates the opportunity to present or defend federal rights (e.g., filing temporary restraining order).[29]

2. Event Triggering Thirty-Day Period for Actions Not Initially Removable

When a case is removable on the face of the initial pleading, the thirty-day removal period begins to run only upon formal service of a summons and the initial pleading instituting a state court action.[30]

The "other paper" requirement contemplates new facts that become a part of the state court record in some new pleading or paper and thereby alters earlier impediments to removal.[31] Indiana district courts have interpreted "other paper" to include documents from state court proceedings, such as discovery depositions, interrogatory answers, and "any 'official papers' filed with the 'action sub judice' or given under 'oath' in connection with the action."[32] Receipt of an

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[26] 28 U.S.C. § 1446(b).
[27] *See In re* Bridgestone/Firestone, Inc., ATX, ATX II, 128 F. Supp. 2d 1198, 1200 (S.D. Ind. 2001) (citing Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc., 526 U.S. 344, 347-48 (1999)).
[28] Bezy v. Floyd County Plan Com'n, 199 F.R.D. 308, 313 (S.D. Ind. 2001).
[29] *Id*. (citing Butts v. Hansen, 650 F. Supp. 996, 998 (D. Minn. 1987)).
[30] *In re Bridgestone/Firestone*, 128 F. Supp. 2d at 1200 (citing *Murphy Bros.*, 526 U.S. at 347-48).
[31] Roberson v. Orkin Exterminating Co., Inc., 770 F. Supp. 1324, 1328 (N.D. Ind. 1991) (citing Nolan v. Boeing Co., 715 F. Supp. 152 (E.D. La. 1989); T & M Dental Lab, Inc. v. First Indus. Bank, 714 F. Supp. 798 (E.D. La. 1989)).
[32] Oehlman v. Wal-Mart Stores East, LP, 2006 WL 1043465, *1 (N.D. Ind. 2006) (quoting Hernandez v. Schering Corp., 2005 WL 1126911, *2 (N.D. Ill. 2005) (internal quotations omitted)) (citing *Roberson*, 770 F. Supp. at 1328 (interrogatories constitute "other paper" under § 1446(b)); Gilardi v. Atchinson, 189 F. Supp. 82, 85 (N.D. Ill. 1960) (discovery deposition was "other paper" under § 1446(b)).

unfiled pleading (e.g., a courtesy copy of an amended complaint), however, is not an "other paper" for purposes of triggering the thirty-day removal period "because there is nothing to be removed if nothing has been filed."[33]

II. FRAUDULENT JOINDER

A. Test for Fraudulent Joinder

Joining a non-diverse party solely for the purpose of destroying diversity jurisdiction is considered "fraudulent," and is disregarded when determining the propriety of removal.[34] A removing defendant has a "heavy burden" to establish fraudulent joinder: "The defender must show that, after resolving all issues of fact *and* law in favor of the plaintiff, the plaintiff cannot establish a cause of action against the in-state defendant."[35] The scope of the court's inquiry is "extremely narrow," allowing only a summary inquiry to determine whether the plaintiff is precluded from recovering from an in-state defendant.[36] Thus, where a claim against a purported fraudulently joined defendant can only be dismissed after an intricate analysis of state law, the claim "is not so wholly insubstantial and frivolous that it may be disregarded for purposes of diversity jurisdiction."[37] In other words, the court must find that there is "no reasonable possibility" that a state court would rule against the non-diverse defendant.[38]

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[33] *Bezy*, 199 F.R.D. at 313 (citing Leverton v. AlliedSignal, Inc., 991 F. Supp. 481, 484 (E.D. Va. 1997)).
[34] McDaniel v. Synthes, Inc., 2007 WL 3232186, *2 (N.D. Ind. 2007) (citing Schwartz v. State Farm Mut. Auto. Inc., Co., 174 F.3d 875, 878 (7th Cir. 1999)).
[35] *Id*. (quoting *Schwartz*, 174 F.3d at 878) (internal quotations omitted) (emphasis in original).
[36] *Id*. (citing Rutherford v. Merck & Co., 428 F. Supp. 2d 842, 847 (S.D. Ill. 2006)).
[37] Lyons v. Lutheran Hosp. of Ind., 2004 WL 2272203, *2 (S.D. Ind. 2004) (quoting Batoff v. State Farm Ins. Co., 977 F.2d 848, 853 (3d Cir. 1992)) (internal quotations omitted).
[38] *McDaniel*, 2007 WL 3232186, *2 (citing Crowe v. Coleman, 113 F.3d 1536, 1538 (11th Cir. 1997) ("If there is even a possibility that a state court would find that the complaint states a cause of action against any one of the resident defendants, the federal court must find that joinder was proper and remand the case to state court.").

B. Evidence of Fraudulent Joinder

Indiana district courts will evaluate a claim of fraudulent joinder by looking to factual assertions beyond those alleged in a plaintiff's complaint.[39] Thus, a court may "pierce the pleadings" and consider "summary judgment-type evidence such as affidavits and deposition testimony" to determine whether a defendant has been fraudulently joined.[40] However, use of affidavits and other evidence is permissible only so long as the evidence is not used to "pre-try" the case.[41]

III. VOLUNTARY / INVOLUNTARY RULE

A. "Voluntary" Dismissal

The voluntary/involuntary rule provides that a case in which a non-diverse defendant is dismissed becomes removable only if the non-diverse defendant was dismissed by the "voluntary" act of the plaintiff.[42] The Seventh Circuit considered what constitutes "voluntary" in dicta, noting that some circuits interpret the doctrine in a traditional manner: only a dismissal initiated by the plaintiff is "voluntary."[43] The *Poulos* court, however, expressed sympathy for the Second Circuit's interpretation that a dismissal is "voluntary" if the plaintiff merely accedes to the dismissal by failing to appeal.[44]

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[39] Conk v. Richards & O'Neil, LLP, 77 F. Supp. 2d 956, 964 (S.D. Ind. 1999) (citing Hoosier Energy Rural Elec. Coop., Inc. v. Amoco Tax Leasing IV Corp., 1992 WL 684355, *1 (S.D. Ind. 1992), *aff'd*, 34 F.3d 1310, 1315-16 (7th Cir. 1994)).

[40] *Id*. (quoting Veugeler v. Gen. Motors, Corp, 1997 WL 160749, *2 (N.D. Ill. 1997)) (internal quotations omitted); *accord, Crowe,* 113 F.3d at 1538 (district court could consider affidavits and deposition transcripts in deciding fraudulent joinder issue); Carriere v. Sears, Roebuck & Co., 893 F.2d 98, 100 (5th Cir. 1990) (same).

[41] *Id*. (quoting Peters v. AMR Corp., 1995 WL 358843, *3-4 (N.D. Ill. 1995) (remanding case to state court because defendants' affidavits addressed "substantive facts" and not "jurisdictional facts")) (internal quotations omitted).

[42] Poulos v. Naas Foods, Inc., 959 F.2d 69, 72 (7th Cir. 1992) (citing Am. Car & Foundry Co. v. Kettelhake, 236 U.S. 311, 316 (1915)).

[43] *Id*. at 72 n. 3.

[44] *Id*. at 72 n. 3 (citing Quinn v. Aetna Life & Cas. Co., 616 F.2d 38, 40 n. 2 (2d Cir. 1980).

B. Exceptions

The Seventh Circuit recognizes the well-established exception to the voluntary/involuntary rule for cases involving fraudulent joinder.[45] Thus, the voluntary/involuntary rule is not a bar to removal if the diverse defendant can show that the involuntarily dismissed defendant was fraudulently joined.[46]

IV. WAIVER OF RIGHT TO REMOVE

A. Waiver by Defending

Indiana district courts hold that pre-removal invocation of state court process does not waive a defendant's right to remove.[47] "[A]bsent some 'extreme situation' like fully trying the state court case on the merits, the right to removal cannot waived."[48]

B. Waiver by Consent / Contract

A defendant's consent to filing a lawsuit in state court is not sufficient to waive removal.[49] Instead, district courts will use established principles of contract interpretation to construe forum selection clauses, and honor waiver of removal only if the contract "clearly and unequivocally" waives the right of removal.[50]

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[45] *Poulos*, 959 F.2d at 72-73; *see* Vogel v. Merck & Co., Inc., 476 F. Supp. 2d 996, 1004-05 (S.D. Ill. 2007).
[46] *Id*. at 73-74.
[47] *In re* Bridgeston/Firestone, Inc., 128 F. Supp. 2d at 1201 (citing Rothner v. City of Chicago, 879 F.2d 1402, 1416 (7th Cir. 1989)).
[48] *Id*. (quoting *Rothner*, 879 F.2d at 1416) (holding defendants did not waive their right to consent to removal by filing motions to dismiss in state court)); *see also*, Hill v. Maton, 944 F. Supp. 695, 697 n. 3 (N.D. Ill. 1996) (filing a motion to dismiss in state court does not waive a defendant's right to remove).
[49] *See* IFC Credit Corp. v. Aliano Bros. Gen. Contractors, 437 F.3d 606, 612 (7th Cir. 2006); Wats/800, Inc. v. Voice America, 867 F. Supp. 811, 812 (S.D. Ind. 1993).
[50] *Watts/800*, 867 F. Supp. at 812 (remanding case where contract selected Indiana's courts of general jurisdiction as forum).

V. PRACTICE POINTERS

Defendants removing diversity cases to Indiana's district courts will avoid remand so long as they follow the requirements of the removal statutes. One potential pitfall, however, relates to the amount in controversy requirement. Specifically, defendants must keep in mind that Rule 8(A)(2) of the Indiana Rules of Trial Procedure preclude a personal injury plaintiff from alleging a specific dollar amount in his or her complaint. Accordingly, a removing defendant cannot rely solely on a state court pleading, and must provide competent proof that there is a reasonable probability that the amount in controversy exceeds $75,000.

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I. POWER AND RIGHT TO REMOVE

A. The Parties

1. Defining "Parties in Interest"

Wisconsin federal courts follow the general rule with regard to how a "party in interest" is defined. The identity of the real party in interest is determined by the law creating the claim, and from the essential nature and effect of the proceeding.[1] Accordingly, a party must have a "substantial stake in the outcome of the case" to be considered a real party in interest.[2] Another court defined a "real-party-in-interest" as "one who, according to applicable substantive law, *has the duty sought to be enforced or enjoined*."[3]

Nominal defendants are not considered in analyzing diversity and only those parties "'who are real and substantial parties to the controversy'" are considered.[4] A defendant is

[1] Olson v. Lacey, No. 06-C-456-S, 2006 WL 3017486, *3 (W.D. Wis. Oct. 19, 2006) (citing Adden v. Middlebrooks, 688 F.2d 1147, 1150 (7th Cir. 1982)); Regalware v. Advanced Mktg. Int'l, Inc., No. 05-CV-263, 2006 WL 752899, *4 (E.D. Wis. Mar. 21, 2006).
[2] *Olson*, 2006 WL 3017486 at *3 (citing State v. Abbott Labs., 341 F.Supp.2d 1057, 1061 (W.D. Wis. 2004)).
[3] Eichmann v. Hunter Automated Mach., Inc., 167 F. Supp. 2d 1070, 1072 (E.D. Wis. 2001) (citing *Moore's Fed. Practice 3d § 102.15*) (emphasis in original).
[4] *Eichmann*, 167 F. Supp. 2d at 1072 (citing Navarro Savings Ass'n v. Lee, 446 U.S. 458, 461, 100 S. Ct. 1779, 64 L. Ed. 2d 425 (1980)).

"nominal" if '"there is no reasonable basis for predicting that it will be held liable.'"[5] Further, parties against whom plaintiff has no claims, such as a third-party defendant, or those defendants whom have settled their claims with plaintiff but not cross claims asserted by defendants, will also not be considered for removal purposes.[6]

An insurer/subrogee does qualify as a real party in interest.[7] Specifically, if the subrogee has paid an entire loss suffered by the insured, it is the only real party in interest and must sue in its own name, but . . "[i]f it has paid only part of the loss, both the insured and insurer . . . have substantive rights . . . which qualify them as real parties in interest."[8]

2. Presence of "Doe" Defendants

Wisconsin district courts have followed a strict reading of § 1441(a), and the citizenship of any "Doe" defendants will not defeat diversity or affect the removal right of diverse defendants.[9]

3. Diversity for Putative Class Actions

In a suit brought as a class action, only the citizenship of the named plaintiffs is relevant in determining whether there is complete diversity of citizenship between the plaintiffs and defendants.[10]

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[5] Estate of Pilsnik v. Hudler, 118 F. Supp. 2d 905, 908 (E.D. Wis. 2000) (citing Shaw v. Dow Brands, 994 F.2d 364, 369 (7th Cir. 1993)) (allowing defendants to amend their notice of removal to include an explanation as to why the nominal defendant did not consent to the removal).
[6] *See generally id.* at 908-09.
[7] *Olson*, 2006 WL 3017486 at *3 (citing United States v. Aetna Cas. & Sur. Co., 338 U.S. 366, 380, 70 S.Ct. 207, 215, 94 L. Ed. 171 (1949)).
[8] *Id.* (citation and internal quotation marks omitted).
[9] *See, e.g.*, Miller Brewing Co. v. Ace U.S. Holdings, Inc., 391 F. Supp. 2d 735, 738 (citing Howell v. Tribune Entm't Co., 106 F.3d 215, 218 (7th Cir. 1997)).
[10] Bentley v. Wellman, Inc., No. 03-C-16-C, 2003 WL 21409819, *1 (W.D. Wis. Apr. 16, 2003) (citing F. & H.R. Framan-Farmaian Consulting Eng'rs Firm v. Harza Eng'g Co., 882 F.2d 281, 284 (7th Cir. 1989)).

B. The Amount in Controversy

1. Establishing the Amount in Controversy

The sum claimed in good faith by the plaintiff in the complaint determines the amount in controversy unless it appears to a "legal certainty" that the claim is really for less than the jurisdictional amount.[11] However, when a defendant tries to remove a case to federal court, the burden is higher as he will have to support the jurisdictional allegations with "competent proof" that proves "to a reasonable probability that jurisdiction exists."[12]

If state law permits the recovery of punitive damages and attorneys fees for the claims plaintiff alleges in the complaint, then both the punitive damages and attorneys fees should be included in determining whether the amount in controversy exceeds the jurisdictional minimum.[13] The same is true for treble damages.[14] With regard to punitive damages, they will be "scrutinized closely" when they make up the majority of the amount in controversy and may have been asserted simply to meet the jurisdictional minimum.[15] The calculation of attorneys' fees, however, is limited to those that have been incurred as of the time of removal.[16] In a class action, the fees are allocated on a pro rata basis.[17]

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[11] *Bentley*, 2003 WL 21409819 at *1. *See also* Holcombe v. Smithkline Beecham Corp., 272 F. Supp. 2d 792 (E.D. Wis. 2003); W. Bend Elevator, Inc. v. Rhone-Poulenc S.A., 140 F. Supp. 2d 963, 966 (E.D. Wis. 2000) (citing St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 289, 58 S. Ct. 586, 82 L.Ed. 845 (1938); NLFC, Inc. v. Devcom Mid-Am., Inc., 45 F.3d 231, 237 (7th Cir. 1995)).

[12] *W. Bend Elevator*, 140 F. Supp. 2d at 966 (citations and internal quotation marks omitted).

[13] *See, e.g., Holcombe*, 272 F. Supp. 2d at 797 (citing Gardynski-Leschuck v. Ford Motor Co., 142 F.2d 955, 956 (7th Cir. 1998)); *W. Bend Elevator*, 140 F. Supp. 2d at 966 (noting that as long as they are recoverable as a matter of law, the federal court will have jurisdiction unless it is shown by a "legal certainty" that there is no way plaintiff could recover over $75,000).

[14] *W. Bend Elevato*r, 140 F. Supp. 2d at 967-68.

[15] *Id*. at 966.

[16] *Bentley*, 2003 WL 21409819 at *2. *See also W. Bend Elevator, Inc.*, 140 F. Supp. 2d at 969 (discussing *Gardynski-Leschuck*, 142 F.3d at 958-59).

[17] *W. Bend Elevator, Inc.*, 140 F. Supp. 2d at 969.

Wisconsin courts have also decided that "a plaintiff may plead less than the true value of a claim solely to avoid federal court."[18] Likewise, a plaintiff can, in many different ways, waive or limit his own right to recover the jurisdictional minimum.[19]

In a class action, "the damages of at least one named plaintiff must satisfy the jurisdictional minimum. A party cannot aggregate the damages sought by members of the class."[20] So long as one named plaintiff meets that minimum, the other class members can remain parties to the litigation even if their claims are less than the jurisdictional minimum as the court would have supplemental jurisdiction under 28 U.S.C. § 1367.[21]

2. Application When a Specific Dollar Amount is Not Pled

First, it is important to note that, in Wisconsin, for tort actions, a party may not include, in its complaint, a demand for judgment that specifies the amount of money the pleader seeks.[22] If a complaint asks for less than $75,000 or does not allege the amount of relief sought, the defendant bears the burden of showing by a "preponderance of evidence" that the amount in controversy exceeds $75,000.[23]

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[18] *Holcombe*, 272 F. Supp. 2d at 796 (citing *St. Paul Mercury Indem. Co.*, 303 U.S. at 294; *Brand Name Prescription Drugs Antitrust Litig.*, 248 F. 3d 668, 670-71 (7th Cir. 2001); Workman v. United Parcel Serv., Inc., 234 F. 3d 998, 1000 (7th Cir. 2000); *Shaw*, 994 F.2d at 366)).

[19] *See, e.g.*, Chase v. Shop n' Save Warehouse Foods, Inc., 110 F.3d 424 (7th Cir. 1997) (noting that a plaintiff can stipulate to a lesser damage amount if done in a timely fashion and that settlement demands by the plaintiff can be considered as proof of the amount in controversy); Jeld-Wen, Inc. v. CDK Distrib., Inc., No. 07-C-342-S, 2007 WL 2436763, *3 (W.D. Wis. Aug. 16, 2007) (noting that plaintiff can sue for less than an amount it would be justly entitled to); *Holcomb*e, 272 F. Supp. 2d at 797 (rejecting notion that a named plaintiff could not limit the damage claims of class members).

[20] *Holcombe*, 272 F. Supp. 2d at 796 (citing *In re* Brand Name Prescription Drugs Antitrust Litig., 123 F.3d 599, 607 (7th Cir. 1997)).

[21] *Id.* (citations omitted). *See also W. Bend Elevator*, 140 F. Supp. 2d at 967.

[22] *See* Wis. Stat. § 802.02 (2006).

[23] *See, e.g., Holcombe*, 272 F. Supp. 2d 795-96.

3. Amount in Controversy Where Equitable Relief is Sought

Wisconsin district courts have adopted the "either viewpoint" rule in assessing the amount in controversy requirement in a case involving injunctive relief.[24] This rule requires that the court assess either "the benefit to the plaintiff or the cost to the defendant of the requested relief."[25] Put another way, "the value of such relief for purposes of determining the amount in controversy is the pecuniary result to either party which the judgment would directly produce." *Id.* (citations and internal quotation marks omitted).[26]

4. Defeating Removal by Amending Relief Sought

"'Events occurring subsequent to the institution of suit which reduce the amount recoverable below the statutory limit do not oust jurisdiction.'"[27] The Seventh Circuit has interpreted that to mean that "'a plaintiff may not obtain a remand by amending the complaint to seek less than the jurisdictional amount.'"[28]

C. Time of Existence of Grounds for Removal

1. Event Triggering Thirty-Day Period for Actions Initially Removable

The thirty-day removal period begins with formal service of process - "either simultaneous service of the summons and complaint or receipt of a complaint after service of the

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[24] *See Holcombe*, 272 F. Supp. 2d at 796 (finding jurisdictional amount met when the cost of complying with the injunction would exceed $75,000 and proven through an unchallenged affidavit).
[25] *Id.*
[26] *See also* Consolidated Doors, Inc. v. Mid-Am. Door Co., 120 F. Supp. 2d 759 (E.D. Wis. 2000) (applying "either viewpoint" rule and finding affidavit submitted by defendants as evidence of the amount that would be lost if judgment were entered in favor of the plaintiff was conclusory, speculative, lacking foundation and insufficient such that remand was proper).
[27] *See* Dow v. Poltzer, 364 F. Supp. 2d 931, 934 (E.D. Wis. 2005) (citing *St. Paul Mercury Indem. Co.*, 303 U.S. at 289) (considering only allegations made in the original complaint in effect at the time of the removal, even though plaintiffs amended the complaint in a way that affected the amount in controversy). *See also Holcombe*, 272 F. Supp. 2d at 796 (citations omitted).
[28] *Dow*, 364 F. Supp. 2d at 934 (citing *In re* Shell Oil Co., 966 F. 2d 1130, 1131 (7th Cir. 1992)).

summons."[29] Receipt of the complaint alone, without any formal service, does not start the "clock."[30]

In a case involving multiple defendants, federal Courts in Wisconsin have generally adopted the "first served" rule, meaning that the thirty-day period begins to run when the first defendant is served.[31] This rule is based on the rationale that if the first defendant waives its right to notice, the remainder of the defendants cannot remove the case anyway since all defendants must consent to removal.[32] There is at least one case which has cited a Seventh Circuit decision wherein the rule was not directly applied and has insinuated that it means the rule has been abolished.[33] However, a more recent case found that *Boyd* did not dispense of the "first served" rule.[34]

A defendant who has not been served with the state court summons need not join in the removal, but a statement for why that particular defendant has not consented must be included in the removal papers.[35]

Preemption concerns are also an issue for determining when a complaint is ripe for removal. Complete preemption "recharacterizes" plaintiff's state law claim as a federal claim so removal becomes proper.[36]

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[29] Andreshak v. Serv. Heat Treating, Inc., 439 F. Supp. 2d 898, 900 (E.D. Wis. 2006) (citing Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc., 526 U.S. 344, 347-48, 119 S. Ct. 1322, 143 L. Ed. 2d 448 (1999)). See also Oshkosh Truck Corp. v. Int'l Union, Etc., 67 F.R.D. 122, 123 (E.D. Wis. 1975) (finding that removal accomplished after a summons had been served but prior to the existence of a complaint was not proper).

[30] *Andreshak*, 439 F. Supp. 2d at 900. *But see* Higgins v. Ken. Fried Chicken, 953 F. Supp. 266 (W.D. Wis. 1997) (removal clock started upon receipt of the complaint by one defendant via letter from plaintiff's counsel).

[31] *See, e.g.*, Auchinleck v. Town of LaGrange, 167 F. Supp. 2d 1066 (E.D. Wis. 2001); *Higgins*, 953 F. Supp. 266 (discussing use of the "first-served" rule but noting the possibility that there may be a situation where there is such an inequity that a new 30-day period could be warranted).

[32] *See Auchinleck*, 167 F. Sup. 2d 1066.

[33] *See* Chlopek v. Fed. Ins. Co., No. 05-C-545-S, 2005 WL 3088355 (W.D. Wis. Nov. 17, 2005) (citing Boyd v. Phoenix Funding Corp., 366 F.3d 524 (7th Cir. 2004)).

[34] *See* Neumann v. Mensch, No. 06-C-217, LOISLAW (E.D. Wis. Aug. 14, 2006) (affirming adoption of the "first-served" rule).

[35] *See Andreshak*, 439 F. Supp. 2d 898.

2. Event Triggering Thirty-Day Period for Actions Not Initially Removable

The general rule is that for something to be considered an "other paper" such that this exception applies at a time when the initial 30-day window has closed, the matter must be revived by some pleading, motion or otherwise that changes the litigation so that the case is "'substantially a new suit that day.'"[37] One general rule that has emerged is that only documents filed in the case for which removal is sought constitute "other papers" for the purpose of § 1445(b).[38] There have only been very limited circumstances in which this rule has been found to not apply.[39] More often than not, the removal period will not be revived.[40]

II. FRAUDULENT JOINDER

A. Test for Fraudulent Joinder

Is there any reasonable possibility that a state court would rule against the non-diverse defendant if all issues of law and fact were resolved in favor of plaintiff?[41] If the answer is no,

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[36] Fagan v. DeStefanis, No. 06-C-0380, LOISLAW (E.D. Wis. Dec. 14, 2006) (finding that the case was ripe for removal when the original complaint was filed, as it was completely preempted by ERISA).

[37] Med. College of Wis. Faculty Physicians & Surgeons v. Pitsch, 776 F. Supp. 437, 439 (E.D. Wis. 1991) (citing Wilson v. Intercollegiate (Big Ten) Conference, 668 F. 2d 962, 965 (7th Cir. 1982)).

[38] *See, e.g.*, State v. Amgen, Inc., 469 F. Supp. 2d 655, 664-65 (W.D. Wis. 2007); McCormick v. Excel Corp., 413 F. Supp. 2d 967, 970-71 (E.D. Wis. 2006); State v. Abbott Labs., 390 F. Supp. 2d 815, 824-825 (W.D. Wis. 2005).

[39] *See Amgen*, 460 F. Supp. 2d at 664-65 (discussing two cases from other circuits in which orders from other cases have been found to be an "other paper" but finding the facts in the subject case were not similar enough to warrant removal).

[40] *See, e.g.*, *Med. College of Wis*., 776 F. Supp. at 440 (holding that an order determining that claims were preempted but could be brought under ERISA did not change the litigation and that the addition of a preempted ERISA claim to the lawsuit would not change the lawsuit as the same facts and medical coverage contract were at issue); Rivord v. Union Sec. Life Ins. Co., No. 07-C-323-C, LOISLAW (W.D. Wis. Oct. 31, 2007) (holding that letter to opposing counsel requesting full payment of a policy exceeding $75,000 insufficient to be "other paper" under removal statute). *But see* Poulos v. Naas Foods, Inc., 959 F.2d 69 (7th Cir. 1992) (noting that an order entering summary judgment for non-diverse defendant was "order or other paper").

[41] BCR Trucking, LLC v. Paccar, Inc., No. 06-CV-901, 2006 WL 3422681, *2 (W.D. Wis. Nov. 28, 2006) (citing *Poulos*, 959 F.2d at 73). *See also* Lerma v. Univision Commc'ns., Inc., 52 F. Supp. 2d 1011 (E.D. Wis. 1999).

then joinder of the non-diverse defendant is fraudulent. This determination is made by looking at the allegations in the complaint and "depends on the situation at the time of the removal."[42]

B. Evidence of Fraudulent Joinder

The removing defendant bears a heavy burden of proof to establish fraudulent joinder.[43] To show fraudulent joinder, the defendant must show that, after resolving all issues of fact and law in favor of the plaintiff, the plaintiff cannot establish a cause of action against the in-state defendant.[44] Fraudulent joinder occurs either when there is no possibility that a plaintiff can state a cause of action against non-diverse defendants in state court, or where there has been outright fraud in plaintiff's pleading of jurisdictional facts.[45] Likewise, any doubt as to removal must be resolved against it.[46]

III. VOLUNTARY / INVOLUNTARY RULE

A. "Voluntary" Dismissal

There has been no bright-line rule established as to what is considered a "voluntary" dismissal in Wisconsin federal courts. Rather, the Seventh Circuited noted the lack of a precise definition of "voluntary" but expressed "some sympathy" to the Second Circuit's interpretation, which is that a dismissal is "voluntary" "if the plaintiff merely accedes to the dismissal by failing to appeal."[47] In that same case in the lower court, the Eastern District of Wisconsin discussed a "voluntary abandonment" and found that this requires there be a "definite or unequivocal

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[42] *Lerma*, 52 F. Supp. 2d at 1014. *See also* Tele-Port, Inc. v. Ameritech Mobile Commc'ns, 49 F. Supp. 2d 1089 (E.D. Wis. 1999) (noting that the consideration of additional and/or subsequent allegations would conflict with the rule that jurisdiction depends on the facts at the time of the removal).
[43] *BCR Trucking, LLC*, 2006 WL 3422681 at *2 (citing *Poulos*, 959 F.2d at 69). *See also Tele-Port, Inc.*, 49 F. Supp. 2d 1089.
[44] *BCR Trucking, LLC*, 2006 WL 3422681 at *2.
[45] *Id.*
[46] *Lerma*, 52 F. Supp. 2d at 1014 (citing Tom's Quality Millwork, Inc. v. Delle Vedove USA, Inc., 10 F. Supp. 2d 1042, 1044 (E.D. Wis. 1998)).
[47] *Poulos*, 959 F.2d at 72 n. 3 (citing Quinn v. Aetna Life & Cas. Co., 616 F.2d 38, 40 n.2 (2d Cir. 1980)).

expression of intent to discontinue the action against the nondiverse party."[48] In *Poulos*, the granting of summary judgment against one of the defendants was not a "voluntary" dismissal.[49]

The time limits for removal do not continue once a case has been dismissed. For instance, if a plaintiff voluntarily dismisses a suit but later reinstates it, the removal period begins anew when the defendant receives service (in any manner) of notice of the litigation having been reinstated.[50]

B. Exceptions

In the context of fraudulent joinder, if a party is fraudulently joined at the time the complaint was originally filed, whether the dismissal was voluntary or not is immaterial since the party should not have been joined in the first place.[51]

IV. WAIVER OF RIGHT TO REMOVE

A. Waiver by Defending

Generally speaking, actions that are "preliminary and nonconclusive" and which are done as a result of the filing of a complaint, such as filing an appearance, opposing a temporary restraining order, stipulating to a date for court action, etc., will not be considered waiver of one's right to remove.[52]

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[48] Poulos v. Naas Foods, Inc., 132 F.R.D. 513, 521 n.9 (E.D. Wis. 1990) (citations omitted).
[49] *Poulos*, 969 F.2d at 72.
[50] *See, e.g.*, Price v. Wyeth Holdings Corp., 505 F.3d 624 (7th Cir. 2007) (holding that removal was proper even though removal was not requested until six years after the lawsuit was reinstated after a voluntarily dismissal and a default judgment was awarded because plaintiff never notified defendants of the suit).
[51] *See Poulus*, 132 F.R.D. 513; Harris v. Home Depot, No. 05-C-164-S, 2005 WL 1587593, *2 (W.D. Wis. July 6, 2005).
[52] *See* Swan v. Cmty. Relations-Social Dev. Comm'n, 374 F. Supp. 9, 12 (E.D. Wis. 1974) (citations omitted).

B. Waiver by Consent

Forum selection clauses are enforceable and should be controlling "absent a strong showing that it should be set aside."[53] By including a forum selection clause in the contract with plaintiff consenting to the plaintiff's filing of suit in state court, the defendant effectively waives its right to remove any subsequent dispute under the contract to federal court.[54]

C. Waiver by Contract

A defendant's right to remove a case is its right alone. It can waive it, exercise it, or bargain it away. The court and the public have no interest in what defendants do with their right to remove.[55]

V. PRACTICE POINTERS

Wisconsin district courts strictly construe the removal statue against removal, resolving any doubt in favor of remand.[56] Thus, defendants must be aware and consider removal immediately upon receipt of any state claim; particularly, as any appeal or motion to reconsideration on removal/remand issues are very rare.[57]

As courts have an obligation on their own to determine whether federal jurisdiction exists and have the discretion to impose costs, fees and/or sanctions for baseless motions for removal, defendants should take care and must have a good faith basis before removing a case.

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[53] Archdiocese of Milwaukee v. Underwriters at Lloyd's, 955 F. Supp. 1066, 1071 (E.D. Wis. 1997) (citing M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 15, 92 S.Ct. 1907, 1916, 32 L.Ed. 2d 513 (1972)).
[54] *Archdiocese of Milwaukee*, 955 F. Supp. at 1071-72.
[55] *Id.* at 1069.
[56] *See, e.g., W. Bend Elevator*, 140 F. Supp. 2d at 966 (citing Doe v. Allied-Signal, Inc., 985 F. 2d 908, 911 (7th Cir. 1993); Milwaukee Carpenter's Dist. Council Health Fund v. Philip Morris, Inc., 70 F. Supp. 2d 888, 892 (E.D. Wis. 1999)). *See also Auchinleck*, 167 F. Supp. 2d at 1068 ("[I]n the removal context, faithful adherence to the statutory language is more important than avoiding potential unfairness.").
[57] *See, e.g., Consolidated Doors, Inc.*, 120 F. Supp. 2d at 764-766 (denying a motion to reconsider a remand order based on the removal statutory provisions that prohibit such review).

8TH CIRCUIT

ARKANSAS

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I. POWER AND RIGHT TO REMOVE

A. The Parties

1. Defining "Parties in Interest"

The Eighth Circuit defines a "real party in interest" as "the person who, under governing substantive law, is entitled to enforce the right asserted."[1] In determining whether federal jurisdiction is appropriate, "if a 'non-diverse' plaintiff is not a real party in interest, and is purely a formal or nominal party, his or her presence in the case may be ignored in determining jurisdiction;" "such a party may be dropped from the case."[2] On the other hand, if the non-diverse plaintiff is a real party in interest, it is not material "that his joinder was motivated by a desire to defeat federal jurisdiction."[3]

2. Presence of "Doe" Defendants

Generally, a "Doe case" may not be removed unless the "plaintiff files an amendment in state court substituting the names of real parties and the defendant seeking removal thereafter establishes diversity of citizenship between the plaintiff and all named defendants."[4] However, a

[1] Iowa Pub. Service Co. v. Medicine Bow Coal Co., 556 F.2d 400, 404 (8th Cir. 1977).
[2] *Id.*
[3] *Id.*
[4] Pecherski v. General Motors Corp., 636 F.2d 1156, 1161 (8th Cir. 1981).

court may allow removal if the inclusion of Doe defendants is fraudulent or if the defendants are nominal parties.[5]

3. Diversity for Putative Class Actions

Pursuant to the Class Action Fairness Act ("CAFA") of 2005, federal courts have jurisdiction over class actions when there is minimal diversity, the proposed class contains at least 100 members, and the amount in controversy is at least $5 million in the aggregate.[6] Minimal diversity simply requires that one plaintiff and one defendant be diverse.[7] If the amount in controversy is in question and CAFA does not apply, Arkansas courts follow 28 U.S.C. § 1367, which allows supplemental jurisdiction over unnamed class members whether or not they meet the amount in controversy requirement so long as named members meet the required amount of $75,000.[8]

B. The Amount in Controversy

1. Establishing the Amount in Controversy

Federal jurisdiction "exists if there is complete diversity of citizenship and the amount in controversy is greater than $75,000."[9] The "amount in controversy" is the "value to the plaintiff of the right sought to be enforced."[10] Punitive damages and attorney's fees are included when calculating the amount in controversy, although a claim for punitive damages will be closely scrutinized to avoid abusing Congressional limits on diversity jurisdiction.[11]

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[5] *Id.*
[6] Toller v. Sagamore Ins. Co., 514 F.Supp.2d 1111, 1115 (E.D. Ark. 2007).
[7] *Id.*
[8] *Id.*
[9] Advance America Servicing of Arkansas, Inc. v. McGinnis, 2008 WL 2151722, at *1 (8th Cir. 2008) (citing Capitol Indem. Corp. v. Russellville Steel Co., 367 F.3d 831, 835 (8th Cir. 2004)).
[10] *Id.* at *3. *See* Massachusetts State Pharm. Ass'n v. Fed. Prescription Serv., Inc., 431 F.2d 130, 132 (8th Cir. 1970) (stating the "plaintiff's viewpoint rule: "the amount in controversy is tested by the value of the suit's intended benefit to the plaintiff.").
[11] Gilmer v. Walk Disney Co., 915 F.Supp. 1001, 1010 (W.D. Ark. 1996).

2. Application When a Specific Dollar Amount is Not Pled

If a state court complaint fails to specify damages sought, "the removing defendant's burden is to establish by a preponderance of the evidence that the amount in controversy is greater than [the jurisdictional amount]."[12] It is enough if the defendant can sufficiently prove that a "plaintiff's verdict reasonably may exceed that amount."[13] Similarly, removal jurisdiction is appropriate if it is "facially apparent that the claims are likely above [the jurisdictional amount]."[14] Removal should not be "based simply upon conclusory allegations."[15] In addition, the complaint should not be removed if there is a "legal certainty that the value of the claim is actually less than the required amount."[16]

3. Amount in Controversy Where Equitable Relief is Sought

Equitable relief is included when determining whether the amount in controversy meets the requirement for federal jurisdiction.[17] If it is unclear whether equitable relief sought will make the amount in controversy beyond the amount required for diversity jurisdiction, the court may require parties to submit evidence of such amount when determining whether removal is appropriate.[18]

Notwithstanding, a removing defendant cannot rely upon the cost of complying with possible equitable relief to support the jurisdictional amount required for federal court jurisdiction. Eighth Circuit precedent requires the district court to rely solely on the plaintiff's viewpoint in meeting the requisite amount[19] – the amount in controversy is tested by the value of

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[12] *Id.* at 1007.
[13] *Id.* (citing Boiling v. Union Nat. Life Ins. Co., 900 F.Supp. 400, 405 (M.D. Ala. 1995)).
[14] *Id.* (citing Allen v. R. & H. Oil & Gas Co., 63 F.3d 1326, 1335 (5th Cir. 1995)).
[15] *Id.*
[16] *Toller*, 514 F.Supp.2d at 1116.
[17] *See id.* at 1120.
[18] *See id.*
[19] Smith v. American States Preferred Ins. Co. 249 F.3d 812, 813 -814 (8th Cir. 2001); Mass. State Pharm. Ass'n v. Fed. Prescription Serv., Inc., 431 F.2d 130, 132 (8th Cir. 1970).

the suit's intended benefit to the plaintiff. This is the so-called 'plaintiff's viewpoint' rule. While there is some authority for the proposition that the amount in controversy is valued by the 'thing to be accomplished by the action' as to either the plaintiff or the defendant, whichever is the higher, the Eighth Circuit does not apply the defendant's standpoint test.[20]

4. Defeating Removal by Amending Relief Sought

After removal, a plaintiff "cannot by stipulation or amendment reduce his claim below the requisite amount and deprive the district court of jurisdiction."[21] Therefore, a change in the amount of controversy after removal does not alter jurisdiction; the situation at the time of removal governs.[22]

C. Time of Existence of Grounds for Removal

1. Event Triggering Thirty-Day Period for Actions Initially Removable

The Arkansas District Court has recognized the split over whether the thirty-day period in 28 U.S.C. § 1446(b) begins to run on notice or upon formal service. [23] Arkansas followed the majority of courts and adopted the "notice rule," so defendant's time period for removal begins to run upon receiving the courtesy copy of the complaint.[24]

2. Event Triggering Thirty-Day Period for Actions Not Initially Removable

Under 28 U.S.C. § 1446(b), if an action is not initially removable but later becomes removable, "a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, or a copy of an amended pleading, motion, order or other paper

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[20] Massachusetts State Pharmaceutical Ass'n v. Federal Prescription Service, Inc. 431 F.2d 130, 132 (8th Cir. 1970)
[21] Erwin v. Allied Van Lines, Inc. 239 F.Supp. 144, 146 (W.D. Ark. 1965) (citing St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283, 291 (1938)).
[22] *Toller*, 514 F.Supp.2d at 1117.
[23] Joiner v. Kaywal Transp., Inc., 979 F.Supp. 1252, 1253 (W.D. Ark. 1997).
[24] *Id.* at 1254.

from which it may first be ascertained that the case is one which is or has become removable."[25] One Arkansas district court concluded that "other paper" referred to "papers or actions of the party that appear in or are part of the proceedings in the case in which removal is sought but would not have been considered an amended pleading, order, or motion."[26] Arkansas courts have also held that "recent Supreme Court decisions", were not "other papers," and that the term "other papers" is limited to some action taken by one of the parties to lawsuit, which affects posture or procedure of case.[27] Furthermore, the language of 42 U.S.C. § 1446(b) itself suggests there must be some action taken by one of the parties.[28]

II. FRAUDULENT JOINDER

A. Test for Fraudulent Joinder

If a complaint fails to state a cause of action against a non-diverse defendant, the joinder is considered fraudulent and federal jurisdiction is retained.[29] On the other hand, if there is a "colorable cause of action," which means that state law might impose liability on the joined defendant of the same state, the joinder is not fraudulent.[30] The joinder must be made in bad faith in order to be considered fraudulent.[31]

B. Evidence of Fraudulent Joinder

In the Eighth Circuit, the burden is on "the removing defendant to establish by clear and convincing evidence that the joinder is fraudulent."[32] The court should consider "whether the plaintiff intended to obtain a joint judgment against the defendants, and whether there was

[25] Kelly v. Rothwell, 2006 WL 796205, at *1 (E.D. Ark. 2006) (citing 28 U.S.C. § 1446(b)).
[26] Holiday v. Travelers Inc. Co., 666 F.Supp. 1286, 1290 (W.D. Ark. 1987).
[27] *Id.*
[28] *Id.*
[29] Davis v. CNH America LLC, 2008 WL 748378, at *1 (W.D. Ark. 2008) (citing Iowa Public Service Co. v. Medicine Bow Coal Co., 556 F.2d 400, 406 (8th Cir. 1977)).
[30] *Id.*
[31] Capehart-Creager Enterprises, Inc. v. O'Hara and Kendall Aviation, Inc., 543 F.Supp. 259, 263 (W.D. Ark. 1982).
[32] *Id.*

colorable grounds existing for securing such a judgment."[33] Finally, the Eighth Circuit has stated that any evidence that shows the real controversy was several rather than joint or that a resident defendant is brought in bad faith to defeat diversity is "no doubt admissible."[34]

III. VOLUNTARY / INVOLUNTARY RULE

A. "Voluntary" Dismissal

Only voluntary action or conduct by the plaintiff can make a case removable if it was not removable when it was commenced.[35] The plaintiff can either amend his pleadings by changing the nature of the cause of action, or voluntarily dismiss a party defendant.[36] Therefore, a case cannot be made removable by the defendant's evidence or by a court order; removal may only be made by the voluntary act of the plaintiff.[37]

B. Exceptions

If there is a "claim of a fraudulent attempt to evade a removal," a case already commenced can still be made removable without voluntary action or conduct of the plaintiff.[38]

IV. WAIVER OF RIGHT TO REMOVE

A. Waiver by Defending

Neither Arkansas nor the Eighth Circuit has ruled on whether a defendant waives its right to removal by proceeding to defend an action in state court or otherwise invoking the processes of that court.

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[33] *Id.*
[34] Morris v. E.I. Du Pont De Nemours & Co., 68 F.2d 788, 793 (8th Cir. 1934).
[35] Stone v. Foster, 163 F.Supp. 298, 304 (W.D. Ark. 1958).
[36] *Id.*
[37] *Id.* at 305 (citing Great Northern Ry. Co. v. Alexander, 246 U.S. 276 (1918)).
[38] *Id.* at 304.

B. Waiver by Consent

For a defendant to waive the right to remove, such waiver must be "clear and unequivocal."[39] The Eighth Circuit has determined that where a contract contains a "clear and unequivocal" waiver of the right to remove, that waiver will be binding.[40] Therefore, if an agreement does not "clearly and equivocally" waive the right to removal, the right to remove has not been waived.[41]

C. Waiver by Contract

Arkansas and the Eighth Circuit have construed forum selection clauses in contracts that prohibit objection to venue as meeting the clear and unequivocal requirement, thereby waiving the right to removal.[42] For example, a clause in which the defendant submitted to "any Court of competent jurisdiction within the United States" constituted a waiver because it unambiguously waived the right to remove.[43] However, if a contract does not "clearly and equivocally" waive the right to remove the suit to federal court, the defendant has not waived the right of removal.

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[39] Murphy Oil USA, Inc. v. U.S. Fielity & Guar. Co., 1992 WL 465701, at *2 (W.D. Ark. 1992) (citing Weltman v. Silna, 879 F.2d 425, 427 (8th Cir. 1989)).
[40] iNet Directories, LLC v. Developershed, Inc., 394 F.3d 1081, 1081 (8th Cir. 2005) (reasoning that a "contract's forum selection clause unambiguously prohibited [defendant] from objecting to venue by removing the case to federal court").
[41] *See* Weltman v. Silna, 879 F.2d 425, 427 (8th Cir. 1989)("agreement in which the [defendants] consented to [the plaintiff's] filing this suit in state court did not address removal," the defendants did not waive the right to removal.)
[42] iNet Directories, LLC v. Developershed, Inc., 394 F.3d 1081, 1082 (8th Cir. 2005).
[43] *Murphy Oil USA, Inc.*, 1992 WL 465701, at *3.

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I. POWER AND RIGHT TO REMOVE

A. The Parties

1. Defining "Parties in Interest"

An action that is not founded on a claim or right arising under the Constitution, a federal statute, or a federal treaty is removable to federal court "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."[1] The rule in the Eighth Circuit is that if a non-diverse party is not a real party in interest, but is instead merely a "formal or nominal party, his or its presence in the case may be ignored in determining jurisdiction."[2] Where Iowa law applies, federal courts in Iowa turn to cases interpreting Iowa Rule of Civil Procedure 1.201, which requires that every civil action "be prosecuted in the name of the real party in interest."[3]

[1] 28 U.S.C. § 1441(b).
[2] Iowa Pub. Serv. Co. v. Medicine Bow Coal Co., 556 F.2d 400, 404 (8th Cir. 1977) (citing Salem Trust Co. v. Manufacturers' Fin. Co., 264 U.S. 182 (1924)).
[3] Iowa R. Civ. P. 1.201; *see, e.g.*, Foslip Pharmaceuticals, Inc. v. Metabolife International, Inc., 92 F. Supp. 2d 891, 907-09 (N.D. Iowa 2000) (discussing factors determining real party in interest).

2. Presence of "Doe" Defendants

The presence of "Doe" defendants is unlikely to arise in cases removed from state to federal court in Iowa because Iowa's rules of civil procedure make no provision for the naming of "Doe" defendants except in cases involving minors, victims of sexual offenses, and other limited circumstances.[4]

The rule in the Eighth Circuit is that "a Jane Doe case may not be removed until the plaintiff files an amendment in state court substituting the names of the real parties and the defendant seeking removal thereafter establishes diversity of citizenship between the plaintiff and all named defendants."[5] If a Doe defendant is fraudulently joined or joined as a nominal party, of course, a federal court can ignore such a party.[6] However, if a Doe defendant is named and the plaintiff actively seeks the identity of that individual to complete service of process, removal is not appropriate.[7]

3. Diversity for Putative Class Actions

For actions commenced on or after February 18, 2005, federal courts in Iowa follow the principles required by 28 U.S.C. § 1332(d). Broadly speaking, section 1332(d) confers federal jurisdiction over class actions where, among other things, there is minimal diversity, the proposed class contains at least 100 members, and the aggregated amount in controversy exceeds $5 million.[8] The 2005 amendments to section 1332(d) supplanted the rule allowing diversity jurisdiction where the named representatives of the class were completely diverse from parties

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[4] *See* Riniker v. Wilson, 623 N.W.2d 220, 226-27 (Iowa App. Ct. 2000) (observing that "[n]o procedure exists for the filing of 'Jane Doe' petitions in Iowa," deferring "to the legislature and/or our supreme court to make such rules").
[5] Pecherski v. Gen. Motors Corp., 636 F.2d 1156, 1161 (8th Cir. 1981).
[6] *Id.*
[7] *Id.*
[8] *Id.*; *see* Plubell v. Merck & Co., 434 F.3d 1070, 1071 (8th Cir. 2006); Larsen v. Pioneer Hi-Bred Int'l, Inc., No.4:06-cv-0077-JAJ, 2007 WL 3341698, at *2 (S.D. Iowa Nov. 9, 2007); Rakes v. Life Investors Ins. Co. of Am., No. 06-cv-99-LRR, 2007 WL 2122195, at *6 (N.D. Iowa July 20, 2007).

opposing it and at least one of the parties had unaggregated claims meeting the amount in controversy requirement.[9]

B. The Amount in Controversy

1. Establishing the Amount in Controversy

The rule in the Eighth Circuit is that if "a fact finder could legally conclude, from the pleadings and proof adduced to the court before trial, that the damages that the plaintiff suffered" exceed the jurisdictional amount, the amount in controversy element is satisfied.[10] This test has been deemed the functional equivalent of a test demanding remand or dismissal "if it appear[s] to a legal certainty that the claim is really for less than the jurisdictional amount."[11] Federal district courts in Iowa have consistently applied this rule, requiring the proponent of jurisdiction to prove satisfaction of any jurisdictional prerequisites by a preponderance of evidence.[12] Claims for punitive damages are to be included in the amount in controversy, but the evidentiary support for such claims must be given greater scrutiny.[13]

2. Application When A Specific Dollar Amount is Not Pled

Determining whether the amount in controversy requirement is met poses a common problem in actions removed from Iowa's state courts because Iowa's procedural rules prohibit pleading a specific amount of damages sought.[14] As a result, federal courts in Iowa typically either, "'provide the parties with the opportunity to satisfy the court as to the amount in controversy,'"[15] or look behind the pleadings to assess the true value of a plaintiff's claims.[16]

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[9] *Larsen*, 2007 WL 3341698, at *2.
[10] Kopp v. Kopp, 280 F.3d 883, 885 (8th Cir. 2002).
[11] Capitol Indem. Corp. v. 1405 Assocs., Inc., 340 F.3d 547, 549 (8th Cir. 2003); *Kopp*, 280 F.3d at 884-85.
[12] *E.g.*, GreatAmerica Leasing Corp. v. Rohr-Tippe Motors, Inc., 387 F. Supp. 2d 992, 994-95 (N.D. Iowa 2005); Adams v. Bank of Am., N.A., 317 F. Supp. 2d 935, 942 (S.D. Iowa 2004).
[13] OnePoint Solutions, LLC v. Borchert, 486 F.3d 342, 349 (8th Cir. 2007); Varboncoeur v. State Farm Fire & Casualty Co., 356 F. Supp. 2d 935, 949 (S.D. Iowa 2005); *Adams*, 317 F. Supp. 2d at 943.
[14] *See* Iowa Code § 619.18; Iowa R. Civ. P. 1.403(1).
[15] *Varboncoeur*, 356 F. Supp. 2d at 942.

The Eighth Circuit has held that a petition that did not state a specific monetary amount sought was insufficient to render the case removable until an "offer of judgment" in an amount exceeding the amount in controversy requirement was filed.[17] Interpreting this rule, the United States District Court for the Southern District of Iowa identified two situations in which a plaintiff filing an action in state court can trigger the thirty-day removal period, thus rendering the action removable immediately: "state in their [state court] petition that the amount in controversy exceeds the federal jurisdictional requirement, if [statutorily permitted], or (2) serve the defendant with a statement of the same separate from the [state court] petition."[18] Reasonable attorneys' fees or interest on an award can be considered part of the amount in controversy.[19]

3. Amount in Controversy Where Equitable Relief is Sought

"'In actions seeking declaratory or injunctive relief, it is well established that the amount in controversy is measured by the value of the object of the litigation.'"[20] For example, in a trespass action seeking an injunction, courts must ascertain the value of the segment of a parcel of land affected by the purported trespass.[21] In an action seeking a declaratory judgment regarding the coverage of certain insurance policies, either the amount sought or the policy limits (whichever is larger) provides a good gauge of the amount in controversy.[22] In addition, where

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[16] *See* Sutter v. Avenits CropScience USA Holding, Inc., 145 F. Supp. 2d 1050, 1053 (S.D. Iowa 2001) (amount in controversy requirement satisfied although plaintiff specifically pled the "damage sustained by each individual class member is less than $75,000," because the amount pled did not include punitive damages and the value of injunctive relief).
[17] *In re Willis*, 228 F.3d 896, 897 (8th Cir. 2000).
[18] LaPree v. Prudential Fin., 385 F. Supp. 2d 839, 845 (S.D. Iowa 2005); Nguyen v. Kautz, 125 F. Supp. 2d 364, 365 (S.D. Iowa 2000).
[19] *See GreatAmerica Leasing Corp.*, 387 F. Supp. 2d at 995-96.
[20] James Neff Kramper Family Farm P'Ship v. IBP, Inc., 393 F.3d 828, 833 (8th Cir. 2005) (quoting Hunt v. Wash. State Apple Advertising Comm'n, 432 U.S. 333, 347 (1977)); *accord Sutter*, 145 F. Supp. 2d at 1052-53.
[21] *James Neff Kramper Family Farm P'Ship*, 393 F.3d at 833.
[22] *See* Modern Equip. Co. v. Continental Western Ins. Co., 146 F. Supp. 2d 987, 992-93 (S.D. Iowa 2001).

an injunction is sought to enjoin infringing use of a trademark, an affidavit that the value of the trademark exceeds the jurisdictional threshold is sufficient.[23]

4. Defeating Removal by Amending Relief Sought

In *Wisconsin Department of Corrections v. Schacht*,[24] the Supreme Court observed that where a "change in the citizenship of a party or a subsequent reduction of the amount at issue below jurisdictional levels" occurs, thereby "destroy[ing] previously existing jurisdiction" federal courts will "keep a removed case." This has been the rule applied by Iowa federal courts for some time.[25]

C. Time of Existence of Grounds for Removal

1. Event Triggering Thirty-Day Period for Actions Initially Removable

By statute, if an action is initially removable, a notice of removal of a civil action must "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 . . . ."[26] Federal courts in Iowa are required to follow the rule announced by the Supreme Court in *Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc.*,[27] where the court held that receipt of a faxed, file-stamped copy of a complaint could not trigger the thirty-day removal period. There, the Supreme Court identified four scenarios triggering the thirty-day removal period based on how and when the summons and complaint are received by a defendant.[28] Courts in the Eighth Circuit and in Iowa have consistently applied this rule.[29]

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[23] *See* Wells' Dairy, Inc. v. Estate of Richardson, 89 F. Supp. 2d 1042, 1047 (N.D. Iowa 2000).
[24] 524 U.S. 381, 391 (1998).
[25] *See, e.g.*, Jil McCorkindale v. Am. Home Assurance Co./A.I.C., 909 F. Supp. 646, 650 (N.D. Iowa 1995) ("[A] plaintiff cannot by amendment divest the court of jurisdiction *once it has attached*." (emphasis supplied; quotation marks omitted)); *Yates v. Process Sys., Inc.*, 766 F. Supp. 726, 727 (S.D. Iowa 1991) (same).
[26] 28 U.S.C. § 1446(b).
[27] 526 U.S. 344, 356 (1999).
[28] *See id.* at 354.
[29] *E.g.* Marano Enters. of Kansas v. Z-Teca Restaurants, L.P., 254 F.3d 753, 756 (8th Cir. 2001).

2. Event Triggering Thirty-Day Period for Actions Not Initially Removable

By statute, if an action is not initially removable, "a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable," provided that the case is not removed more than one year after the action is commenced.[30] *Murphy Brothers* is not applicable to this scenario because service of process has theoretically occurred before the step rendering the action removable. Of critical importance are what constitutes "service or otherwise" and what constitutes "other paper."

Section 1446(b) is clear that a defendant need only receive a qualifying paper to begin the thirty-day period. Iowa's federal courts have implied that this term is to be broadly construed to include receipt of any kind.[31] Regarding the document that must be received, the Eighth Circuit recently explained that "the types of documents mentioned in § 1446 are listed in a logical sequence in the development of an *individual case*."[32] As a result, an "order" could not be "a decision in a separate case with different parties."[33] In *dicta*, the court reaffirmed that a motion response that states a federal cause of action and a post-complaint demand letter seeking an amount exceeding the amount in controversy requirement all count as "other paper" that triggers

[30] 28 U.S.C. § 1446(b). It is the law in the Eighth Circuit that the one-year bar period applies only to actions that were not initially removable. *See* Brown v. Tokio Marine & Fire Ins. Co., 284 F.3d 871, 872-73 (8th Cir. 2002).
[31] *See, e.g.*, Gale v. Smock, 64 F.R.D. 330, 332 & n.1 (S.D. Iowa 1974) (examining potential dates upon which the defendant received notice of a qualifying paper, but concluding that even if the latest date were used, the removal petition was still untimely); *cf.* Iowa Lamb Corp. v. Kalene Indus., Inc., 871 F. Supp. 1149, 1152-53 (N.D. Iowa 1994) (discussing, but not resolving, when the thirty-day time limit begins to run where the plaintiff sent a qualifying paper via certified mail without a return receipt, and the defendant alleged the mailing address to which the paper was sent was defunct, resulting in a delay of more than thirty days while the post office forwarded the paper to the correct address).
[32] Dahl v. R.J. Reynolds Tobacco Co., 478 F.3d 965, 969 (8th Cir. 2007) (emphasis added).
[33] *Id.*

the thirty-day removal period.[34] Federal courts in Iowa have noted that the filing of a motion to amend in state court, which, if granted, would create federal jurisdiction, is insufficient to make an action removable if the state court retains discretion to deny the motion to amend.[35] However, filing a state court petition among diverse parties equipped with an allegation that the amount in controversy exceeds the amount in controversy requirement or serving a defendant with a statement of the same but separate from the state court petition can trigger the thirty-day removal period.[36]

II. FRAUDULENT JOINDER

The general rule in the Eighth Circuit is that the fraudulent joinder of a resident defendant cannot defeat the right of an out-of-state defendant to remove an action to federal court.[37]

A. Test for Fraudulent Joinder

In the Eighth Circuit, claims for fraudulent joinder are tested against the standard applied in *Wilkinson v. Shackelford*.[38] There, the court reaffirmed the principle that when considering whether a party has been fraudulently joined, courts are to "determine 'whether there is arguably a reasonable basis for predicting that the state law might impose liability based upon the facts involved.'"[39] The key inquiry is whether, under the facts alleged, a "plaintiff 'might' have a

[34] *Id.* (citing Chaganti & Assocs., P.C. v. Nowotny, 470 F.3d 1215, 1220-21 (8th Cir. 2006); Addo v. Globe Life & Accident Ins. Co., 230 F.3d 759, 761-62 (8th Cir. 2000)).
[35] *See* Owings v. Deere & Co., 441 F. Supp. 2d 1011, 1013-14 (S.D. Iowa 2006). *But see* Webster v. Sunnyside Corp., 836 F. Supp. 629, 630 (S.D. Iowa 1993) (stating contrary rule).
[36] *See LaPree*, 385 F. Supp. 2d at 845-46; *see also* Kreinbring v. Alternative Claims Servs., Inc., No. C03-123-LBR, 2004 WL 1293927, at *2-*3 (N.D. Iowa 2004) (demand letter constitutes "other paper").
[37] *E.g.*, Simpson v. Thomure, 484 F.3d 1081, 1083 (8th Cir. 2007) (quoting Wilson v. Republic Iron & Steel Co., 257 U.S. 92, 97 (1921)).
[38] 478 F.3d 957, 963 (8th Cir. 2007).
[39] *Id.* (quoting Filla v. Norfolk S. Ry., 336 F.3d 806, 811 (8th Cir. 2003)); *see also* BP Chems. Ltd. v. Jiangsu Sopo Corp., 285 F.3d 677, 685 (8th Cir. 2002) (joinder is fraudulent "when there exists no reasonable basis in fact and law supporting a claim against the resident defendants" (quotation marks omitted)).

'colorable' claim under the state law against a fellow resident."[40] Courts applying this rule are to "'resolve all doubts about federal jurisdiction in favor of remand.'"[41]

Federal courts in Iowa have identified two species of fraudulent joinder: "'fraud in the recitation of jurisdictional facts'" and "'the more common allegations of absence of any possibility that the plaintiff has stated a claim against the resident defendant.'"[42] The first applies where a plaintiff—either intentionally or mistakenly—incorrectly alleges a defendant is a citizen of the same state as the plaintiff.[43] The second involves a failing of the plaintiff's claims against the allegedly improperly added defendant.[44]

B. Evidence of Fraudulent Joinder

When considering whether a plaintiff has a colorable claim against a co-citizen defendant, federal courts in Iowa focus on whether the complaint adequately pleads each element of the claim against the subject defendant.[45] A party's tactics after filing a lawsuit can also be indicative of fraudulent joinder.[46]

III. VOLUNTARY / INVOLUNTARY RULE

The Eighth Circuit has recognized the rule establishing that "[i]f the dismissal of a defendant in state court creates complete diversity between all parties so that the case may be removed to federal court, the propriety of removal is determined according to whether the

[40] *Id.* at 964 (quoting Menz v. New Holland N. Am., Inc., 440 F.3d 1002, 1005 (8th Cir. 2006)).
[41] *Id.* (quoting Transit Cas. Co. v. Certain Underwriters at Lloyd's of London, 119 F.3d 619, 625 (8th Cir. 1997)).
[42] Wells' Dairy, Inc. v. Am. Indus. Refrigeration, Inc., 157 F. Supp. 2d 1018, 1036 (N.D. Iowa 2001).
[43] *Id.*
[44] *Id.* at 1037.
[45] *See Wells' Dairy*, 157 F. Supp. 2d at 1041.
[46] *Compare* Johnson v. Tyson Fresh Meats, Inc., No. C-06-1002-LRR, 2006 WL 1004970, at *4 (N.D. Iowa Apr. 17, 2006) (proof that a plaintiff sued but did not serve defendants working in the same building as plaintiff and failed to include their names in captions of discovery requests is evidence of fraudulent joinder), *with* Comm. Sav. Bank v. Comm. Fed. Bank, 939 F. Supp. 674, 680-81 (N.D. Iowa 1996) (allegations that a resident co-defendant acted in concert with a non-resident defendant sufficient evidence that joinder was not fraudulent), *and* Accola v. Fletcher, 216 F. Supp. 202, 203-04 (N.D. Iowa 1963) (existence of a factual dispute regarding the relation between two co-defendants deemed sufficient evidence that joinder was not fraudulent).

dismissal was voluntary or involuntary with respect to the plaintiff."[47] Federal courts in Iowa have applied the rule faithfully.[48] A corollary of this rule is that a defendant cannot create diversity of citizenship by its own actions.[49]

IV. WAIVER OF RIGHT TO REMOVE

Regarding waiver of the right to remove, federal courts in Iowa follow the pronouncement by the Eighth Circuit that any waiver must be "clear and unequivocal."[50]

A. Waiver by Defending

Acceptance of service in a state court has been held not to constitute a waiver of the right to remove the action to federal court.[51] After reciting the general rule that any waiver must be "clear and unequivocal," the court, in *Wiggins v. Guardian Life Ins. Co. of Am.*, noted that the acceptance of service the defendant signed specifically noted it did not constitute a waiver of "the right to removal of the case to federal court."[52] As a result, the court concluded the defendant's acceptance of service did not amount to wavier.[53]

A case cited by the *Wiggins* court suggests that even if the acceptance of service did not include a reservation of rights to remove to federal court, the court would not have found the defendant waived the right to remove.[54]

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[47] *In re* Iowa Mfg. Co. of Cedar Rapids, Iowa, 747 F.2d 462, 463-64 (8th Cir. 1984).
[48] *See, e.g.*, Drost Equip., Inc. v. Ford Motor Co., 605 F. Supp. 94, 95 (S.D. Iowa 1985) (observing that "[i]t has long been the law under section 1446(b) that for a change in the posture of the litigation to permit removal, it must have been the result of the plaintiff's voluntary act" and "dismissal of a party whose original presence precluded removal after a directed verdict in his favor, or upon his successful motion for summary judgment is not voluntary as to the plaintiff and does not make the action removable" (citation omitted)).
[49] *See* Bejeck v. Allied Life Fin. Corp., 131 F. Supp. 1109, 1113 (S.D. Iowa 2001) (a corporation's dissolution after the initiation of litigation cannot create diversity because the parties' citizenships were fixed when the paper initiating litigation was filed).
[50] INet Directories, LLC v. Developershed, Inc., 394 F.3d 1081, 1082 (8th Cir. 2005); Weltman v. Silna, 879 F.2d 425, 427 (8th Cir. 1989).
[51] *See* Wiggins v. Guardian Life Ins. Co. of Am., 820 F. Supp. 419, 422-23 (N.D. Iowa 1993).
[52] *Id.*
[53] *Id.*
[54] *See* Beasley v. Union P. R.R. Co., 497 F. Supp. 213, 216 (D. Neb. 1980) (filing a motion to vacate a temporary restraining order in state court is not inconsistent with retaining the right to remove the action).

B. Waiver by Consent

Federal courts in Iowa would likely follow the rule announced in *Weltman v. Silna*,[55] where the Eighth Circuit examined an "agreement" wherein all parties "consented to subject matter jurisdiction and venue" in a state court.[56] The court held that because the agreement "did not address removal," the agreement did not amount to a clear and unequivocal waiver of the right to remove.[57] As a result, merely consenting to filing a case in state court—even if that consent is embodied in an "agreement—does not amount to a waiver to the right to amend unless the "agreement" specific includes a wavier of the right to remove.

C. Waiver by Contract

Contractual waiver provisions are enforceable in the Eighth Circuit.[58] In *iNet Directories, LLC v. Develophsed, Inc.*,[59] a contract provided that, all parties thereto waived any objection "to they laying of venue" of any litigation arising from the contract in "any . . . federal or state court in the State of Missouri."[60] The Eighth Circuit interpreted this language as a contractual waiver of the right to remove a breach of contract action from Missouri state court to federal court.[61]

Addressing a slightly different question, the United States District Court for the Southern District of Iowa has considered whether remand was an appropriate procedural vehicle to enforce a forum selection clause found in a contract.[62] There, the contract at issue specifically provided that any lawsuit to enforce or construe the subject agreement must be brought in a state court in

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[55] 879 F.2d 425 (8th Cir. 1989).
[56] *Id.* at 427.
[57] *Id.*
[58] *See* iNet Directories, LLC v. Developshed, Inc., 394 F.3d 1081, 1082 (8th Cir. 2005).
[59] 394 F.3d 1081, 1082 (8th Cir. 2005).
[60] *Id.*
[61] *See id.* (The *iNet Directories* court distinguished *Weltman* for the reason that *Weltman* "did not address removal." *iNet Directories*, 394 F.3d at 1082.)
[62] RX Dixon Co. v. Dealer Mktg. Servs., Inc., 284 F. Supp. 2d 1204, 1208-09 (S.D. Iowa 2003.)

Iowa.[63] The court observed, "[a] forum selection clause is one way parties can contractually waive the right to remove."[64] As a result, the court concluded that remand was an appropriate way to enforce a forum selection clause that constituted a valid waiver of the right to remove.[65]

V. PRACTICE POINTERS

Federal courts in Iowa strictly construe and enforce the removal statutes and local rules. As a result, parties are encouraged to review the recently amended local rules of Iowa's federal district courts and be familiar with the documents litigants are required to file upon removing a case.[66] Iowa's federal courts review each action removed from state court to analyze whether removal procedures are followed, and do not shy from issuing *sua sponte* remands if the filings required by Local Rule 81(f) are not satisfactory.[67]

[63] *Id.* at 1207.
[64] *Id.* at 1208 (collecting cases).
[65] *Id.*
[66] *See* LR 5.2(g)(1)(B), 81 (N.D. & S.D. Iowa 2008).
[67] *See id.* R. 81(f) (providing that "[w]hen a civil action is removed to this court from a state court based on diversity of citizenship under 28 U.S.C. § 1332, if the petition filed in state court does not, on its face, indicate either the required diversity of citizenship or the required amount in controversy, the removing party also must include in the notice of removal a statement of the facts that demonstrate satisfaction of these jurisdictional requirements").

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I. POWER AND RIGHT TO REMOVE

A. The Parties

1. Defining "Parties in Interest"

When considering removal, the federal district court need only look at the citizenship of the "parties in interest" for assessing whether there is complete diversity. For plaintiffs, a real party in interest is a "person who, under governing substantive law, is entitled to enforce the right asserted."[1] A defendant is a real party in interest if there appears to be a reasonable basis for predicting that it will be held liable.[2] Those defendants against whom "no real relief is sought" are nominal defendants, whose citizenship need not be considered for determining whether complete diversity exists for removal purposes.[3]

2. Presence of "Doe" Defendants

Where a plaintiff has brought claims against Doe defendants, the case may not be removed until the citizenship of such defendants are known.[4] Such a case may not be removed until after the plaintiff files an amendment substituting the names of real parties for the Doe

[1] Iowa Pub. Service Co. v. Medicine Bow Coal Co., 556 F.2d 400, 404 8th Cir. 1977).
[2] *See* Moubry v. Kreb, 58 F.Supp.2d 1041, 1046 (D. Minn. 1999).
[3] *Id.*
[4] Pecherski v. General Motors Corp., 636 F.2d 1156, 1161 (8th Cir. 1981).

defendants. A plaintiff may not defeat removal simply by naming Doe defendants, however, as the action will still be removable if such Doe defendants are merely nominal parties.[5]

3. Diversity for Putative Class Actions

Plaintiffs in a putative class action may defeat removal by selecting non-diverse representatives. Only the citizenship of the representatives is considered, however, when determining whether there is complete diversity in a class action.[6] The Class Action Fairness Act of 2005 created an exception to this rule for certain class actions with 100 members or more, and in which the matter in controversy exceeds $5,000,000. For such actions, diversity may be established where any class member is a citizen of a state different from any defendant.[7]

B. The Amount in Controversy

1. Establishing the Amount in Controversy

Section 1441 requires that the amount in controversy exceed $75,000. The defendant seeking removal bears the burden of establishing that the amount in controversy requirement is met.[8] To meet this burden, the defendant must produce "competent proof, to a reasonable probability, that the jurisdictional minimum is met."[9] This burden may be met by showing that a plaintiff's verdict reasonably may well exceed that amount, or, based on the face of the complaint, the claims are likely above the jurisdictional amount.[10]

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[5] *Id.*
[6] *See* Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* §3606 at 424 (2d Ed. 1984).
[7] *See* 28 U.S.C. 1332(d) (2005).
[8] Hartridge v. Aetna Casualty & Surety Co., 415 F.2d 809, 814 (8th Cir. 1969).
[9] Solum v. AT&T Corp., 2004 U.S. Dist. LEXIS 9578, *8 (D. Minn. 2004).
[10] McNeilus Truck & Mfg., Inc. v. Hunt, 2001 U.S. Dist. LEXIS 17016, *5 (D. Minn. 2001).

2. Amount in Controversy Where Equitable Relief is Sought

In an action for equitable relief, the amount in controversy is measured by the value of the right to be enforced.[11] Where a prayer for relief includes a claim for attorney's fees, such fees may be included in the calculation of the amount in controversy.[12]

3. Defeating Removal by Amending Relief Sought

A subsequent reduction of the plaintiff's claim does not defeat federal jurisdiction that is acquired through removal. Even if plaintiff's claim is reduced by a partial summary judgment, or plaintiff settles some of the claims against defendants, the federal court's jurisdiction may not be divested.[13] Further, the plaintiff may not destroy diversity jurisdiction by subsequently reducing his claim to less than the jurisdictional amount.[14]

Since plaintiffs will often plead that they are seeking in excess of the state jurisdictional minimum, defendants often seek a stipulation regarding the damages sought by the plaintiff in order to support removal. In *Solum v. AT&T Corp.*,[15] the plaintiff refused to agree to a stipulation stating that she would not seek damages in excess of $75,000. This evidence, by itself, was insufficient: "while a plaintiff's failure to stipulate to an amount below the jurisdictional threshold may be a factor…it does not shift the defendant's initial burden to produce proof of the requisite amount."[16]

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[11] Burns v. Mass. Mutual Life Ins. Co., 820 F.2d 246, 248 (8th Cir. 1987).
[12] McNeilus Truck & Mfg., Inc. v. Hunt, 2001 U.S. Dist. LEXIS 17016, *7 (D. Minn. 2001) (citing Peterson v. BASF Corp., 12 F. Supp. 2d 964, 968).
[13] Macan-Wightman v. Bajda, 1998 U.S. Dist. LEXIS 9296, *11 (D. Minn. 1998).
[14] *McNeilus Truck & Mfg., Inc.*, 2001 U.S. Dist. LEXIS 17016 at *7 (citing *Hartridge*, 415 F.2d at 814).
[15] 2004 U.S. Dist. LEXIS 9578, *8 (D. Minn. 2004).
[16] *Solum*, 2004 U.S. Dist. LEXIS 9578 at *9.

C. Time of Existence of Grounds for Removal

1. Event Triggering Thirty-Day Period for Actions Initially Removable

Section 1446 provides that a defendant must file a notice of removal "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." In *Marano Enterprises of Kansas v. Z-Teca Restaurants, L.P.*,[17] the Court stated that the thirty-day period is triggered only after a defendant is (1) notified of the action, and (2) brought under a court's authority, by formal process.[18] Each defendant in an action has thirty days to remove, even if the time for the first-served defendant to remove the action has expired.[19]

2. Event Triggering Thirty-Day Period for Actions Not Initially Removable

An action may be removed after this thirty-day period only upon the "service or otherwise" of an amended pleading, motion, order or other paper from which it may be first ascertained that the case is or has become removable. The District of Minnesota has interpreted this language to refer "solely to documents generated within the state court litigation itself."[20] Another court decision in a separate case is therefore not an "other paper" for purposes of this rule. The other paper need not be part of the record, but rather can be a demand letter in excess of $75,000, or any other document that renders the action removable "from its receipt."[21]

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[17] 254 F.2d 753 (8th Cir. 2001).
[18] *Id.* at 756 (citing Murphy Bros. v. Michetti Pipe Stringing, Inc., 526 U.S. 344, 347 (1999)). *See also* Brown v. Tokio Marine & Fire Ins. Co., Ltd., 284 F.3d 871, 873 (8th Cir. 2002).
[19] *Marano Enterprises*, 254 F.2d at 756.
[20] Johansen v. Employee Benefit Claims, Inc., 668 F.Supp. 1294, 1296 (D. Minn. 1987); Minn. v. Pharmacia Corp., 2005 U.S. Dist. LEXIS 27638, *2 (D. Minn. 2005). *See* Dahl v. R.J. Reynolds Tobacco Co., 478 F.3d 965, 969 (8th Cir. 2007).
[21] *Id.* at 969, 971.

II. FRAUDULENT JOINDER

A. Test for Fraudulent Joinder

Where a plaintiff has named a nominal party that prevents complete diversity of citizenship among the parties, a defendant may still remove the action, though it must demonstrate the nominal party was "fraudulently joined." In the Eighth Circuit, the fraudulent joinder standard focuses primarily on the reasonableness of the basis underlying the plaintiff's claims.[22] The relevant inquiry focuses on whether a plaintiff might have a "colorable" claim against the resident defendant.[23] "[I]f there is a 'colorable' cause of action – that is, if the state law *might* impose liability on the resident defendant under the facts alleged – then there is no fraudulent joinder."[24]

B. Evidence of Fraudulent Joinder

A defendant may show fraudulent joinder either by showing that "there is no reasonable basis in fact or colorable ground supporting the claim" against the resident defendant.[25] The court may consider the entire record in order to determine whether there is factual support for the claims against the allegedly nominal, or fraudulently joined, defendants.[26]

[22] Filla v. Norfolk Southern Railway Co., 336 F.3d 806, 810 (8th Cir. 2003).
[23] Wilkinson v. Shackelford, 478 F.3d 957, 964 (8th Cir. 2007).
[24] *Filla*, 336 F.3d at 810.
[25] Minnesota Deli Provisions, Inc. v. Boar's Head Provisions Co., Inc., 2006 U.S. Dist. LEXIS 54421, *4 (D. Minn. 2006) (citing Masepohl v. American Tobacco Co., 974 F.Supp. 1245, 1250 (D. Minn. 1997)).
[26] Minnesota Deli Provisions, Inc. v. Boar's Head Provisions Co., Inc., 2006 U.S. Dist. LEXIS 54421 at *4; Masepohl, 974 F. Supp. at 1250; Scientific Computers, Inc. v. Edudata Corp., 596 F. Supp. 1290, 1292 (D. Minn. 1984).

III. VOLUNTARY /INVOLUNTARY RULE

A. "Voluntary" Dismissal

Generally, removal on diversity grounds requires complete diversity both at the time of filing and at the time of removal. An exception to this rule applies where the plaintiff takes some voluntary action subsequent to filing the complaint that creates diversity of citizenship among the parties.[27] The action must be taken by the plaintiff, not the defendant.[28] The action must be voluntary by the plaintiff, however.[29] An action does not become removable where, for example, a non-diverse defendant is dismissed pursuant to a contested motion to dismiss or motion for summary judgment. Similarly, Minnesota's innocent seller statute permits the dismissal of certain claims against "innocent sellers" in product liability lawsuits.[30] Dismissal under this statute is not voluntary, however. Thus, even where the dismissal of a non-diverse innocent seller creates diversity among the remaining defendants, the action may not be removed.

B. Exceptions

Where a plaintiff voluntarily dismisses the non-diverse defendant, however, the action may be removable if there is complete diversity of the remaining parties. The 'voluntary' rule is not limited to this situation, as any action taken voluntarily by a plaintiff that creates complete diversity of citizenship between the plaintiffs and defendants can render an action removable. For example, the plaintiff in *Graff* voluntarily changed his residence after litigation began. His new citizenship in Minnesota created complete diversity with the Colorado defendant, who

[27] Graff v. Qwest Communications Corp., 33 F.Supp.2d 1117, 1119 (D.Minn. 1999).
[28] *Id.*
[29] *See also In re* Manufacturing Company of Cedar Rapids, Iowa, 747 F.2d 462, 463 (8th Cir. 1984).
[30] MINN. STAT. §544.41.

removed the action to federal court. The Court noted "there is no reason to protect the plaintiff against the adverse consequences of his own voluntary acts."[31]

IV. WAIVER OF RIGHT TO REMOVAL

A. Waiver by Defending

As a general rule, defendants cannot waive their right to remove unless they take substantial defensive action in the state before petitioning for removal.[32] The District of Minnesota and the Eighth Circuit Court of Appeals have not yet defined or addressed this issue. In practice, however, such defensive action generally does not include the filing of an Answer, or a motion addressing defects in the plaintiff's pleading, but rather refers to dispositive motions brought before the state court.

B. Waiver by Consent

Waiver of the right to remove must be clear and unequivocal.[33] Consenting to subject matter jurisdiction and venue in a state court, without more, does not amount to a waiver of the right to remove.[34] Rather, a defendant's consent must either address removal, and or must waive the right to object to the laying of venue in state court.

C. Waiver by Contract

Forum selection clauses are generally upheld in Eighth Circuit. The wording of such a provision must, however, be a clear and unequivocal waiver of the right to remove. The court, in *iNet Directories, LLC v. Developershed, Inc.*,[35] found and enforced such a waiver. In that case, a contractual waiver of the right to removal was upheld and enforced where the "[c]ontract state[d]

[31] *Graff*, 33 F.Supp.2d at 1120.
[32] *See, e.g.*, Aqualon Co. v. MAC Eqpt., Inc., 149 F.3d 262, 264 (4th Cir. 1998).
[33] Weltman v. Silna, 879 F.2d 425, 427 (8th Cir. 1989).
[34] *Id.*
[35] 394 F.3d 1081, 1082 (8th Cir. 2005).

the parties waive any objections to the laying of venue in any court in [state court]."[36] Since removal was deemed to be an object to the laying of venue in state court, the defendant was found to have waived its right to remove.[37]

[36] *Id.* at 1082.
[37] *Id.*

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I. POWER AND RIGHT TO REMOVE

A. The Parties

1. Defining "Parties in Interest"

Under Missouri law, "every civil action shall be prosecuted in the name of the real party in interest." [1] A real party in interest holds either legal or equitable title to the action.[2] Missouri Rule of Civil Procedure 52.01 expressly authorizes various persons to sue in a representative capacity "without joining the party for whose benefit the action is brought."[3] Persons authorized to sue in their own names in a representative capacity are executors, administrators, guardians, trustees of an express trust, and a party with whom or in whose name a contract exists for the benefit of another.[4] Further, "when a statute so provides, a civil action for the use or benefit of another shall be brought in the name of the State of Missouri."[5] An estate itself cannot sue, as it is not a legal entity.[6] If a statute creates a cause of action, and the statute designates who may

[1] MO. R. CIV. P. 52.01.
[2] Halferty v. National Mutual Casualty Co., 296 S.W.2d 130, 137 (Mo.App. W.D. 1956).
[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] Estate of Lemaster v. Hackley, 750 S.W.2d 692, 694 (Mo.App. W.D. 1988).

sue, those persons are exclusively entitled to bring the cause of action.[7]

The purpose of Rule 52.01 is "to enable those who are directly interested in the subject matter of the suit and are entitled to reap the benefits therefrom, to be those who maintain the action."[8] Accordingly, Rule 52.01 protects against multiple suits brought by persons who are not real parties in interest.[9] A party objecting that the plaintiff is not the real party in interest must make the objection in the pleadings; failure to do so operates as a waiver.[10]

2. Presence of "Doe" Defendants

Missouri district courts follow 28 U.S.C. § 1441(a), which states, "[f]or purposes of removal . . ., the citizenship of defendants sued under fictitious names shall be disregarded."[11] When a petition asserts no claim of any kind against a John Doe defendant, his presence in the action cannot destroy diversity.[12] This is true even if it is clear that the unnamed defendant would eliminate diversity and the plaintiff's failure to identify the defendant is due only to state procedural requirements. However, where the negligence of a John Doe servant is alleged, making him a real party in interest in the suit, his citizenship will matter to a determination of whether complete diversity exists.[13]

Mere allegations of citizenship of an unidentified John Doe will not suffice to prevent removal, but when plaintiff substitutes an identifiable defendant of common citizenship with plaintiff against whom actual recovery is sought, the presence of the non-diverse party divests a

[7] Superior Minerals Co. v. Missouri Pac. R. Co., 45 S.W.2d 912 (Mo.App. E.D. 1932).
[8] Janssen v. Guaranty Land Title Co., 571 S.W.2d 702, 706 (Mo.App. E.D. 1978).
[9] Holt v. Myers, 494 S.W.2d 430, 435 (Mo.App. E.D. 1973).
[10] Marks Mortuary v. Estate of Koepeel, 740 S.W.2d 397, 398 (Mo.App. 1987). *Cf.* Brock v. City of St. Louis, 724 S.W.2d 721 (Mo.App. E.D. 1987) (where plaintiff lacked standing to sue such defect is not waived).
[11] Bromberg v. Dillard's, Inc., 2007 WL 2907897, at *1 (E.D.Mo. 2007).
[12] *Id.*
[13] Pullman Co. v. Jenkins, 305 U.S. 534, 537 (1939).

federal court of jurisdiction, necessitating remand to state court.[14] Further, the existence of a nondiverse defendant who is unserved at the time of removal nevertheless precludes removal.[15]

3. Diversity for Putative Class Actions

In order to determine diversity in class actions, Missouri courts follow 28 U.S.C. § 1332(d).[16] The Class Action Fairness Act of 2005 ("CAFA"), which amended the federal diversity jurisdiction statute, provides for diversity jurisdiction in class actions under Federal Rule of Civil Procedure 23, and confers original jurisdiction over class actions where the amount in controversy exceeds $5 million, there is minimal diversity, and the class has 100 or more members.[17] Thus, the purpose of CAFA, inter alia, is to expand the availability of diversity jurisdiction in class actions.[18]

The CAFA applies to actions commenced after February 18, 2005.[19] Section 5 of CAFA, which creates a new removal statute, 28 U.S.C. § 1453, governs the removal of class actions, and provides that 28 U.S.C. § 1446 is controlling to the extent that there are inconsistencies.[20]

An action filed in state court is removable if the federal court has "original jurisdiction" over the matter.[21] On February 18, 2005, Congress enacted CAFA with the purpose of, inter alia, expanding the availability of diversity jurisdiction for class action lawsuits. CAFA confers original federal jurisdiction over any class action involving: (1) an aggregate amount in controversy of at least $5,000,000, exclusive of interest and costs; (2) minimal diversity, i.e., where at least one plaintiff and one defendant are citizens of different states; and (3) 100 or more

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[14] Portis v. Sears, Roebuck & Co., 621 F.Supp. 682, 683 (E.D.Mo. 1985); Pullman Co. v. Jenkins, 305 U.S. 534 (1939).
[15] Pecherski v. General Motors Corp., 636 F.2d 1156, 1160 (8th Cir. 1981).
[16] *See* Saab v. Home Depot U.S.A., Inc., 469 F.3d 758, 759 (8th Cir. 2006).
[17] Pierce v. TTP, Inc., 2006 WL 3827517, at *1 (W.D.Mo. 2006); 28 U.S.C. § 1332(d).
[18] Nowak v. Innovative Aftermarket Systems, L.P. 2007 WL 2454118, at *2 (E.D.Mo. 2007).
[19] *Id.*
[20] 28 U.S.C. § 1453(b).
[21] 28 U.S.C. § 1441(a); Peters v. Union Pacific R. Co., 80 F.3d 257, 260 (8th Cir. 1996).

class members.[22] Although a defendant has a statutory right to remove when jurisdiction is proper, any doubts about the propriety of removal are resolved in favor of remand.[23]

B. The Amount in Controversy

1. Establishing the Amount in Controversy

Missouri Rule 55.05 provides that, in an action for money damages, plaintiff's Petition must state the amount demanded. Nevertheless, in a Missouri tort action, Rule 55.05 prohibits plaintiffs from pleading a specific dollar amount, "except to determine the proper jurisdictional authority", and requires that "the prayer shall be for such damages as are fair and reasonable." "Proper jurisdictional authority" refers to the Associate Circuit Court's jurisdiction over cases in which $25,000 or less is in controversy.

Missouri federal courts examine the relief requested in the Petition to determine the amount in controversy, which is "the value of the right … sought to be enforced by the suit."[24] The proponent of jurisdiction must establish the amount in controversy by a preponderance of the evidence.[25] In some instances, Missouri federal courts have also required the proponent of jurisdiction to "show to a legal certainty that the amount in controversy requirement is met."[26] Where plaintiff sought federal court jurisdiction, the Eighth Circuit Court of Appeals asserted: "[t]he district court has subject matter jurisdiction in a diversity case when a fact finder could

[22] *See* 28 U.S.C. §§ 1332(d)(2), (5)(B), (6).
[23] McHugh v. Physicians Health Plan of Greater St. Louis, 953 F.Supp. 296, 299 (E.D.Mo. 1997).
[24] City of University City, Missouri v. AT& T Wireless Services, Inc., 229 F.Supp.2d 927, 933-34 (E.D.Mo. 2002) (citing Bishop Clarkson Memorial Hospital v. Reserve Life Ins. Co., 350 F.2d 1006, 1008 (8th Cir. 1965)).
[25] *Id.* at 931-32; Hill v. Ford Motor Co., 324 F.Supp.2d 1028, 1035-36 (E.D.Mo. 2004); Miller v. CEVA Logistics, 2008 WL 130847, at *1 (W.D.Mo. Jan. 10, 2008) (quoting *In re* Minnesota Mut. Life Ins. Co. Sales Practices Litig., 346 F.3d 830, 834 (8th Cir. 2003)); Riffert v. Walgreen Co., 2008 WL 495643, at *2 (E.D.Mo. Feb. 20, 2008) (also quoting *In re* Minnesota Mut. Life Ins. Co. Sales Practices Litig., 346 F.3d 830, 834 (8th Cir. 2003)).
[26] *University City*, 229 F.Supp.2d at 931; *Hill*, 324 F.Supp.2d at 1035.

legally conclude, from the pleadings and proof adduced to the court before trial, that the damages that the plaintiff suffered are greater than $75,000."[27]

Missouri courts consider punitive damages, actual damages, and attorney fees to determine the amount in controversy for federal jurisdiction.[28] A removing party must provide the court specific facts or evidence such as plaintiff's settlement offer, plaintiff's stipulation that they will seek or accept more than $75,000, a list of plaintiff's injuries, a calculation of lost wages and benefits, a calculation of attorney's fees, or recent similar cases with verdicts of more than $75,000. Also note that married plaintiffs' claims for personal injury and loss of consortium are not "common and undivided" such that they can be aggregated to meet the amount in controversy requirement for federal jurisdiction.[29] Additionally, to include punitive damages in the amount in controversy analysis, the court must determine, to a legal certainty, that plaintiff has a valid claim for punitive damages.[30]

2. Application When a Specific Dollar Amount is Not Pled

According to recent decisions, when there is no request for a specific amount of damages in the state court Petition, the removing party "must prove by a preponderance of the evidence that the amount in controversy exceeds $75,000."[31] Then, "[i]f the removing party satisfies this burden, the plaintiff can still defeat removal by showing to a legal certainty that recovery cannot exceed $75,000."[32] Legal certainty means that a fact finder could not find that plaintiff's damages exceed $75,000.[33]

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[27] Kopp v. Kopp, 280 F.3d 883, 885 (8th Cir. 2002).
[28] Visintine v. Saab Auto. A.B., 891 F.Supp. 496, 497 (E.D.Mo. 1995).
[29] McClure v. Raymond Corp., 174 F.Supp.2d 982, 986 (E.D.Mo. 2001).
[30] State v. Western Surety Co., 51 F.3d 170, 173-74 (8th Cir. 1995).
[31] *Miller*, 2008 WL 130847, at *1.; *Riffert*, 2008 WL 495643, at *2.
[32] *Miller*, 2008 WL 130847, at *2; *Riffert*, 2008 WL 495643, at *2.
[33] *Miller*, 2008 WL 130847, at *2; *Riffert*, 2008 WL 495643, at *2.

3. Amount in Controversy Where Equitable Relief is Sought

In injunction actions, the amount in controversy "is measured by the value to the plaintiff of the right sought to be enforced."[34] In a declaratory judgment action, the amount in controversy is "the value of the object of the litigation," such as insurance coverage.[35] Courts apply the same preponderance of the evidence and legal certainty tests outlined in the previous section to analyze whether federal diversity jurisdiction is proper.

4. Defeating Removal by Amending Relief Sought

The general rule is that plaintiff may not defeat diversity jurisdiction by filing a post-removal amended complaint reducing the amount of damages sought.[36] Similarly, a plaintiff "may not defeat removal simply by seeking less than the requisite amount in controversy when the court is informed that the value of the interest to be protected exceeds that amount."[37] Where plaintiff asserted his damages "… for as long as removal potential exists during the year interval after this case is filed, less than the amount for removal jurisdiction …", the court held this was not controlling. Consequently, the court asserted, "while plaintiff may limit his damages to avoid removal, he may not temporarily defeat removal and then upon remand and after the expiration of the one year removal period, amend his pleadings or even without a formal amendment, ask huge amounts at trial."[38]

Since plaintiffs in Missouri tort cases cannot allege a specific amount of damages in their Petition, on a motion to remand, courts will consider a post-removal affidavit of plaintiff as a

[34] Burns v. Massachusetts Mutual Life Ins. Co., 820 F.2d 246, 248 (8th Cir. 1987); Commercial Coverage, Inc. v. Paradigm Ins. Co., 998 F.Supp. 1088, (E.D.Mo. 1998); Price v. Cybertel Cellular Tel. Co, 2007 WL 1445846 (E.D.Mo. 2007).
[35] Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 347 (1977); American Ass'n of Orthodondists v. Yellow Book USA, Inc., 2007 WL 1687259, at *1 (E.D.Mo. 2007).
[36] Hatridge v. Aetna Cas. & Sur. Co., 415 F.2d 809, 814 (8th Cir. 1969) (citing Saint Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 289-290 (1938)).
[37] Hollenbeck v. Outboard Marine Corp., 201 F.Supp.2d 990, 993 (E.D.Mo. 2001).
[38] *Id*. at 993.

clarification that their damages do not exceed $75,000. The court will grant plaintiff's motion to remand based on a post-removal affidavit if defendants do not present sufficient facts or evidence to show that plaintiff's damages exceed $75,000.[39] This is only true when plaintiff's affidavit clarifies an ambiguity rather than changes the amount sought at the time of removal.[40]

C. Time of Existence of Grounds for Removal

1. Event Triggering Thirty-Day Period for Actions Initially Removable

Where actions are initially removable, a notice of removal of a civil action must "be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of the initial pleading . . . ."[41] This is a procedural rather than jurisdictional rule, and any defendant who fails to remove within this thirty-day period waives the right to remove.[42]

In Missouri, "the thirty-day time limit for filing a notice of removal begins to run when the defendant has actual notice of the amount in controversy."[43] Where the issue was "whether the named defendant must be officially summoned to appear in the action before the time to remove begins to run,"[44] the U.S. Supreme Court held that formal service of process is required.[45]

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[39] Neighbors v. Muha, 2005 WL 2346968, at *3 (W.D.Mo. 2005) (citing Halsne v. Liberty Mut. Group, 40 F.Supp.2d 1087, 1090-91 (N.D. Iowa 1999)); *see also* Dyrda v. Wal-Mart Stores, Inc., 41 F.Supp.2d 943, 949 (D. Minn. 1999).

[40] Gillming v. J.Jill, LLC, 2006 WL 2246431, at *3 (W.D.Mo. 2006); Walters v. American Family Mut. Ins. Co., 2006 WL 461073, at *3 (W.D.Mo. 2006).

[41] 28 U.S.C. § 1446(b).

[42] McHugh v. Physicians Health Plan of Greater St. Louis, Inc., 953 F.Supp. 296, 299 (E.D.Mo. 1997).

[43] Williams v. Safeco Ins. Co. of America, 74 F.Supp.2d 925, 929 (W.D.Mo. 1999) (defendant had actual knowledge that the amount in controversy exceeded $75,000 based on demand letters which were written before the filing of the petition).

[44] Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc., 526 U.S. 344, 347 (1999).

[45] *Id.* at 347-48 ("noting the difference between mere notice to a defendant and official service of process: 'An individual or entity named as a defendant is not obliged to engage in litigation unless notified of the action, and brought under a court's authority, by formal process.' *Id.* Thus, a defendant is "required to take action" as a defendant-that is, bound by the thirty-day limit on removal- 'only upon service of a summons or other authority-asserting measure stating the time within which the party served must appear and defend.'").

2. Event Triggering Thirty-Day Period for Actions Not Initially Removable

The time for removal under 28 U.S.C. § 1446(b) commences upon the defendant's simultaneous receipt of summons and complaint, or when defendant receives a separate copy of the complaint "through service or otherwise" after having been served with summons, but is not triggered by mere receipt of a complaint unattended by any formal service of summons. [46] In Missouri, only formal service of process triggers the thirty-day time limit for removal.

The language of the statute is clear and unambiguous; therefore, the plain meaning is determinative. Congress intended for the period of removal to commence as long as the defendant receives by "service or otherwise" a copy of the pleading setting for the claim for relief.[47] "Unless a named defendant agrees to waive service, the summons continues to function as the sine *qua* non directing an individual or entity to participate in a civil action or forgo procedural or substantive rights."[48]

Although federal law requires a defendant to file a notice of removal within thirty days of service, state law governs the sufficiency and service of process.[49] Rule 54.13(b)(1) generally states that an individual may be served by (1) delivering a copy of the summons and complaint to the individual personally (i.e., in-hand service), (2) leaving copies at his dwelling house or place of abode with a person of suitable age and discretion (i.e., abode service), or (3) delivering a copy to an agent authorized to receive service (i.e., agency service). Additionally, Rule 54.13(b)(3) permits a corporation, partnership, or other unincorporated association to be served

[46] *Id.* at 347-48.
[47] Brown v. Mayflower Transit, Inc., 960 F.Supp. 212, 214 (W.D.Mo. 1997).
[48] Murphy Bros. Inc. v. Michetti Pipe Stringing, Inc., 526 U.S. at 347-48 ("[W]e hold that a named defendant's time to remove is triggered by simultaneous service of the summons and complaint, or receipt of the complaint, 'through service or otherwise,' after and apart from service of the summons, but not after mere receipt of the complaint unattended by any formal service.").
[49] *See* Porter v. Safeco Ins. Co. of Illinois, 2007 WL 3236424, at *2 (E.D.Mo. 2007) (state method of service of process was sufficient for valid service of process).

by delivering a copy of the summons and complaint to an officer, managing or general agent, or to any other agent authorized by appointment or law to receive service of process.

There are provisions that allow removal after the thirty-day time limit has elapsed. A notice of removal may be filed within thirty days after receipt by the defendant of a copy of an amended pleading, motion, order or other paper from which it may be first ascertained that the case is one, which is or has become removable.[50] However, a case may not be removed based on jurisdiction conferred by 28 U.S.C.A. § 1332 more than one year after the commencement of the action.[51] The only remedy to this one-year absolute time limit is an argument to the District Court that the non-diverse defendant was fraudulently joined. In that case, removal would proceed as normal with a motion and supporting documents seeking to dismiss the non-diverse defendant for fraudulent joinder.

Missouri district courts provide no clear definition regarding what constitutes "other paper," but the Missouri district court and the Eighth Circuit have considered a demand letter "other paper" under 28 U.S.C. §1446(b), and therefore the thirty day removal period was triggered.[52] This circuit has held that a "plaintiff's deposition testimony did not constitute a voluntary act by plaintiff such as to trigger the removal statute's 'other paper' conversion"[53] and that papers other than amended pleadings, motions or orders in a state court action constitute "other papers."[54] Essentially, "papers filed in the action itself which alter or clarify the stated

[50] 28 U.S.C.A. § 1446(b).
[51] 28 U.S.C.A. § 1446(b).
[52] Petersen v. Cates Sheet Metal Indus., Inc., 1996 WL 40999, at *5 (W.D.Mo. 1996).
[53] Avenevoli v. Lockton Companies, Inc., 2008 WL 509545, at *4 (E.D.Mo. 2008).
[54] Tripp v. Kline, 2007 WL 844821, at *1 n. 2 (E.D.Mo. 2007) (quoting Black v. Brown & Williamson Tobacco Corp., 2006 U.S. Dist. LEXIS 26212, at *17 (E.D.Mo. 2006)); Kocaj v. Chrysler Corp., 794 F.Supp. 234, 237 (E.D. Mich. 1992)).

claim so as to reveal for the first time that a federal cause of action is stated" constitute "other papers."[55]

II. FRAUDULENT JOINDER

A. Test for Fraudulent Joinder

When Missouri law precludes a cause of action against a non-diverse defendant, joinder is fraudulent.[56] "[I]f there is a "colorable" cause of action – that is, if [Missouri] law *might* impose liability on the resident defendant under the facts alleged – then there is no fraudulent joinder."[57] This means, "the alleged cause of action is reasonable, but speculative."[58] "If there is no reasonable basis in fact or law supporting the claim against the resident defendant, or the reviewing court finds that the plaintiff has no real intention of prosecuting the action against the resident defendant, joinder is fraudulent…"[59] Where the law is ambiguous, "the court must simply determine whether there is a reasonable basis for predicting that the state's law might impose liability against the defendant."[60]

For example, joinder of a non-diverse seller in a Missouri products-liability case is not fraudulent, even if the seller is entitled to be dismissed from the action under the "innocent seller statute," § 537.762.[61] The effect of the innocent seller statute is only procedural.[62] It creates a defense but does not foreclose potential liability.[63]

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[55] *Id.*
[56] Filla v. Norfolk Southern Ry. Co., 336 F.3d 806, 810 (8th Cir. 2003).
[57] *Id.*
[58] *Id.* at 810 n.10.
[59] Reeb v. Wal-Mart Stores, Inc., 902 F.Supp. 185, 187 (E.D.Mo. 2003).
[60] *Filla*, 336 F.3d at 811.
[61] Dorsey v. Sekisui America Corp., 79 F.Supp.2d 1089, 1091 (E.D.Mo. 1999).
[62] *Id.* at 1091.
[63] *Id.*

B. Evidence of Fraudulent Joinder

Missouri federal courts will consider facts and evidence outside the pleadings, such as affidavits, interrogatory answers, business records, and settlement agreements, to determine whether joinder of a non-diverse party is fraudulent.[64] They do so to determine whether plaintiffs have a reasonable basis in law or fact to support the claim against the resident defendant, not to determine whether plaintiffs will prevail on the claim.[65]

As an example, the court found a store manager had been fraudulently joined in a premises liability case based on business records that established she did not have prior notice of the alleged dangerous condition.[66] Evidence that plaintiffs and a resident defendant had a settlement agreement under which plaintiffs would not seek damages or execute on a judgment against him, however, did not establish fraudulent joinder because the resident defendant was still subject to judgment under Missouri law.[67]

III. VOLUNTARY / INVOLUNTARY RULE

A. "Voluntary" Dismissal

In Missouri district courts, voluntarily dismissing a case against a nondiverse defendant includes discontinuing or in any way abandoning the action against the resident defendant.[68] The paramount consideration is whether the resident defendant was dropped from a case as a result of a voluntary act of the plaintiff.[69] In *Powers v. Chesapeake & Ohio Ry.*,[70] the United States Supreme Court articulated the standard "voluntary-involuntary" rule for evaluating

[64] Dumas v. Patel, 317 F.Supp.2d 1111, 1115-16 (W.D.Mo. 2004); *Reeb*, 902 F.Supp. at 188.
[65] *Dumas*, 317 F.Supp.2d at 1115-16.; *Reeb*, 902 F.Supp. at 187-88.
[66] *Reeb*, 902 F.Supp. at 189.
[67] *Dumas*, 317 F.Supp.2d at 1117.
[68] Jarrell v. Fort Worth Steel & Mfg. Co., 666 S.W.2d 828, 838-9 (Mo. Ct. App. 1984).
[69] *Id.* at 837-38.
[70] 169 U.S. 92, 99-101 (1898).

removability.[71] The rule prohibits removal unless a "voluntary" act by the plaintiff brings about such a change in circumstances that makes the suit removable:[72]

> The rule establishes a bright line test for evaluating removability. If the dismissal of a defendant in state court creates complete diversity between all parties so that the case may be removed to federal court, the propriety of removal is determined according to whether the dismissal was voluntary or involuntary with respect to the plaintiff. In other words, if the plaintiff voluntarily dismisses the non-diverse defendant, the case may be removed. Removal is improper, however, if the dismissal of that resident defendant was involuntary.[73]

Following this rule, the Missouri federal court in *Pender v. Bell Asbestos Mines, Ltd.*,[74] held the dismissal under the innocent seller statute on seller's motion was involuntary with respect to plaintiff because plaintiff did not oppose it, and thereby, did not consent to it.

Where a plaintiff voluntarily dismisses, discontinues, or abandons an action against the resident defendant, the action then becomes removable and may, with prompt action, be removed by the non-resident defendants to federal court.[75] If the dismissal of a defendant in state court creates complete diversity between all parties so that the case may be removed to federal court, the propriety of removal is determined according to whether the dismissal was voluntary or involuntary with respect to the plaintiff. In other words, if the plaintiff voluntarily dismisses the non-diverse defendant, the case may be removed. Removal is improper, however, if the dismissal of that resident defendant was involuntary.[76] "The rationale and meritorious purpose of the voluntary-involuntary test is the prevention of premature removals in cases where the issue of the resident defendant's dismissal has not been fully determined in the state court."[77]

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[71] Power v. Norfolk & Western Ry. Co., 778 F.Supp 468, 469 (E.D.Mo. 1991).
[72] *Id.*
[73] Pender v. Bell Asbestos Mines, Ltd., 46 F.Supp.2d 937, 940 (E.D.Mo. 1999).
[74] 46 F.Supp.2d 937, 940 (E.D.Mo. 1999).
[75] *Jarrell*, 666 S.W.2d at 838. (citing Stamm v. American Telephone & Telegraph Co., 129 F.Supp. 719, 721 (W.D.Mo. 1955)).
[76] *Id.*
[77] Machinsky v. Johnson & Johnson Medical, Inc., 868 F.Supp. 269, 270 (E.D.Mo. 1994) (quoting Saylor v. General Motors Corp., 416 F.Supp. 1173, 1175-6 (E.D. Ky. 1967)).

B. Exceptions

Under Missouri law, exceptions to the voluntary/involuntary rule are sparse. The recognized exception to the voluntary/involuntary dismissal rule is fraudulent joinder. The Eighth Circuit Court of Appeals has established that "[j]oinder is fraudulent and removal is proper when there exists no reasonable basis in fact and law supporting a claim against the resident defendants."[78] So, "[w]here applicable state precedent precludes the existence of a cause of action against a defendant, joinder is fraudulent."[79] Generally, there is no federal diversity jurisdiction if the plaintiff and any defendant are citizens of the same State.[80] However, the right of an out-of-state defendant to remove a diversity suit to federal court "cannot be defeated by a fraudulent joinder of a resident defendant."[81]

According to the current law in the Eastern District, which is based on Missouri substantive law, joinder of a non-diverse seller in a Missouri products liability case is not fraudulent, even if the seller is entitled to be dismissed from the action under the "innocent seller statute," R.S.Mo. § 537.762.[82] The reason, as explained by the Missouri Court of Appeals in *Malone v. Schapun, Inc.*,[83] is that the effect of the innocent seller statute is only procedural and does not change the substantive law related to an innocent seller's potential liability under a theory of strict products liability.[84] The statute creates a defense but does not foreclose potential liability.[85] Application of this defense depends upon plaintiff's potential recovery from other defendants and does not exonerate the seller until the conclusion of the action by final judgment

[78] Wiles v. Capitol Indemnity Corp., 280 F.3d 868, 871 (8th Cir. 2002).
[79] Filla v. Norfolk Southern Railway Co., 336 F.3d 806, 811 (8th Cir. 2003).
[80] 28 U.S.C. § 1332(a).
[81] Simpson v. Thomure, 484 F.3d 1081, 1083 (8th Cir. 2007) (stating removal was proper based upon district court's dismissal of fraudulently joined non-diverse defendant) (quoting Wilson v. Republic Iron & Steel Co., 257 U.S. 92, 97 (1921)).
[82] Dorsey v. Sekisui America Corp., 79 F.Supp.2d 1089, 1090 (E.D.Mo. 1999).
[83] 965 S.W.2d 177 (Mo.App. E.D. 1997).
[84] *Id* at 1091.
[85] *Id.*

or settlement. "As a result, the statute has no effect on whether plaintiff has stated a cause of action against [the non-diverse seller] in the first instance, which is the relevant inquiry" regarding fraudulent joinder.[86]

IV. WAIVER OF RIGHT TO REMOVE

A. Waiver by Defending

Parties waive the right to removal when they "clearly indicate an intention to submit to the jurisdiction of the state court".[87] Filing an entry of appearance in a state court case can constitute waiver.[88] Parties do not waive their right to remove, however, if they take actions in the state court that are not inconsistent with the intent to remove.[89] Missouri federal courts have found no waiver when the removing parties' actions in the state court occurred before they became parties or "before the case became removable or before the [party] was able to determine that the case was removable", or were "preliminary and not conclusive in character, and [fell] short of submission of the claim to a binding decision on the merits" or "a voluntary general appearance."[90]

B. Waiver by Consent

Since the parties' contractual consent to filing actions in state court does not prevent the parties from seeking removal, it can be inferred that any other form of consent to filing in state court should not waive the right to removal.[91] Nevertheless, a specific consent to state court venue for the case as opposed to just plaintiff filing there would waive the right to remove.[92]

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[86] *Id.*
[87] State v. Missouri Public Service Corp., 25 F.Supp. 690, 691 (W.D.Mo. 1938).
[88] *Id.*
[89] Madison Bank v. Simpson, 122 F.R.D. 547, 549-50 (E.D.Mo. 1988) (citing Genie Machine Prods. Inc. v. Midwestern Machinery Co., 367 F.Supp. 897, 899 (W.D.Mo. 1974)); Adams v. Lederle Laboratories, 569 F.Supp. 234, 246-47.
[90] *Id.*; Genie Machine Prods., Inc. v. Midwestern Machinery Co., 367 F.Supp. 897, 899 (W.D.Mo. 1974).
[91] Weltman v. Silna, 879 F.2d 425, 427 (8th Cir. 1989).
[92] iNet Directories, LLC v. Developershed, Inc., 394 F.3d 1081, 1082 (8th Cir. 2005).

C. Waiver by Contract

Forum selection clauses have been found to waive the right to removal if they "unambiguously prohibit[t] [the parties] from objecting to venue by removing the case to federal court."[93] An agreement that contains defendant's consent to plaintiff filing suit in state court but does not specifically address removal does not waive defendant's right to remove.[94]

V. PRACTICE POINTERS

A. Stipulation of Damages

A Stipulation of Damages is a useful and strategic tool that may support removal. Well before the removal deadline, defendant should consider drafting a letter inquiring as to whether plaintiff seeks or will accept damages in excess of $75,000 at the time of the letter or at the time of trial. If not, then plaintiff's counsel should be asked to sign a Stipulation of Damages. The Stipulation should provide that plaintiff agree to neither seek nor accept damages, whether compensatory, consequential, punitive, or otherwise in excess of $75,000 exclusive of interest and costs at any time, including the time of trial. If plaintiff's counsel will not enter into such a stipulation, then that can be used as evidence to prove the amount in controversy exceeds $75,000 at the time of removal. This technique has proven successful.[95]

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[93] *Id.*
[94] *Weltman*, 879 F.2d at 427.
[95] Neighbors v. Muha, 2005 WL 2346968, at *2 (W.D.Mo. 2005) (explaining that courts consider evidence such as settlement offers exceeding the jurisdictional amount, plaintiff's refusal to stipulate that she would not demand more than the jurisdictional amount, among other evidence in order to prove plaintiff has met the jurisdictional amount).

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I. POWER AND RIGHT TO REMOVE

A. The Parties

1. Defining "Parties in Interest"

A real party in interest is determined by "examining the effect of any judgment entered in favor of the plaintiff."[1]

2. Presence of "Doe" Defendants

The Nebraska federal district court has not yet had the opportunity to determine whether the presence of "Doe" defendants destroy diversity. However, the Eighth Circuit has stated that "[o]rdinarily [a Doe defendant] case may not be removed until the plaintiff files an amendment in state court substituting the names of real parties and the defendant seeking removal thereafter establishes diversity of citizenship between the plaintiff and all named defendants."[2] Further, "[r]emoval also may be proper if the plaintiff dismisses the action against the Doe defendants or actually commences trial of the action without completing service of process."[3] Removal may also be proper if the Doe defendants were joined fraudulently in an attempt to defeat diversity.[4]

[1] Jakoubek v. Fortis Benefits Ins. Co., 301 F. Supp. 2d 1045, 1051 (D. Neb. 2003).
[2] Percherski v. Gen. Motors Corp., 636 F.2d 1156, 1161 (8th Cir. 1981).
[3] *Percherski*, 636 F.2d at 1161.
[4] *Id.*

However, where the plaintiff has actively sought to identify the Doe defendant so that service of process can be completed, removal is not proper.[5]

3. Diversity for Putative Class Actions

The court will "look only to the citizenship of the representative parties in a class action" in determining whether diversity exists.[6]

B. The Amount in Controversy

1. Establishing the Amount in Controversy

The federal district court has adopted the Eleventh Circuit's definition of the amount in controversy. In *Gonzalez v. Eagle Parts & Prods.*,[7] the court adopted the Eleventh Circuit's definition in *Burns v. Windsor Ins. Co.*,[8] wherein the court determined that "'only the sum actually demanded is in controversy.'" The court has also determined that "[t]he amount claimed by plaintiff generally controls in determining the jurisdictional amount" as "the plaintiff may avoid federal jurisdiction or thwart attempts at removal by claiming less than the jurisdictional amount in the complaint."[9]

The Eighth Circuit has determined that where the "'court questions whether the amount alleged is legitimate, [] the party invoking federal jurisdiction must prove the requisite amount by a preponderance of the evidence.'"[10]

2. Application When a Specific Dollar Amount is Not Pled

When a specific amount has not been pled in the plaintiff's complaint, courts will also impose the requirement on the removing defendant to demonstrate by a preponderance of the

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[5] *Id.*
[6] Green v. Ameritrade, Inc., 120 F.Supp.2d 795, 799 (D. Neb. 2000).
[7] 2007 WL 675108, *4 (D. Neb. 2007).
[8] 31 F.3d 1092, 1095 (11th Cir. 1994)
[9] Vangsness v. Schwan's Sales Enters., Inc., 2007 WL 3124657 (D. Neb. 2007).
[10] James Neff Kamper Family Farm Partnership v. IBP, Inc., 393 F.3d 828, 830 (8th Cir. 2005) (citing Missouri ex rel. Pemiscot County v. W. Sur. Co., 51 F.3d 170, 173 (8th Cir. 1995).

evidence that the amount in controversy exceeds $75,000.[11] The court is also able to look outside the pleadings to determine whether federal jurisdiction exists.[12] Further, courts have determined that in deciding whether the amount in controversy meets the jurisdictional prerequisite, the issue "'is not whether the damages are greater than the requisite amount, but whether a fact finder might legally conclude they are.'"[13]

3. Defeating Removal by Amending Relief Sought

Also in *Gonzalez*, the federal district court explained that the "determination about whether a federal court has removal jurisdiction is made on the basis of the record at the time of removal.[14] Once the jurisdiction has been granted to the federal court, a "'subsequent change, such as the plaintiff's post-removal voluntary reduction of his claim to less than the jurisdictional amount, does not defeat federal jurisdiction acquitted through removal.'"[15] The federal district court will only consider post-petition affidavits if the information is relevant to the time of removal.[16] Further, "[i]f the court is satisfied to a legal certainty, from the face of the pleadings or from the proofs, 'that the plaintiff never was entitled to recover [the jurisdictional] amount,' the court lacks jurisdiction."[17]

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[11] *See* Gonzalez v. Eagle Parts & Prods., 2007 WL 675108 (D. Neb. 2007) (quoting Crosby v. Aid Ass'n for Lutherans, 199 F.R.D. 636, 638 (D. Minn. 2001) wherein the court determined that "'[w]hen no amount is specified…the required amount [must be proven] by a preponderance of the evidence'"); *see also* In-Custody Intern. Corp. v. Taper, 2007 WL 2068117 (articulating the same standard).
[12] *Gonzalez*, 2007 WL 675108, at * 4 (noting that the U.S. Supreme Court determined in Land v. Dollar, 330 U.S. 731, 735 & n.4 (1947) that federal courts have the authority to look to other evidence in the record).
[13] *Id.* at * 4 (quoting *James Neff*, 393 F.3d at 834).
[14] *Id.* at * 3.
[15] *Id.* at *3 (quoting Hatridge v. Aetna Cas. & Sur. Co., 415 F.2d 809, 814 (8th Cir. 1969).
[16] *Id.*
[17] *Vangsness*, 2007 WL 3124657, at * 3 (internal citations omitted).

C. Time of Existence of Grounds for Removal

1. Event Triggering Thirty-Day Period for Actions Initially Removable

In Nebraska, the thirty-day removal period is triggered by the date the summons is served on the defendant.[18]

2. Event Triggering Thirty-Day Period for Actions Not Initially Removable

Section 1441 requires a defendant to file a notice of removal within thirty days after receiving the document putting the defendant on notice that the case may be removed. In Nebraska, the phrase "through service or otherwise" has been held to include a general appearance.[19]

Nebraska's federal district court has not yet had the opportunity to determine what would constitute "other paper" whereby the defendant would be placed on notice of the removal of the action; however, the Eighth Circuit has provided some guidance in this area.[20]

II. FRAUDULENT JOINDER

A. Test for Fraudulent Joinder

Nebraska's federal district court has not yet had the opportunity to determine whether the joinder of a non-diverse defendant is fraudulent. The Eighth Circuit, however, has stated that "joinder is fraudulent when there exists no reasonable basis in fact and law supporting a claim

[18] *See* Youngson v. Lusk, 96 F. Supp. 285, 288 (D.C. Neb. 1951) (explaining that, "in Nebraska the filing of the petition precedes the service of process in an action, and the petition is not required to be served on the defendant [] the critical date from which the [removal] period must be computed is the date of service of the summons on the defendant").
[19] *See* Windac Corp. v. Clarke, 530 F. Supp. 812 (D.C. Neb. 1982) (reasoning "[a] general appearance [may] operate[] in lieu of service on a defendant for purposes of removability under s 1441(b)").
[20] *See* Dahl v. R.J. Reynolds Tobacco Co., 478 F.3d 965 (8th Cir. 2007) (reasoning a decision rendered in a separate action did not constitute "other paper")

against the resident defendants."[21] The Eighth Circuit has determined "a proper review should give paramount consideration to the reasonableness of the basis underlying the state claim."[22]

B. Evidence of Fraudulent Joinder

The Eighth Circuit has determined that if the defendant has presented evidence demonstrating that plaintiff can bring no cause of action supported by state law against the joined defendant, then the joinder is fraudulent.[23] Nebraska courts have not yet had the opportunity to determine what constitutes evidence of fraudulent joinder in the context of an action in products liability.

III. VOLUNTARY/INVOLUNTARY RULE

A. "Voluntary" Dismissal

Nebraska's federal district court has not yet had the opportunity to determine the application of this rule. However, the Eighth Circuit has determined that the voluntary-involuntary rule is still applicable in this circuit.[24]

B. Exceptions

The Eighth Circuit has recognized an exception to this rule where the non-diverse defendant has been found to have been joined fraudulently in order to defeat diversity.[25]

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[21] Filla v. Norfolk S. Ry., 336 F.3d 806, 810 (8th Cir. 2003).
[22] *Id.* at 810. *See Simpson v. Thomure*, 484 F.3d 1081 (8th Cir. 2007) (applying the "reasonable basis" test)
[23] *Filla*, 336 F.3d at 810; *see also* Windac Corp. v. Clarke, 530 F. Supp. 812, 814 (D.C. Neb. 1982) (considering the lack of evidence "before the court showing that [the putative party] holds the lease as a result of a sham transaction or a colorable claim," which would be "indicia of a conveyance to defeat removal jurisdiction").
[24] *See In re* Iowa Mfg. Co. of Cedar Rapids, Iowa, 747 F.2d 462, 463 (stating that where "the dismissal of a defendant in state court creates complete diversity between all parties so that the case may be removed to federal court, the propriety of removal is determined according to whether the dismissal was voluntary or involuntary with respect to the plaintiff" and reasoning that where the non-diverse defendant's motion for summary judgment was granted, removal was improper as the dismissal was involuntary)
[25] *See* Simpson v. Thomure, 484 F.3d 1081 (8th Cir. 2007) (stating removal was proper based upon district court's dismissal of fraudulently joined non-diverse defendant).

IV. WAIVER OF RIGHT TO REMOVE

A. Waiver by Defending

In *Beasley v. Union Pac. R. Co.*,[26] the court determined that in certain situations a defendant could waive its right to removal by taking certain actions in state court, but the defendant did not waive its right when it engaged in purely preliminary actions in the state court. The court stated "the case law makes clear, the right of removal is not lost by action in state court short of proceeding to an adjudication on the merits."[27]

B. Waiver by Consent

Nebraska's federal district court has not yet had the opportunity to address whether a defendant's consent to plaintiff's filing the suit in state court will waive the defendant's right to remove. However, the Eighth Circuit has determined that a "waiver of a right to remove must be 'clear and unequivocal.'"[28] In *Weltman v. Silna*,[29] the court reasoned that because the "agreement in which the [defendants] consented to [the plaintiff's] filing this suit in state court did not address removal," the defendants did not waive the right to removal.

C. Waiver by Contract

Nebraska's federal district court has not yet had the opportunity to address whether contractual waivers of removal are binding. However, the Eighth Circuit has determined that where a contract contains a clear and unequivocal waiver of the right to remove, that waiver will be binding.[30]

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[26] 497 F. Supp. 213 (D.C. Neb. 1980).
[27] *Beasley*, 497 F. Supp. at 217.
[28] *Weltman v. Silna*, 879 F.2d 425, 427 (8th Cir. 1989).
[29] 879 F.2d 425, 427 (8th Cir. 1989).
[30] *See iNet Directories, LLC v. Developershed, Inc.*, 394 F.3d 1081, 1081 (8th Cir. 2005) (reasoning that a "contract's forum selection clause unambiguously prohibited [defendant] from objecting to venue by removing the case to federal court").

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I. POWER AND RIGHT TO REMOVE

A. The Parties

1. Defining "Parties in Interest"

Defendants seeking to remove actions from North Dakota state court to the District Court for the District of North Dakota are bound by decisions of the Eighth Circuit and the District of North Dakota interpreting federal removal statutes. The Eighth Circuit explains that non-federal question cases "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."[1]

2. Presence of "Doe" Defendants

The presence of a "Doe" defendant does not preclude removal by destroying diversity in North Dakota. *See* 28 U.S.C. § 1441(a) (explaining in the commentary portion that Congress dealt with problems associated with fictitiously named defendants by adding explicit instructions to courts to disregard the citizenship of fictitiously named defendants).

[1] Horton v. Conklin, 431 F.3d 602, 604 (8th Cir. 2005) (quoting 28 U.S.C. § 1441(b)).

3. Diversity for Putative Class Actions

The Eighth Circuit determines diversity in putative class actions based upon traditional principles of diversity jurisdiction.[2]

B. The Amount in Controversy

1. Establishing the Amount in Controversy

The removing defendant bears the burden of establishing the requisite "amount in controversy" by a preponderance of the evidence.[3]

2. Application When a Specific Dollar Amount is Not Pled

This is true even when a plaintiff fails to assert an amount in controversy.[4] A court lacks jurisdiction whenever "it appears to a legal certainty that the claim is really for less than the jurisdictional amount."[5] The Eighth Circuit does not assume the amount contained in the plaintiff's complaint is the actual amount in controversy.[6]

Class members cannot aggregate their claims to meet the jurisdictional requisite.[7] Attorney's fees are considered in satisfying the requisite amount in controversy; fees cannot be aggregated by class members to meet the amount in controversy.[8] The exception to the "non-

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[2] Saab v. Home Depo U.S.A., Inc., 469 F.3d 758, 759 (8th Cir. 2006) (citing 28 U.S.C. §§ 1332(a), 1441); *see generally* Mehl v. Canadian Pac. Ry., 216 F.R.D. 627, 631 (D. N.D.) (denying defendant's discovery request to unnamed class members who may upset diversity)

[3] Trimble v. Asarco, Inc., 232 F.3d 946, 959 (8th Cir. 2000); Bergstrom v. Burlington N. R. Co., 895 F.Supp. 257, 258 (D. N.D. 1995).

[4] *In re* Minnesota Mut. Life Ins. Co. Sales Practices Litig., 346 F.3d 830, 834 (8th Cir. 2003); Ongstad v. Piper Jaffray & Co., 407 F.Supp.2d 1085, 1090 (D. N.D. 2006).

[5] Kopp v. Kopp, 280 F.3d 883, 884 (8th Cir.2002) (internal citations and quotations omitted).

[6] James Neff Kramper Family Farm P'ship v. IBP, Inc., 393 F.3d 828, 831 (8th Cir. 2005).

[7] Kessler v. Nat'l Enters., Inc., 347 F.3d 1076, 1081 (8th Cir. 2003); *see also* Kary v. ExxonMobil Corp., 2002 WL 32067456, *2 (D. N.D. 2002) (noting the same requirement applies to putative class members).

[8] *Kessler*, 347 F.3d at 1080; *see also Kary*, 2002 WL 32067456 at *2 (noting attorney's fees, punitive damages, actual damages, and restitution cannot be aggregated by class members for jurisdictional purposes).

aggregation rule" for class members occurs when "several plaintiffs 'unite to enforce a single title or right in which they have a common and undivided interest.'"[9]

3. Amount in Controversy Where Equitable Relief is Sought

Equitable relief sought by a plaintiff is considered as part of the amount in controversy.[10] The plaintiff in *Bergstrom* asserted damages of $29,000 as well as a demand defendant build a culvert under its railroad for drainage.[11] The court determined that the amount attributable to equitable relief should be determined as the cost to the defendant rather than the cost to the plaintiff.[12] The court rejected the contrasting "plaintiff's viewpoint" rule, reasoning: "If the plaintiff's standpoint is used, the defendant is forced to prove the value of the controversy to the plaintiff, without the aid of any discovery."[13]

4. Defeating Removal by Amending Relief Sought

Challenges to subject matter jurisdiction because of a deficient amount in controversy can be considered on appeal for the first time.[14] The court explained: "Although our jurisdictional inquiry focuses on the claims made at the time of removal, such that certain subsequent events-for example, the dismissal of one or more claims or parties-do not divest us of jurisdiction, we still judge the legitimacy of the amount in controversy 'based on information known to the court at the time jurisdiction [is] challenged.'"[15] The court will even raise the issue of jurisdiction sua sponte.[16]

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[9] *Kary*, 2002 WL 32067456 at *2 (quoting Crawford v. F. Hoffman-La Roche Ltd., 267 F.3d 760, 765 (8th Cir. 2001)).
[10] Bergstrom v. Burlington N. R. Co., 895 F.Supp. 257, 262 (D. N.D. 1995).
[11] *Id.* at 258.
[12] *Id.*
[13] *Id.* at 262.
[14] *James Neff*, 393 F.3d at 834.
[15] *Id.* (internal citation omitted).
[16] *Id.*

C. Time of Existence of Grounds for Removal

1. Event Triggering Thirty-Day Period for Actions Initially Removable

The Eighth Circuit has determined that "the thirty-day time limit of section 1446(b) begins running upon receipt of the initial complaint only when the complaint explicitly discloses the plaintiff is seeking damages in excess of the federal jurisdictional amount."[17] The court explained that this rule "promoted certainty and judicial efficiency."[18] In addition, it prevents plaintiffs from "disguising" the amount in controversy until after the removal period has expired.[19] Service of a summons in North Dakota commences an action in state court; the complaint must be served with the summons.[20] The Eighth Circuit has adopted the "last-served" defendant rule.[21] In other words, the thirty-day timeline for removal runs independently for each defendant depending on the date the defendant was served.[22]

2. Event Triggering Thirty-Day Period for Actions Not Initially Removable

The District of North Dakota, relying on the United States Supreme Court, has explained what constitutes "service or otherwise" in the context of 28 U.S.C. § 1441 (now 1446(b)).[23] The language has been interpreted to require "official service" in commencing the thirty-day period.[24] Therefore, the fact a defendant received informal copies of the pleadings before "official service" did not act to commence the thirty-day period for removal.[25]

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[17] *In re* Willis, 228 F.3d 896, 897 (8th Cir. 2000).
[18] *Id.*
[19] *Id.*
[20] N.D. R. Civ. P. 3, 4(2).
[21] Brown v. Tokio Marine and Fire Ins. Co., 284 F.3d 871, 873 (8th Cir. 2002); Marano Enters. of Kansas v. Z-Teca Rests., L.P., 254 F.3d 753, 755 (8th Cir. 2001).
[22] *Id.*
[23] Fisher v. Dakota Cmty. Bank, 405 F.Supp.2d 1089, 1093 (D. N.D. 2005).
[24] *Id.* (citations omitted).
[25] *Id.*

"Other papers," again in the context of 28 U.S.C. 1446(b), has been analyzed by the Eighth Circuit. A defendant claimed that an opinion issued by the Eighth Circuit constituted an "order or other paper" that acted to re-commence the thirty day removal period.[26] However, the Eighth Circuit held that the opinion would not re-commence the thirty day period for removal because Congress did not include this basis in § 1446(b).[27] The court explained that the term "other paper," in light of other precedent, could not be interpreted to mean documents not associated with the immediate action.[28] The term "other paper" has been interpreted to include documents like a motion stating the claim is a federal question and a post-complaint demand letter that sought more than $75,000.[29]

II. FRAUDULENT JOINDER

A. Test for Fraudulent Joinder

Courts in this jurisdiction must use "reason" to determine whether a defendant has been fraudulently joined.[30] A review of whether fraudulent joinder has occurred involves "a proper review . . . [giving] paramount consideration to the reasonableness of the basis underlying the state claim."[31] If there is nothing in "fact and law" that supports a claim against resident defendants, then the joinder is fraudulent.[32]

B. Evidence of Fraudulent Joinder

Evidence of fraudulent joinder can take the form of a claim brought against a non-diverse defendant who is immune from suit in state court.[33] The Eighth Circuit deemed a claim against a

[26] Dahl v. R.J. Reynolds Tobacco Co., 478 F.3d 965, 968 (8th Cir. 2007).
[27] *Id.* at 969.
[28] *Id.*
[29] *Id.*
[30] Menz v. New Holland N. Am., Inc., 440 F.3d 1002, 1004 (8th Cir. 2006).
[31] *Id.* (citation omitted).
[32] *Id.* (citation omitted).
[33] Simpson v. Thomure, 484 F.3d 1081, 1083 (8th Cir. 2007).

non-diverse defendant who was immune from suit because of state worker's compensation laws to be fraudulent joinder.[34]

III. VOLUNTARY / INVOLUNTARY RULE

A. "Voluntary" Dismissal

An action that was previously non-removable cannot become removable because of the involuntary dismissal of a defendant.[35] The Eighth Circuit explained:

> If the dismissal of a defendant in state court creates complete diversity between all parties so that the case may be removed to federal court, the propriety of removal is determined according to whether the dismissal was voluntary or involuntary with respect to the plaintiff. In other words, if the plaintiff voluntarily dismisses the non-diverse defendant, the case may be removed. Removal is improper, however, if the dismissal of that resident defendant was involuntary.[36]

For example, a defendant is involuntarily dismissed if it is by summary judgment.[37]

IV. WAIVER OF RIGHT TO REMOVE

A. Waiver by Consent

A company that appoints an agent in a state for service of process purposes does not waive its right to removal.[38] A defendant that consents to a plaintiff filing an action in state court does not prevent the defendant from seeking removal.[39]

B. Waiver by Contract

Agreements can constitute waiver. An agreement consenting to filing in state court that unequivocally and clearly establishes defendant's waiver to seek removal is enforceable.[40] The Eighth Circuit addressed a forum selection clause that stated: "The Parties hereby irrevocably waive any and all objections which any Party may now or hereafter have to the . . . laying of

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[34] *Id.*
[35] Lidgerwood Pub. Sch. v. Cole Papers, Inc., WL 288469, *2-3 (D. N.D. 2003) (citation omitted).
[36] *In re* Iowa Mfg. Co., 747 F.2d 462, 463 (8th Cir. 1984).
[37] *Lidgerwood*, WL 288469 at *3.
[38] Polito v. Molasky, 123 F.2d 258, 262 (8th Cir. 1941).
[39] Weltman v. Silna, 879 F.2d 425, 427 (8th Cir. 1989).
[40] *Id.*

venue of any such suit, action or proceeding brought in any such federal or state court . . . ."[41] The defendant sought removal to federal court.[42] The district court remanded the action pursuant to the contract and the Eighth Circuit affirmed.[43] The contract unambiguously prohibited defendant from objecting to venue chosen by plaintiff.[44]

[41] iNet Directories, LLC v. Developershed, Inc., 394 F.3d 1081, 1081 (8th Cir. 2005).
[42] *Id.*
[43] *Id.* at 1081-82.
[44] *Id.* at 1082 (citing Waters v. Browning-Ferris Indus. Inc., 252 F.3d 796, 797-98 (5th Cir. 2001)).

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I. POWER AND RIGHT TO REMOVE

A. The Parties

1. Defining "Parties in Interest"

When diversity is a defendant's basis for removal, removal is only appropriate where "none of the parties in interest properly joined and served as defendants is a citizen of the state in which such action is brought."[1] Stated similarly, "where there are plural plaintiffs and plural defendants[,] a federal court does not have diversity jurisdiction unless there is diversity between all plaintiffs and all defendants."[2] A non-diverse defendant that is merely "formal" or "nominal" will not destroy diversity.[3] By way of comparison, if a non-diverse party is "a real party in interest" a federal court cannot retain jurisdiction.[4] In South Dakota, a party is not properly designated as "formal" or "nominal" unless that party's rights will not be affected by the adjudication or that party has no interest in the outcome of the action.[5]

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[1] 28 U.S.C. 1441(b).
[2] Iowa Public Service Co. v. Medicine Bow Coal Co., 556 F.2d 400, 403-04 (8th Cir. 1977).
[3] *Id. See also In re* General Adjudication of All Rights to Use Water and Water Rights of the Missouri River, 531 F.Supp. 449, 455 (D.S.D. 1982) (recognizing that the presence of nominal, formal or unnecessary parties "has no controlling significance for removal purposes").
[4] *See generally In Re General Adjudication of All Rights*, 531 F.Supp. at 455-56.
[5] *Id.*

2. Presence of "Doe" Defendants

The federal district court in South Dakota has not addressed what effect inclusion of "Doe" defendants will have on diversity. However, the issue has been definitively addressed at the Eighth Circuit Court of Appeals.[6] "[O]rdinarily . . . a Jane Doe case may not be removed until the plaintiff files an amendment in the state court substituting the names of real parties, and the defendant seeking removal thereafter establishes diversity of citizenship between the plaintiff and named defendants."[7] Stated similarly, where a plaintiff alleges claims against a Doe defendant and actively seeks an identity in order to accomplish service of process removal is improper.[8] However, if a defendant can convince the court that the plaintiff joined "Doe defendants" fraudulently or that those defendants are "merely nominal parties," removal may be appropriate and allowed.[9]

B. The Amount in Controversy

1. Establishing the Amount in Controversy

If federal court jurisdiction is based on diversity, there must be evidence that the amount in controversy exceeds $75,000, exclusive of costs and interest.[10] When the plaintiff claims damages which meet the amount in controversy, the lawsuit cannot be dismissed for lack of jurisdiction unless "it appears to a legal certainty that the claim is really for less than the jurisdictional minimum."[11] On the other hand, if there is a question as to whether the

[6] *See* Pecherski v. General Motors Corp., 636 F.2d 1156 (8th Cir. 1981).
[7] *Id.* at 1161.
[8] *Id.*
[9] *Id.*
[10] *See* Dupraz v. Aventis CropScience USA Holding, 153 F.Supp.2d 1102, 1104 (D.S.D. 2001) (citing 28 U.S.C. §1332(a)).
[11] *Id.* (citations omitted).

requirement is satisfied, the party seeking to invoke federal jurisdiction has the burden of proving that there is a sufficient amount in controversy.[12]

2. Application When a Specific Dollar Amount is Not Pled

If, on their face, the pleadings fail to establish that the amount in controversy requirement is satisfied, courts can look to other evidence in the record.[13] After recognizing that different courts apply different standards of proof with regard to the "amount in controversy" requirement, the South Dakota Federal District Court endorsed a requirement that the party seeking to invoke federal jurisdiction show by a "reasonable probability" that a sufficient amount is in controversy.[14] A court can consider the potential value of actual damages, injunctive relief and punitive damages.[15]

3. Amount in Controversy Where Equitable Relief is Sought

If the plaintiff seeks equitable relief, the amount of controversy is determined with reference to the right that is sought to be enforced. By way of example, in an action seeking enforcement of insurance policies, the amount in controversy is the face value of the insurance policies.[16]

4. Defeating Removal by Amending Relief Sought

A plaintiff cannot defeat federal court jurisdiction by actions, which occur or are undertaken after removal has been properly accomplished.[17] The South Dakota Federal District Court has specifically explained: "[o]nce a case . . . has been removed properly, subsequent

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[12] *Id.*
[13] *Id.* (citing United Food Local 919 v. CenterMark Properties, 30 F.3d 298, 305 (2d Cir. 1994).
[14] *Id.* at 1104-05 (citing Shaw v. Dow Brands, Inc., 994 F.2d 364, 366 (7th Cir. 1993). In *Dupraz*, a reasonable probability that the amount in controversy exceeded $75,000 was established because, among other things, Plaintiff's counsel had demanded over $75,000 in another case involving substantially the same facts and parties and because juries has awarded more than $75,000 in similar cases.
[15] *Id.*
[16] *In Re* Minnesota Mut. Life Ins. Co. Sales Practices Lit., 346 F.3d 830, 834 (8th Cir, 2003).
[17] *See* Waldner v. Bush, 2006 WL 3312039, at * 7 (D.S.D. 2006).

events that reduce the amount recoverable . . . will not defeat the federal court's subject matter jurisdiction."[18] This precept remains true even if the amount in controversy is reduced because of dismissal of federal claims. In such a situation, the court's discretion to retain or dismiss remaining state claims remains unaffected.[19]

C. Time of Existence of Grounds for Removal

1. Event Triggering Thirty-Day Period for Actions Initially Removable

The United States Supreme Court answered the question of when the thirty-day removal period commences in *Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc.*[20] Two years later, the Eighth Circuit emphasized that settled law sets the trigger for removal as "the time that the defendant is served with the complaint."[21]

Please note that in South Dakota, an action is commenced by service of the summons, and there is no requirement that the complaint be served with the summons.[22] The plaintiff is, however, required to state in the summons where the complaint is filed, "or will be filed."[23] Under *Murphy Brothers*,[24] if a defendant is served with a summons alone (which does not indicate that the complaint has already been filed), the removal period will run from the time the complaint is furnished.[25] On the other hand, if a defendant is served with a summons, which indicates that a complaint has previously been filed, the time for removal will begin at the time of service of the summons.[26]

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[18] *Id.*
[19] *Id.*
[20] 526 U.S. 344 (1999).
[21] *See* Brown v. Tokio Marine and Fire Ins. Co., 284 F.3d 871, 873 (8th Cir. 2002).
[22] *See* SDCL §15-2-30.
[23] *Id.*
[24] 526 U.S. 344 (1999).
[25] *See* Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc., 526 U.S. 344, 354 (1999).
[26] *Id.*

The removal period may be revived by service of a later-named defendant. For instance, in *Brown v. Tokio Marine & Fire Ins. Co.*,[27] though the first-served defendant failed to comply with removal procedure, removal of the entire case was eventually accomplished when an amended complaint added an additional diverse defendant, who accomplished removal within thirty days of service of process of the amended complaint.[28]

2. Event Triggering Thirty-Day Period for Actions Not Initially Removable

If removability is not apparent from the initial complaint, "a notice of removal may be filed within thirty days after receipt by the defendant . . . of a copy of an *amended pleading, motion, order or other paper* from which it may first be ascertained that the case is one which is or has become removable"[29]

According to the Eighth Circuit, the italicized phrase supports the conclusion that only documents exchanged within the case a bar will revive the removal right.[30] Stated similarly, the Eighth Circuit has interpreted the pertinent statutory language as recommencing the thirty day removal period only to papers and documents involved "in the case being removed."[31] Consequently, receipt of a legal decision in a separate case, which did not involve the same parties, cannot recommence the thirty-day removal period.[32]

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[27] 284 F.3d 871 (8th Cir. 2002).
[28] *Id. See also* Marano Enterprises of Kansas v. Z-Teca Rest.,L.P., 254 F.3d 753, 756 (8th Cir. 2001) (concluding that each defendant should receive thirty days after receiving formal service in which to file a notice of removal regardless of whether a previously served defendant had filed a notice of removal).
[29] Chaganti & Associates, P.C. v. Nowotny, 470 F.3d 1215, 1220 (8th Cir. 2006). (citing 28 U.S.C.1446(b)). An ultimate one-year limitation, applies to cases that were not originally removable to federal court but later became removable.
[30] Dahl v. R.J. Reynolds Tobacco Co., 478 F.3d 965 (8th Cir. 2007).
[31] The *Dahl* decision does seem to leave room for creating later exceptions to this general rule by distinguishing *Dahl* from *Green v. R.J. Reynolds Tobacco Co.*, 274 F.3d 263 (5th Cir. 2001) and *Doe v. Am. Red Cross*, 14 F.3d 196 (3d. Cir. 1993). *See generally Dahl*, 478 F.3d at 969.
[32] *Id.*

On the other hand, *Chiaganti & Associates, P.C. v. Nowotny*,[33] presents an example of the type of document, which does recommence the thirty-day removal period.[34] In *Chiaganti*, the Eighth Circuit concluded that removal, which was accomplished within thirty days of receipt of a resistance to a motion to transfer and which, for the first time, included a specific allegation of federal anti-trust claims, was timely accomplished.[35] Similarly, it would appear that a post-complaint settlement demand seeking an amount greater than the $75,000 jurisdiction limit would constitute an "other paper," which would recommence the removal period.[36]

II. FRAUDULENT JOINDER

A. Test for Fraudulent Joinder

"If a defendant is fraudulently joined that defendant's 'residency is disregarded for purposes of determining the jurisdictional issue.'"[37] The party seeking to invoke federal jurisdiction has the burden of proving joinder was fraudulent.[38] The South Dakota Federal District Court has explained that joinder will be termed "fraudulent" only where "there exists no reasonable basis in fact and law supporting a claim against the resident defendants."[39] In other words, the appropriate inquiry is whether a plaintiff has "a colorable [state law] claim" against the non-diverse party.[40]

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[33] 470 F.3d 1215 (8th Cir. 2006).
[34] Chaganti & Associates, P.C. v. Nowotny, 470 F3d 1215, 1220 (8th Cir. 2006).
[35] *Id.*
[36] *See Dahl*, 478 F.3d at 969 (citing Addo v. Globe Life & Accident Ins. Co., 230 F.3d 759, 761-62 (5th Cir. 2000)).
[37] Palmquist v. Conseco Medical Ins. Co., 128 F.Supp.2d 618, 621 (D.S.D. 2000) (citations omitted).
[38] *Id.*
[39] Culhane Communications v. Fuller, 489 F.Supp.2d 959, 961 (D.S.D 2007).
[40] *Id.* at 961. (internal quotations omitted).

B. Evidence of Fraudulent Joinder

A defendant does not need to persuade the court that a plaintiff acted with fraudulent intent.[41] "Rather, a defendant will be deemed to have been fraudulently joined if, regardless of plaintiff's motive or good faith, plaintiff has no chance of succeeding in its claim against the challenged defendant."[42]

If a plaintiff fails to state a viable cause of action against the non-diverse defendant, or where the complaint merely mentions the non-diverse defendant without stating "substantive allegations," joinder may be deemed fraudulent.[43] Though a conclusion of fraudulent joinder can be made from the pleadings, the South Dakota Federal District Court has explained that its review is not limited to the pleadings alone. Rather, where a conclusion cannot be made from the pleadings alone, the court will "pierce the pleadings" and consider affidavit testimony.[44]

III. VOLUNTARY / INVOLUNTARY RULE

A. "Voluntary" Dismissal

The Eighth Circuit has endorsed the "Voluntary – Involuntary" rule, explaining that it provides a "bright line test" for assessing removablity.[45] When dismissal of a non-diverse state court defendant creates complete diversity, the case becomes removable, only if, the dismissal was voluntary with respective to the plaintiff.[46] Consequently, "if the plaintiff voluntarily dismisses the non-diverse defendant, the case may be removed."[47] On the other hand, if

[41] Federal Beef Processors, Inc. v. CBS Inc., 851 F.Supp. 1430, 1435 (D.S.D. 1994) (citations omitted).
[42] *Id.*
[43] *Id.*
[44] *Id.* at 1436.
[45] *See In re* Iowa Mfg. Co. of Cedar Rapids, 747 F.2d 462, 463 (8th Cir. 1984).
[46] *Id.*
[47] *Id.*

dismissal of the non-diverse defendant is involuntary (*e.g.*, on defendant's motion for summary judgment), removal is improper.[48]

IV. WAIVER OF RIGHT TO REMOVE

A. Waiver by Defending

It does not appear that the Eighth Circuit or South Dakota Federal District Court has directly addressed whether participation in a state court action or invoking state court processes will constitute a waiver of the right to remove. Nevertheless, in *Ward v. Resolution Trust Corp.*,[49] the Eighth Circuit cited *Brown v. Demco, Inc.*,[50] where the Fifth Circuit concluded that defending a state court action gave rise to waiver. The *Ward* court distinguished *Brown* and held that a defendant's post-removal motion seeking release of the state court record (filed in state court) did not waive federal court jurisdiction.[51] It would appear from *Ward* that a post-removal filing, which is merely procedural, would not constitute waiver of federal court jurisdiction. Specifically, the *Ward* court emphasized that the defendant in that case had "not request[ed] a ruling on the merits" or indicated its intent to abandon federal jurisdiction.[52]

B. Waiver by Consent

It does not appear that the South Dakota Federal District Court has addressed the question of whether a defendant's consent to the filing of a suit in state court constitutes a waiver of the right to remove. The Eighth Circuit has, on the other hand, stated that a "waiver of the right to remove must be "clear and unequivocal."[53] In light of this requirement, the Court of Appeals concluded that an agreement by which the defendant consented to subject matter jurisdiction and

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[48] *Id.*
[49] 972 F.2d 196 (8th Cir. 1992).
[50] 792 F.2d 478, 481 (5th Cir. 1986).
[51] *See* Ward v. Resolution Trust Co., 972 F.2d 196, 198 (8th Cir. 1992).
[52] *Id.*
[53] Weltman v. Silna, 879 F.2d 425, 427 (8th Cir. 1989) (citations omitted).

venue, but did not specifically waive its right to remove the case, did not effectuate a waiver of its removal right.[54]

C. Waiver by Contract

Though the South Dakota Federal District Court has not addressed enforceability of a contractual waiver of a defendant's right to remove, Eighth Circuit precedent indicates that such contractual provisions are enforceable. In *iNet Directories, LLC v. Developershed Inc.*,[55] the Court of Appeals concluded that, if a contract "clearly and unequivocally" waives the right to remove, the waiver is legally binding.[56]

[54] *Id.* at 427.
[55] 394 F.3d 1081 (8th Cir. 2005).
[56] *Id.* at 1082.

9TH CIRCUIT

ALASKA

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Given its small population and relative youth as a state, Alaska does not have a significant body of case law regarding federal jurisdiction based on removal that might differentiate it from other states within the Ninth Circuit. For that reason, Ninth Circuit opinions as well as unreported materials from the District of Alaska have been cited herein where appropriate.

I. POWER AND RIGHT TO REMOVE

A. The Parties

1. Defining "Parties in Interest"

Fed. R. Civ. P. 17(a) requires that every action in federal court be asserted in the name of the real party in interest. A "real party in interest" is a party who, by substantive law of the forum, has a right sought to be enforced.[1] "The real party in interest requirement . . . focuses on ensuring that the proper plaintiff is prosecuting the claim, i.e., that the plaintiff is the person who possesses the right to be enforced."[2]

It is well settled that a court sitting in diversity must look to the substantive law of the forum state to determine whether a party has a right to be enforced, i.e. is a real party in interest.[3] The Alaska courts have not adopted a test by which to evaluate whether a party constitutes a

[1] Pacific Am. Fisheries v. Mullaney, 105 F.Supp. 907, 909 (D. Alaska 1952).
[2] Bering Strait Sch. Dist. v. Safeco Ins. Co. Payment Bond No. 6092134, 2005 WL 1287452, at *2 (D. Alaska) (order denying summary judgment).
[3] 17 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 10 (3d ed. 1999).

"real party in interest" and the analysis must be conducted on a case-by-case basis to assess whether a party has a substantive right to be enforced under Alaska law.

2. Presence of "Doe" Defendants

Section 1441(a) was amended in 1988 to provide that the citizenship of "Doe" defendants is disregarded for removal purposes. Citizenship becomes relevant only if the plaintiff seeks leave to substitute a named defendant in the place of the fictitious defendant.[4] There are no published decisions from Alaska interpreting these provisions but it may be presumed that the Alaska federal district court would follow the Ninth Circuit precedent recognizing the effect of the 1988 amendments.[5]

3. Diversity for Putative Class Actions

The Class Action Fairness Act ("CAFA")[6] took effect on February 18, 2005, and introduced a number of changes to class action procedures in federal courts. Among the changes introduced by CAFA was a relaxation of the diversity requirement for jurisdiction over class actions. District courts now generally have jurisdiction over class actions with 100 or more class members in which more than $5 million is in controversy and in which there exists minimal diversity.[7] CAFA thus abandons the complete diversity rule for covered class actions.[8]

Citizenship of the proposed plaintiff classes, for purposes of establishing jurisdiction under CAFA, is determined as of the date of the filing of the complaint or amended complaint.[9] Alternatively, if the case stated by the initial pleading is not subject to removal, then citizenship is determined as of the date of service of the amended pleading, motion, or other paper indicating

[4] 28 U.S.C.A. § 1447(e).
[5] *See e.g.*, Soliman v. Phillip Morris Inc., 311 F.3d 966 (9th Cir. 2002), *cert. denied*, 540 U.S. 814 (2003).
[6] Pub. L. 109-2, 119 Stat. 4, codified at 28 U.S.C.A. §§ 1 note, 1332(d) 1332 note, 1453, 1711-1715, 2071 note, 2074 note.
[7] 28 U.S.C.A. § 1332(d).
[8] *See* Abrego Abrego v. The Dow Chemical Co., 443 F.3d 676, 680 (9th Cir. 2006) (citing Bush v. Cheaptickets, Inc., 425 F.3d 683, 684 (9th Cir. 2005)).
[9] 28 U.S.C.A. § 1332(d)(7).

the existence of federal jurisdiction.[10] An unincorporated association is deemed to be a citizen of the state in which it has its principal place of business and the state under whose laws it is organized.[11]

B. The Amount in Controversy

1. Establishing the Amount in Controversy

Diversity jurisdiction exists only if the amount in controversy exceeds $75,000.[12] "The amount in controversy is determined by looking to the complaint at the time of removal, but if it is unclear from the complaint, then [the removing party] bears the burden of proving it meets the jurisdiction requirement under 28 U.S.C. § 1332(a)."[13] In the case of declaratory judgment actions contesting the applicability of insurance policies, at least one Alaska District Court judge has taken the approach that the amount in controversy is the face value of the policy when the validity of the entire contract is at issue.[14] When the applicability of liability coverage to a particular occurrence is at issue in a declaratory relief action, the amount in controversy is the value of the underlying potential tort action.[15]

Alaska has no reported decisions that provide further guidance as to how "amount in controversy" is defined under either § 1332 (a) or (d)(2). The Ninth Circuit has reported extensive authority on this point, however, and many more volumes of persuasive authority can be found from other jurisdictions.

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[10] 28 U.S.C.A. § 1332(d)(7).
[11] 28 U.S.C.A. § 1332(d)(10).
[12] 28 U.S.C.A. § 1332(a).
[13] Borgen v. United Parcel Svc., 2006 WL 1096628, at *1 (D. Alaska) (order denying remand).
[14] State Farm Fire and Casualty Co. v. Domaika, 2005 WL 1719265, at *1, note 7 (D. Alaska) (order denying motion to dismiss or stay action) (quoting 14B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD COOPER, FEDERAL PRACTICE AND PROCEDURE § 3710 (3d Ed. 1998)).
[15] *Id.* (citing Budget Rent-A-Car Inc. v. Higashiguchi, 109 F.3d 1471, 1473 (9th Cir. 1997)).

2. Application When a Specific Dollar Amount is Not Pled

Alaska also has no reported decisions on the issue of how the amount in controversy requirement is met when a specific dollar amount is not pled. The general rule in the Ninth Circuit is that, when the complaint does not demand a specific dollar amount, the removing defendant must prove by a preponderance of the evidence that the amount in controversy exceeds $75,000.[16]

3. Amount in Controversy Where Equitable Relief is Sought

Alaska has no reported decisions that provide further guidance as to how the amount in controversy requirement is met when equitable relief is requested. The Ninth Circuit has reported extensive authority on this point, however, and many more volumes of persuasive authority can be found from other jurisdictions.

4. Defeating Removal by Amending Relief Sought

At least one Alaska District Court decision suggests that a plaintiff may defeat federal jurisdiction by amending the complaint to limit the amount in controversy. In *Huyck v. Allstate*,[17] the District Court at Anchorage denied plaintiff's motion to remand but noted:

> [T]here is a preponderance of evidence that the amount in controversy is above $75,000 and Plaintiff has not amended his complaint. Therefore, the Court has jurisdiction. *If Plaintiff amends the complaint in this matter to limit the amount in controversy, the Court will, upon timely request, revisit the issue.*[18]

The clear implication of the ruling is that the court would consider granting a motion to remand based upon an amendment to the complaint that reduced the amount in controversy. However, it appears that, absent an actual amendment to the complaint, mere argument that the amount in question is less than the jurisdictional amount will not support remand.

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[16] *See* Kroske v. United States Bank Corp., 432 F.3d 976 (9th Cir. 2005) (trial court properly considered interrogatory answers and emotional distress awards in similar cases to find that damages exceeded $75,000).
[17] 2005 WL 3133005, *at 1 (D. Alaska) (order denying remand).
[18] *Id.* (emphasis added).

C. Time of Existence of Grounds for Removal

1. Event Triggering Thirty-Day Period for Actions Initially Removable

Section 1446(b) provides a thirty-day time period for removal of a state court action to federal district court. If the initial pleading provides notice that the case is removable, then the period for removal commences to run upon defendant's receipt, through "service or otherwise," of the initial pleading or, if service of the initial pleading is not required, then upon service of the summons if the initial pleading has been filed in court, whichever time period is shorter.

In civil actions in Alaska state court, the plaintiff must cause the summons and a copy of the complaint to be served upon each defendant or their attorney.[19] Service of these documents can be accomplished by personal service, certified mail, or, after plaintiff's diligent inquiry as to the absent party's whereabouts, the court may authorize service by publication or any other method reasonably calculated to give the defendant actual notice and an opportunity to be heard.[20] Thus, defendant's receipt of the summons and complaint through service made pursuant to Alaska R. Civ. P. 4 triggers the thirty-day time period for removal if the complaint provides notice that the matter is removable.[21]

2. Event Triggering Thirty-Day Period for Actions Not Initially Removable

In *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*,[22] the Supreme Court found that the language "service or otherwise" in § 1446(b) was intended to provide uniform operation of the timing for removal among the states by extending the commencement of the removal period until such time as the defendant gained access to the complaint.[23] In states such as Alaska that require

[19] Alaska R. Civ. P. 4(a).
[20] Alaska R. Civ. P. 4(d)-(h).
[21] *See Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 347-49 (1999).
[22] 526 U.S. 344, 347-49 (1999).
[23] 107 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 30[3][c] (3d ed. 1999).

the complaint to be served along with the summons, the concerns addressed by the language "service or otherwise" are moot.

"Other paper" has been construed in the Ninth Circuit to include demand letters[24] and depositions.[25] In its sole reported decision on the issue, however, the Alaska District Court adopted a narrow view of what may constitute "other paper." The case of *Interior Glass Svcs., Inc. v. FDIC*[26] was originally filed as a state court action against a failed bank that went to receivership under the FDIC. The FDIC subsequently removed the action to federal court. Upon plaintiff's motion to remand, the district court rejected the argument that the thirty-day removal period commenced to run when the failed bank's lawyers sent the FDIC a letter informing the FDIC of the pending state court action and enclosing a copy of the complaint.

In its decision, the *Interior Glass Svcs*. court distinguished *FDIC v. C.C. Brooks*,[27] which held that a judge's letter triggered the removal period despite the fact that the FDIC had not yet moved to intervene in that case. Judge Kleinfeld held that stretching *C.C. Brooks* to include lawyers' letters would violate the principle of *ejusdem generis*; i.e. "the phrase 'other paper' in 'amended pleading, motion, order or other paper' means a 'paper' similar to an amended pleading, motion, or order."[28] In the court's view, a judge's letter was similar to an order, whereas a lawyer's letter was not.

II. FRAUDULENT JOINDER

A. Test for Fraudulent Joinder

There is no Alaska-specific authority, which addresses this question. The Ninth Circuit rule on fraudulent joinder is that a non-diverse defendant's citizenship will be disregarded for

[24] *Cohn v. Petsmart, Inc.*, 281 F.3d 837, 840 (9th Cir. 2002).
[25] *Riggs v. Continental Baking Co.*, 678 F. Supp. 236, 238 (N.D. Cal. 1988).
[26] 691 F.Supp. 1255 (D. Alaska 1988).
[27] 652 F.Supp. 745 (N.D. Tex. 1985).
[28] *Interior Glass Svcs*., 1255 F.Supp. at 1257.

purposes of determining diversity *if the plaintiff fails to state a cause of action against the resident defendant and the failure is obvious according to the settled rules of the state*.[29]

III. VOLUNTARY / INVOLUNTARY RULE

A. "Voluntary" Dismissal

This issue has not been discussed in Alaska case law.

B. Exceptions

None that are discussed in Alaska case law.

IV. WAIVER OF RIGHT TO REMOVE

A. Waiver by Defending

This issue has not been discussed in Alaska case law. However, a useful discussion of this topic is provided by the Ninth Circuit decision in *Resolution Trust Corp. v. Bayside Developers*:[30]

> A party, generally the defendant, may waive the right to remove to federal court where, after it is apparent that the case is removable, the defendant takes actions in state court that manifest his or her intent to have the matter adjudicated there, and to abandon his or her right to a federal forum. A waiver of the right of removal must be clear and unequivocal. In general, "the right of removal is not lost by action in the state court short of proceeding to an adjudication on the merits." Where [] a party takes necessary defensive action to avoid a judgment being entered automatically against him, such action does not manifest an intent to litigate in state court, and accordingly, does not waive the right to remove.[31]

B. Waiver by Consent

Language conferring jurisdiction is not a waiver.[32]

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[29] Morris v. Princess Cruises, Inc., 236 F.3d 1061, 1067 (9th Cir. 2001); Ritchey v. Upjohn Drug Co., 139 F.3d 1313, 1318 (9th Cir. 1998).
[30] 43 F.3d 1230, 1240 (9th Cir. 1994), *as amended* (January 20, 1995):
[31] *Id.* at 1240 (internal citations omitted); *see generally*, 107 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 18[3][a] (3d ed. 1999).
[32] Hunt Wesson Foods, Inc. v. Supreme Oil Co., 817 F.2d 75, 76-78 (9th Cir. 1987).

C. Waiver by Contract

This issue has not been discussed in Alaska case law.

ARIZONA

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I. POWER AND RIGHT TO REMOVE

A. The Parties

1. Defining "Parties in Interest"

To determine diversity, courts consider the citizenship of all properly joined and served defendants.[1] The Supreme Court held that an entity that has not been named or joined as a defendant to the action cannot be considered a real party in interest for purposes of destroying diversity.[2]

In addition, courts can disregard the citizenship of a named party if that party is not the real party in interest.[3] For example, improperly or collusively named parties under 28 U.S.C. § 1359, state agencies named when the suit is really against the state itself, parties named to satisfy state pleading rules, and parties with no stake in the controversy can all be disregarded for determining diversity because they are not real parties to the controversy.[4]

[1] *See* Lincoln Property Co. v. Roche, 546 U.S. 81, 90, 93-94 (2005); Abrego v. Dow Chemical Co., 443 F.3d 676, 680 (9th Cir. 2006).
[2] *Lincoln Property*, 546 U.S. at 93-94.
[3] *Id.* at 91-93.
[4] *Id.*

2. Presence of "Doe" Defendants

The Ninth Circuit held that by amending §1441(a) to state that "the citizenship of defendants sued under fictitious names shall be disregarded," Congress "obviously reached the conclusion that doe defendants should not defeat diversity jurisdiction."[5]

3. Diversity for Putative Class Actions

The Class Action Fairness Act of 2005 ("CAFA"),[6] confers federal jurisdiction upon class action lawsuits that contain 100 or more proposed plaintiffs, where the amount in controversy exceeds the sum or value of $5,000,000, and minimal diversity requirements are met.[7] Minimal diversity requirements are satisfied if any class member is a citizen of a state different from any defendant.[8]

B. The Amount in Controversy

1. Establishing the Amount in Controversy

The amount in controversy is generally determined from the face of the pleadings.[9] Both attorneys' fees and punitive damages may be included in determining the amount in controversy.[10] However, the mere possibility of an award of attorneys' fees and/or punitive damages is not sufficient to prove that the amount in controversy requirement has been satisfied.[11] The defendant must present appropriate evidence, such as, analogous case law to demonstrate the likelihood or the potential amount of any such awards.[12]

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[5] Bryant v. Ford Motor Co., 886 F.2d 1526, 1528 (9th Cir. 1989).
[6] 28 U.S.C. § 1332(d).
[7] Serrano v. 180 Connect, Inc., 478 F.3d 1018, 1020-21 (9th Cir. 2007).
[8] *Abrego*, 443 F.3d at 680.
[9] Pachinger v. MGM Grand Hotel-Las Vegas, Inc. 802 F.2d 362, 363-64 (9th Cir. 1986).
[10] Bruemmer v. Hartford Accident and Indemnity Co., 2007 U.S. Dist. 26204, at * 9-10 (D. Ariz. 2007).
[11] *Id.*
[12] *Id.* at *11.

2. Application When a Specific Dollar Amount is Not Pled

If it is not clear from the complaint that the jurisdictional amount is satisfied, the removing defendant must establish by a preponderance of the evidence that the amount in controversy requirement is met.[13] Conclusory allegations of the amount in controversy are insufficient to establish that it is more likely than not that the amount in controversy exceeds the jurisdictional minimum.[14] The Ninth Circuit will consider "facts presented in the removal petition as well as any 'summary judgment type evidence relevant to the amount in controversy at the time of removal.'"[15]

3. Amount in Controversy Where Equitable Relief is Sought

When declaratory or injunctive relief is sought, "it is well established that the amount in controversy is measured by the value of the object of the litigation."[16] In *Cohn*, the heart of the plaintiff's suit was his request for injunctive and other equitable relief.[17] The court found that the plaintiff's settlement letter, which demonstrated his assessment of the value of his claim, was sufficient evidence to establish the amount in controversy.[18]

In multiple plaintiff actions, the court must examine the potential benefits that might accrue in favor of plaintiff and the class from the injunctive relief, and not from the defendant's viewpoint.[19]

4. Defeating Removal by Amending Relief Sought

"Jurisdiction must be analyzed from the basis of the pleadings at the time of removal" and not from subsequent amendments.[20]

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[13] *Id.* at *9.
[14] *Id.* at *7.
[15] *Id.* (quoting Valdez v. Allstate Ins. Co., 372 F.3d 1115, 1117 (9th Cir. 2004)).
[16] Cohn v. Petsmart, Inc., 281 F.3d 837, 840 (9th Cir. 2002) (quoting Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 347, 53 L. Ed. 2d 383, 97 S. Ct. 2434 (1977)).
[17] *Id.*
[18] *Id.* at 840.

C. Time of Existence of Grounds for Removal

1. Event Triggering Thirty-Day Period for Actions Initially Removable

"The thirty day removal period begins to run only when a defendant is formally served with a copy of the complaint" and the ground for removal is affirmatively revealed in the initial pleading.[21] Removability must be apparent from the "four corners of the applicable pleadings, not through subjective knowledge or a duty to make further inquiry."[22]

2. Event Triggering Thirty-Day Period for Actions Not Initially Removable

Under this provision, it appears that "service or otherwise" merely requires receipt by the removing defendant of a paper from which it is first ascertainable from the face of the document that the action is removable.[23]

Courts have construed "other paper" broadly to include correspondence. In *Harris*, the court found a letter from plaintiffs counsel to defense counsel that indicated constituted "other paper" under the statute.[24] Similarly, in *Babasa*, the court found that a letter sent in preparation for mediation served as proper notice that the claim had become removable.[25]

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[19] Haisch v. Allstate Insurance Co., 942 F. Supp. 1245, 1248 (D. Ariz. 1996).
[20] Sparta Surgical Corp. v. National Association of Securities Dealers, 159 F.3d 1209, 1213 (9th Cir. 1998) (holding that the plaintiff could not compel a remand by amending the complaint).
[21] Emerson v. Maricopa County, 2007 U.S. Dist. LEXIS 58318, at *4 (D. Ariz. 2007) (citing Murphy Bros., Inc. v. Michetti Pipe Stringing Inc., 526 U.S. 344, 353-54, 119 S. Ct. 1322, 143 L. Ed. 2d 448 (1999)); Harris v. Bankers Life and Casualty Co., 425 F.3d 689, 695 (9th Cir. 2005).
[22] *Harris*, 425 F.3d at 694.
[23] *Harris*, 425 F.3d at 694; *see also* Babasa v. Lenscrafter, Inc., 498 F.3d 972 (9th Cir. 2007).
[24] *Harris*, 425 F.3d at 696.
[25] *Babasa*, 498 F.3d 972

II. FRAUDULENT JOINDER

A. Test for Fraudulent Joinder

In Arizona, a joinder is fraudulent "if the plaintiff fails to state a cause of action against a resident defendant, and the failure is obvious according to the settled rules of the state."[26] The removing party "faces a strong presumption against removal, and bears the burden of establishing that removal was proper by a preponderance of the evidence."[27] First, the court resolves all ambiguities in the controlling state law in favor of the non-removing party and then the court determines whether the plaintiff has "any possibility of recovery against the non-diverse defendant."[28]

B. Evidence of Fraudulent Joinder

The removal seeking defendant is "entitled to present facts showing the joinder to be fraudulent."[29] "Merely a defective statement of the plaintiff's action does not warrant removal."[30] A finding of fraudulent joinder is only appropriate when "there is no reasonable basis for predicting that state law might impose liability" on the non-diverse defendants.[31] For example, evidence demonstrating that the non-diverse defendant had "no real connection with the controversy" could establish the fraudulent joinder of that defendant.[32]

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[26] Walnut Creek Estates Development Co., L.L.P. v. American Land Management, L.L.C., 2005 U.S. Dist. LEXIS 21934, at *3 (D. Ariz. 2005) (quoting Ritchey v. Upjohn Drug Co., 139 F.3d 1313, 1318 (9th Cir. 1998)).
[27] *Id.* (citing Sanchez v. Monumental Life Ins. Co., 102 F.3d 398, 403-04 (9th Cir. 1996)).
[28] Ballesteros v. American Standard Insurance Co. of Wisconsin, 436 F. Supp. 2d 1070, 1072 (D. Ariz. 2006) (quoting Dodson v. Spiliada Maritime Corp., 951 F. 2d 40, 42 (5th Cir. 1992)).
[29] McCabe v. General Foods Corp., 811 F.2d 1336, 1339 (9th Cir. 1987).
[30] *Ballesteros*, 436 F. Supp. 2d at 1072 (quoting Albi v. Street & Smith Publications, Inc., 140 F.2d 310, 312 (9th Cir. 1944)).
[31] Bertrand v. Aventis Pasteur Laboratories, Inc., 226 F. Supp. 2d 1206, 1212 (D. Ariz. 2002).
[32] *Ritchey*, 139 F.3d 1318 (quoting Wilson v. Republic Iron & Steel Co., 257 U.S. 92, 97-99, 42 S. Ct. 35, 37-38, 66 L. Ed. 144 (1921)).

III. VOLUNTARY / INVOLUNTARY RULE

1. "Voluntary" Dismissal

A dismissal is only voluntary if it was the plaintiff's voluntary act that brought about the change which rendered the case removable.[33] In *Self*, the court held that the non-diverse defendant was eliminated from the case by a final judgment rendered by the court and not by any action of the plaintiff to dismiss or discontinue the case against that defendant.[34] Therefore, the voluntary/involuntary rule barred removal of the action.[35]

IV. WAIVER OF RIGHT TO REMOVE

A. Waiver by Defending

In *Braudrick v. City of Phoenix*,[36] the court held that it takes more than a request for an extension of time to answer to constitute waiver of the right to remove. The court noted that the Ninth Circuit has required that "a waiver of the right to removal must be clear and unequivocal."[37] A party does not waive the right to remove by taking "necessary defensive action to avoid judgment being entered automatically against him."[38] The court in *Braudrick* also indicated that even filing an answer in state court would not waive the right to remove.[39]

V. PRACTICE POINTERS

In order to remove an action successfully, Defendant must be able to establish by a preponderance of the evidence that the amount in controversy requirement is satisfied. Therefore, unless it is facially apparent from the face of the complaint, Defendant must submit

[33] Self v. General Motors Corp., 588 F.2d 655, 657 (9th Cir. 1978).
[34] *Id.* at 660.
[35] *Id.*
[36] 2006 U.S. Dist. LEXIS 77939, *3-4 (2006).
[37] *Id.* (quoting EIE Guam Corp. v. Long term Credit Bank of Japan, Ltd., 322 F.3d 635, 649 (9th Cir. 2003)).
[38] *Id.* (quoting Resolution Trust Co. v. Bayside Developers, 43 F.3d 1230, 1240 (9th Cir. 1994)).
[39] *Id.* (citing Fed. R. Civ. P. 81(c)).

factual evidence to meet this burden. Defendant cannot rely upon conclusory allegations or vague statements.

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I. POWER AND RIGHT TO REMOVE

A. The Parties

1. Defining "Parties in Interest"

"The existence of diversity of citizenship jurisdiction is based on an examination of the citizenship of the real parties in interest."[1] Parties are "real parties in interest" when "the cause of action is against them and substantial relief is sought against them."[2]

2. Presence of "Doe" Defendants

Pursuant to 28 U.S.C. § 1441(a) (as amended in 1988), "[f]or purposes of removal …, the citizenship of defendants sued under fictitious names shall be disregarded." Thus, under amended Section 1441(a), "[t]he citizenship of fictitious defendants is disregarded for removal purposes and becomes relevant only if and when the plaintiff seeks leave to substitute a named defendant."[3]

3. Diversity for Putative Class Actions

a. Class Action Fairness Act of 2005 ("CAFA")

Under CAFA--applicable to class actions involving 100 or more putative class members and where the aggregate amount in controversy exceeds $5 million--a class action is generally

[1] Fink v. Unumprovident Corp., 2005 WL 2375168, at *3 (N.D. Cal. Sept. 27, 2005) (citations omitted).
[2] Heatherton v. Playboy, Inc., 60 F.R.D. 372, 377 (C.D. Cal. 1973).
[3] Soliman v. Philip Morris Inc., 311 F.3d 966, 971 (9th Cir. 2002).

removable to federal court where any (named or unnamed) class member is a citizen of a state different from that of any defendant, *i.e.*, "minimal diversity."[4]

Under CAFA, a removed putative class action is subject to "mandatory remand" where either: (a) Two-thirds or more of the class members and the "primary defendants" are citizens of the forum state; OR (b) if all of the following four factors are present: (i) More than two-thirds of the class members are citizens of the forum state; (ii) at least one defendant, against whom "significant relief" is sought and whose conduct forms a "significant basis" for the claims the proposed class asserts, is a citizen of the forum state; (iii) "principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in the [forum] State"; and (iv) no other class action complaints asserting the "same or similar factual allegations" have been filed in the last three years against any of the defendants.

Under CAFA, a removed putative class action is subject to "discretionary remand" in the "interests of justice and the totality of the circumstances" (after weighing six statutory factors) if: (i) more than one-third but less than two-thirds of the class members are citizens of the forum state; and (ii) the "primary defendants" are citizens of the forum state.[5]

The Ninth Circuit has held that CAFA "does not alter the longstanding rule that the party seeking federal jurisdiction on removal bears the burden of establishing that jurisdiction."[6] Thus, the removing defendant bears the burden under CAFA of establishing: (i) minimal diversity; and (ii) that the amount in controversy exceeds $5 million. With respect to the burden of establishing whether the mandatory or discretionary remand provisions apply, the Ninth Circuit has held that "although the removing party bears the initial burden of establishing federal

[4] 28 U.S.C. § 1332(d); Abrego v. The Dow Chemical Co., 443 F.3d 676 (9th Cir. 2006); Bush v. Cheaptickets, Inc., 425 F.3d 683, 684 (9th Cir. 2005). Class actions involving certain securities and corporate governance issues are excluded from CAFA's expanded federal jurisdiction provisions. 28 U.S.C. § 1332(d)(9).
[5] *See* 28 U.S.C §1332(d)(3) (identifying six factors to be considered by the court).
[6] *Abrego*, 443 F.3d at 686.

jurisdiction under § 1332(d)(2), once federal jurisdiction has been established under that provision, the objecting party bears the burden of proof as to the applicability of any express statutory exception."[7]

b. Other Class Action Removals

In putative class actions not subject to CAFA (*i.e.*, class actions involving fewer than 100 putative class members or where the aggregate amount in controversy does not exceed $5 million), removal is proper only if the citizenship of each named putative class representative is different from that of each defendant (and the requisite amount in controversy is satisfied).[8]

B. The Amount in Controversy

1. Establishing the Amount in Controversy

Under Ninth Circuit precedent, "the removing defendant bears the burden of establishing, by a preponderance of the evidence, that the amount in controversy exceeds [the minimum jurisdictional amount]. Under this burden, the defendant must provide evidence establishing that it is 'more likely than not' that the amount in controversy exceeds that amount."[9]

The jurisdictional determination is to be made on the basis of the various forms of relief sought in the complaint. The federal diversity jurisdiction statute, 28 U.S.C. §1332(a), "amount-in-controversy requirement excludes only 'interest and costs.'"[10] Compensatory damages, punitive damages, injunction and other equitable relief as well as attorneys' fees are included.[11]

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[7] Serrano v. 180 Connect, Inc., 478 F.3d 1018, 1024 (9th Cir. 2007).
[8] Exxon Mobil Corp. v. Allapattah Services, 545 U.S. 546 (2005); Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356, 365-66 (1921).
[9] Sanchez v. Monumental Life Ins. Co., 102 F.3d 398, 404 (9th Cir. 1996).
[10] Guglielmino v. McKee Foods Corp., 506 F.3d 696, 700 (9th Cir. 2007).
[11] *See generally id.*

2. Application When a Specific Dollar Amount is Not Pled

Within the Ninth Circuit, the standard for proving the amount in controversy will vary based on the allegations of the complaint: (i) Where plaintiff expressly seeks in excess of the minimum amount in controversy, the requisite jurisdictional amount is presumptively satisfied unless it appears to a "legal certainty" that the plaintiff cannot actually recover that amount; (ii) where the complaint is unclear or ambiguous as to the amount in controversy, the preponderance of the evidence must establish that the requisite amount is sought; and (iii) where the complaint expressly seeks less than the requisite amount in controversy, a defendant must establish to a "legal certainty" that plaintiff seeks in excess of the requisite amount.[12]

It should be noted that in the context of CAFA removals, the Ninth Circuit has held that CAFA does not require post-removal jurisdictional discovery regarding the amount in controversy.[13]

3. Amount in Controversy Where Equitable Relief is Sought

In actions seeking declaratory or injunctive relief, "it is well established that the amount in controversy is measured by the value of the object of the litigation."[14] The Ninth Circuit views that value from plaintiff's perspective.[15] In cases subject to CAFA seeking equitable relief, the requisite amount in controversy is satisfied if the aggregate amount of the equitable relief sought from defendants exceeds $5 million.[16]

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[12] *Id.* at 699-700.
[13] *Abrego*, 443 F.3d at 690-92.
[14] Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 347 (1977).
[15] Snow v. Ford Motor Co., 561 F.2d 787, 789-91 (9th Cir. 1977).
[16] *See* 28 U.S.C. § 1332(d)(6).

4. Defeating Removal by Amending Relief Sought

As the United States Supreme Court has held, "the right to remove . . . [is] to be determined according to the plaintiffs' pleading at the time of the petition for removal."[17] Generally, courts will not consider post-removal amendments to the complaint in determining the propriety of removal. Indeed, the Ninth Circuit has "long held that post-removal amendments to the pleadings cannot affect whether a case is removable, because the propriety of removal is determined solely on the basis of the pleadings filed in state court."[18] By parity of reasoning, where a plaintiff seeks to amend the complaint after removal to assert less than the jurisdictional minimum, a defendant could argue that the Court should not consider the proposed post-removal amendment. Practitioners should be aware, however, that the Ninth Circuit has held that a post-removal admission by plaintiff that plaintiff seeks *in excess* of the requisite amount may be considered by the Court.[19]

C. Time of Existence of Grounds for Removal

1. Event Triggering Thirty-Day Period for Actions Initially Removable

The United States Supreme Court has held that the 30-day removal deadline is triggered by actual service, as opposed to receipt of the complaint through other means.[20]

Neither the statute nor the Supreme Court's decision in *Murphy Bros*. expressly addresses multi-defendant actions—*i.e.*, whether the action must be removed within 30 days of service on the first-served defendant (the "First-Served Defendant Rule") or whether each defendant has 30 days from the date it was served with the complaint (the "Later-Served Defendant Rule").

[17] Pullman Co. v. Jenkins, 305 U.S. 534, 537-38 (1939).
[18] Williams v. Costco Wholesale Corp., 471 F.3d 975, 976 (9th Cir. 2006).
[19] Singer v. State Farm Mut. Auto. Ins. Co., 116 F.3d 373, 376 (9th Cir. 1997).
[20] Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc., 526 U.S. 344 (1999).

The Ninth Circuit has "express[ed] no opinion . . . on the propriety of either rule."[21] The evolving trend among federal district courts in California is to follow the Later-Served Defendant Rule.[22]

The Ninth Circuit has held, however, that where the first-served defendant was fraudulently joined, the date of service on that defendant does not trigger the 30-day removal clock.

Where the complaint does not affirmatively provide the basis for federal diversity jurisdiction, the Ninth Circuit has held that a defendant is not required to "investigate the necessary jurisdictional facts within the first thirty days of receiving an indeterminate complaint."[23] Rather, "the ground for removal must be revealed affirmatively in the initial pleading in order for the first thirty-day clock under §1446(b) to begin."[24]

2. Event Triggering Thirty-Day Period for Actions Not Initially Removable

Under the Supreme Court's holding in *Murphy Bros*., *supra*, only actual service will trigger the 30-day period for removal. Although that decision addressed removals based on the initial pleading, a defendant could argue that the same construction should apply to the phrase "service or otherwise" in the context of removals based on "other paper."

"The Ninth Circuit has not ruled on the definition of 'other paper' within the meaning of § 1446(b), nor on when the 'other paper' must be received by the defendant."[25] Within the Ninth Circuit, the phrase "other paper" has been interpreted as "documents generated within the state

[21] United Computer Sys., Inc. v. AT & T Corp., 298 F.3d 756, 763 n.4 (9th Cir. 2002).
[22] *See, e.g.*, Lear v. Louisville Ladder, Inc., 2007 WL 2947430, at *4 (S.D. Cal. Oct. 9, 2007) (applying Later-Served Defendant Rule); Bonner v. Fuji Photo Film, 461 F. Supp. 2d 1112, 1118 (N.D. Cal. 2006) (same); Smith v. Mail Boxes, Etc. USA, Inc., 191 F. Supp. 2d 1155, 1161 (E.D. Cal. 2002) (same); *but see* McAnally Enterprises, Inc. v. McAnally, 107 F. Supp. 2d 1223, 1227 (C.D. Cal. 2000) (applying First-Served Defendant Rule and collecting cases).
[23] Harris v. Bankers Life & Casualty Co., 425 F.3d 689, 693-95 (9th Cir. 2005).
[24] *Id*. at 695.
[25] Rico-Chinn v. Prudential Ins. Co. of America, 2005 WL 1632289, at *3 (N.D. Cal. July 12, 2005).

court litigation."[26] It is also well-established that discovery responses qualify as "other paper" within the meaning of § 1446(b).[27]

II. FRAUDULENT JOINDER

A. Test for Fraudulent Joinder

Even if there is a lack of complete diversity, under the doctrine of fraudulent joinder (which the Ninth Circuit has referred to as a "term of art"), an action may be removed to federal court when "plaintiff fails to state a cause of action against a resident defendant, and the failure is obvious according to the settled rules of the state."[28]

B. Evidence of Fraudulent Joinder

"The defendant seeking removal to the federal court is entitled to present the facts showing the joinder to be fraudulent."[29] The Ninth Circuit has held that the expiration of the statute of limitations is a basis to find fraudulent joinder.[30] Federal courts in California have applied the doctrine of fraudulent joinder to deny remand where plaintiffs, for example, named non-diverse sales representatives[31] and clinical researchers.[32]

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[26] Rose v. Beverly Health and Rehabilitation Services, Inc., 2006 WL 2067060, at *5 (E.D. Cal. July 22, 2006).
[27] *Rico-Chinn*, 2005 WL 1632289, at *4.
[28] McCabe v. General Foods Corp., 811 F.2d 1336, 1339 (9th Cir. 1987); Ritchey v. Upjohn Drug Co., 139 F.3d 1313, 1318 (9th Cir. 1998).
[29] *McCabe*, 811 F.2d at 1339; *Ritchey*, 139 F.3d at 1318.
[30] *Ritchey*, 139 F.3d at 1319-20.
[31] *See, e.g.*, Shah v. Wyeth Pharmaceuticals, Inc., No. 04-8652DT (MANx) (C.D. Cal. Jan. 18, 2005).
[32] *See, e.g.*, Sink v. Warner-Lambert Co., No. CV-02-9519 R (RCx) (C.D. Cal. Feb. 19, 2003).

III. VOLUNTARY / INVOLUNTARY RULE

A. "Voluntary" Dismissal

Under this rule, a state court action, which is not initially removable to federal court, must "remain in state court unless a 'voluntary' act of the plaintiff brings about a change that renders the case removable."[33]

If the Court orders the dismissal of the non-diverse defendant, the action may generally not be removed.

B. Exceptions

Courts in the Ninth Circuit have referred to the "fraudulent joinder exception to the voluntary / involuntary rule."[34] Practitioners with a basis to assert fraudulent joinder should not wait until a state court adjudication on the merits of the non-diverse defendant. Indeed, a federal court in California recently granted remand where a state court dismissed the non-diverse defendant. The court found that the claim against non-diverse defendant was not "bereft of any merit and maintained in violation of Rule 11."[35] In addition, the Ninth Circuit has focused upon an adjudication of dismissal "on the merits,"[36] but has not addressed the applicability of the rule to dismissals on "procedural" grounds. Moreover, the Ninth Circuit has expressed its disapproval of the argument that completion of the state appellate process regarding a court's dismissal of the non-diverse defendant will permit removal.[37]

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[33] Self v. General Motors, 588 F.2d 655, 657 (9th Cir. 1978); *see also*, State of Cal. *ex rel.* Lungren *v. Keating*, 986 F.2d 346, 348-49 (9th Cir. 1993).
[34] Cava v. NetVersant-Nat., Inc., 2007 WL 4326754, at **6-7 (N.D. Cal. Dec. 7, 2007).
[35] *Id.*
[36] *Self*, 588 F.2d at 659-60.
[37] *Id.* at 658 ("[i]f the finality of state court proceedings were the basis for the rule, it would seem that once the appellate process were ended in the state courts, removal would be possible. The Supreme Court, however, apparently does not rely on this basis as evidenced by *Lathrop, Shea & Co.*, 215 U.S. at 249-51, 30 S. Ct. 76, where the voluntary-involuntary rule was invoked to prohibit removal even though the state appellate process was complete").

IV. WAIVER OF RIGHT TO REMOVE

A. Waiver by Defending

"A party, generally the defendant, may waive the right to remove to federal court where, after it is apparent that the case is removable, the defendant takes actions in state court that manifest his or her intent to have the matter adjudicated there, and to abandon his or her right to a federal forum."[38] "A waiver of the right of removal must be clear and unequivocal . . . [and] the right of removal is not lost by action in the state court short of proceeding to an adjudication on the merits."[39] Thus, it has generally been held that the filing of a responsive pleading does not constitute waiver of the right to remove.[40]

A federal court in California has held that the filing of a petition for rehearing, where the petition stated that defendant would remove the action (and the action was removed that day) did not constitute a waiver because the petition was filed only to preserve the *status quo* pending removal.[41] Similarly, seeking a stay of discovery prior to removal has been held not to constitute waiver of the right to remove.[42] However, where an action was removed four days after the filing of a cross-complaint coupled with counterclaims against plaintiff, a federal district court in California held that defendant waived the right to remove.[43]

[38] Resolution Trust Corp. v. Bayside Developers, 43 F.3d 1230, 1240 (9th Cir. 1994) (citations omitted).
[39] *Id.*
[40] California Republican Party v. Mercier, 652 F. Supp. 928, 931 n.3 (C.D. Cal. 1986).
[41] *Resolution Trust Corp., supra.*
[42] *California Republican Party*, 652 F. Supp. at 931.
[43] Acosta v. Direct Merchants Bank, 207 F. Supp. 2d 1129 (S.D. Cal. 2002).

2. Waiver by Contract

The Ninth Circuit has held that a party can waive its right to remove by agreeing to a forum selection clause designating a state court.[44] But such a clause will only act as a waiver where it "clearly designates a [state court] forum as the exclusive one."[45]

V. PRACTICE POINTERS

A. Successful Strategies for Removal and Avoiding Remand

The following are several removal issues regarding which practitioners in California (and in the Ninth Circuit) should be mindful in developing a removal strategy and avoiding remand.

1. Section 1446(b)'s one-year limitation on diversity-based removals

Under the removal statute, "[a] case may not be removed on the basis of jurisdiction conferred by section 1332 of this title [federal diversity jurisdiction] more than 1 year after commencement of the action."[46] The Ninth Circuit has held that removal is proper more than 1 year after commencement where the defendant was not served prior to the first anniversary of the action (and the action is removed within 30 days of service).[47]

2. Equitable arguments in favor of remand

A federal district court in California has held that there is "no merit" to an argument by plaintiff that the "equities support remand even if technical application of the law does not."[48]

3. Amended Notice of Removal

Where plaintiff files an amended complaint after removal providing a different basis for federal jurisdiction than at the time of removal, the Ninth Circuit has held "that a party that has

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[44] *See generally*, Pelleport Investors, Inc. v. Budco Quality Theatres, Inc., 741 F.2d 273 (9th Cir. 1984).
[45] Northern California Dist. Council of Laborers v. Pittsburg-Des Moines Steel Co., 69 F.3d 1034, 1037 (9th Cir. 1995).
[46] 28 U.S.C. § 1446(b) (emphasis added).
[47] *Ritchey*, 139 F.3d at 1317-18.
[48] Walker v. Pacific Pride Services, Inc., 2007 WL 1888885, at *3 (N.D. Cal. June 29, 2007).

properly removed a case need not amend its removal notice or file a new notice after an amended complaint changes the ground for federal jurisdiction. Because post-removal pleadings have no bearing on whether the removal was proper, there is nothing a defendant can or need do to perfect the removal."[49]

[49] *Williams*, 471 F.3d at 976.

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I. POWER AND RIGHT TO REMOVE

A. The Parties

1. Defining "Parties in Interest"

The United States District Court for the District of Hawai‘i ("USDC") has used, but has not expressly defined the term "parties in interest."[1] The Ninth Circuit Court of Appeals has defined "parties in interest" as proper, necessary, or indispensable parties to a suit.[2] "Parties in interest" must have a "tangible interest in the controversy or exercise some control over it."[3] Nominal or formal parties are not considered "parties in interest" and cannot be used to defeat diversity jurisdiction.[4]

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[1] *See, e.g.*, Burcena v. Bank One, 2007 U.S. Dist. LEXIS 73408, at *14 (D. Haw. 2007); *see also* Emberg v. University of Md. Univ. College Asian Div., 3 F. Supp. 2d 1127, 1132 (D. Haw. 1998); *see also* Sensible Traffic Alternatives & Res., Ltd. v. Fed. Transit Admin. of the United States DOT, 307 F. Supp. 2d 1149, 1159 (D. Haw. 2004).

[2] Desert Empire Bank v. Insurance Co. of North America, 623 F.2d 1371, 1374 n.2 (9th Cir. 1980) (holding that proper, necessary, or indispensable parties are real parties in interest); Atchison, T. & S.F. Ry. Co. v. Phillips, 176 F. 663, 667 (9th Cir. 1910); *see also* American Triticale, Inc. v. Nytco Services, Inc., 664 F.2d 1136, 1141 (9th Cir. 1981) (holding that whether plaintiff is the real party in interest is dependent upon whether plaintiff is "a proper party to maintain [the] action under applicable state law").

[3] *Atchison*, 176 F. at 668.

[4] *Desert Empire Bank*, 623 F.2d at 1374 n.2 (holding that parties who are not real parties in interest are formal or nominal parties); *see Atchison*, 176 F. at 667.

2. Presence of "Doe" Defendants

The presence of Doe defendants do not destroy diversity nor preclude removal.[5]

3. Diversity for Putative Class Actions

Non-diverse class members who are not class representatives do not destroy diversity.[6] Class representatives are named plaintiffs whose interests are sufficiently aligned with those of the class as a whole.[7]

B. The Amount in Controversy

1. Establishing the Amount in Controversy

The amount in controversy must exceed the jurisdictional limit of $75,000.[8] This amount in controversy requirement includes attorney's fees, but excludes interest and costs.[9] In a class action, the amount in controversy must meet the $5 million threshold for removability pursuant to the Class Action Fairness Act, 28 U.S.C. § 1332(d).[10]

2. Application When a Specific Dollar Amount is Not Pled

The removing defendant bears the burden of establishing, by a preponderance of the evidence, that the amount in controversy exceeds $75,000.[11] If the complaint does not plead a specific dollar amount, the USDC looks to the defendant's removal petition to determine whether the amount of controversy requirement has been met.[12] Jurisdictional facts must be determined

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[5] Fat T, Inc. v. Aloha Tower Assocs. Piers 7, 8 & 9, 172 F.R.D. 411, 414-15 (D. Haw. 1996).
[6] Hum v. Dericks, 162 F.R.D. 628, 634 (D. Haw. 1995) (citing *In re* School Asbestos Litigation, 921 F.2d 1310 (3d Cir. 1990), *cert. denied*, 499 U.S. 976 (1990)).
[7] Yokoyama v. Midland Nat'l Life Ins. Co., 243 F.R.D. 400, 407 (D. Haw. 2007).
[8] Paoa v. Marati, 2007 U.S. Dist. LEXIS 67596, at *8 (D. Haw. 2007).
[9] 28 U.S.C. §1332(a); *Paoa*, 2007 U.S. Dist. LEXIS 67596, at *8; *see* Ortiz v. Menu Foods, Inc., 2007 U.S. Dist. LEXIS 84031, at *16-17 (D. Haw. 2007); *see also* Guglielmino v. McKee Foods Corp., 2007 U.S. App. LEXIS 23654, at *12 (9th Cir. 2007).
[10] *Ortiz*, 2007 U.S. Dist. LEXIS 84031, at *3.
[11] Engle v. Liberty Mut. Fire Ins. Co., 402 F. Supp. 2d 1157, 1160 (D. Haw. 2005).
[12] Hunt v. Transport Indem. Ins., Co., 1990 U.S. Dist. LEXIS 16555, at *3 n.1 (D. Haw. 1990).

at the time of removal.[13]

3. Amount in Controversy Where Equitable Relief is Sought

In actions seeking equitable relief, the amount in controversy is measured either by (1) the value of the object of the litigation, or (2) the value of the requested equitable relief.[14] The burden is on the removing defendant to prove that the controversy meets jurisdictional requirements.[15] In a class action suit, each individual Plaintiff's claims must meet the $75,000 amount in controversy requirement.[16]

4. Defeating Removal by Amending Relief Sought

There is no Hawai‘i case law which expressly addresses this issue.

C. Time of Existence of Grounds for Removal

1. Event Triggering Thirty-Day Period for Actions Initially Removable

The thirty-day period for removal is triggered when (1) the case is removable on the face of the initial pleading; or (2) if the case is not removable on its face or its removability is indeterminable, when it is ascertainable that the case is removable.[17]

Where the case is removable on its face, the thirty-day removal period starts running when defendant has been served with the complaint or if service is not required, then after the complaint has been filed in court.[18]

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[13] Haskell v. State Farm Mut. Auto. Ins. Co., 187 F. Supp. 2d 1241, 1249 (D. Haw. 2002).
[14] Cohn v. Petsmart, Inc., 281 F.3d 837, 840 (9th Cir. 2002); Int'l Padi, Inc. v. Diverlink, 2005 U.S. App. LEXIS 14234, at *3-4 (9th Cir. 2005).
[15] *Cohn*, 281 F.3d at 839-40.
[16] *In re* Ford Motor Co./Citibank, 264 F.3d 952, 958 (9th Cir. 2001) (Plaintiffs in a class action lawsuit cannot aggregate the value of their claims to meet the amount in controversy requirement because each plaintiff's claim is separate and distinct. However, where the class action plaintiffs assert a "common and undivided" right of the class, the court may consider the value of the equitable relief in evaluating whether the jurisdictional minimum has been met.); *see also* Kanter v. Warner-Lambert Co., 265 F.3d 853, 859 (9th Cir. 2001).
[17] *Paoa*, 2007 U.S. Dist. LEXIS 67596, at *9.
[18] 28 U.S.C. § 1446(b); Kaneshiro v. North American Co. for Life & Health Ins., 496 F. Supp. 452, 456 (D. Haw. 1980), *overruled on other grounds by* Harris v. Bankers Life and Cas. Co., 425 F.3d 689 (9th Cir. 2005).

2. Event Triggering Thirty-Day Period for Actions Not Initially Removable

If the case is not removable or indeterminable on its face, the thirty-day removal period is triggered when the defendant receives an amended pleading, motion, order or other paper from which it may first be ascertained that the case is removable.[19] To constitute a "service or otherwise" it must be a "formal process" and "not by mere receipt of the complaint unattended by any formal service."[20] The phrase "other paper" has been interpreted as "documents generated within the state court litigation."[21]

II. FRAUDULENT JOINDER

A. Test for Fraudulent Joinder

Joinder of a non-diverse defendant is fraudulent only if the plaintiff fails to state a cause of action against that defendant, and the failure is obvious according to the settled rules of the state.[22] The removing defendant has the burden to show with specificity that the facts stated in the complaint would provide no basis for recovery against the alleged fraudulently joined defendant.[23] A claim for fraudulent joinder must be asserted with particularity and supported by clear and convincing evidence.[24]

In determining whether there has been fraudulent joinder, the court can look outside the

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[19] *Paoa*, 2007 U.S. Dist. LEXIS 67596, at *9.
[20] State of Hawai'i v. Abbott Labs., Inc., 2006 U.S. Dist. LEXIS 95955, at *9 (D. Haw. 2006) ("Abbot I") (holding that serving a party with a deposition notice does not constitute "service or otherwise" within the meaning of the removal statute).
[21] State of Hawai'i v. Abbott Labs., Inc., 469 F. Supp. 2d 842, 848 (D. Haw. 2006) ("Abbot II") (holding that an unsealed Federal Qui Tam Action does not constitute "other paper" within the meaning of the removal statute); *see also* O'Brien v. Powerforce, Inc., 939 F. Supp. 774, 781 (D. Haw. 1996) (holding that a deposition held during the state court proceedings is not sufficient to be considered "other paper").
[22] Kalawe v. KFC Nat'l Management Co., 1991 U.S. Dist. LEXIS 20073, at *6-7 (D. Haw. 1991).
[23] *Kalawe*, 1991 U.S. Dist. LEXIS 20073, at *5 (citing McCabe v. General Foods Corp., 811 F.2d 1336, 1339 (9th Cir. 1987)); *see also* Lovell v. Bad Ass Coffee Co. of Hawai'i, Inc., 103 F. Supp. 2d 1233, 1237 (D. Haw. 2000).
[24] *Kalawe*, 1991 U.S. Dist. LEXIS 20073, at *4.

pleadings.[25] Questions of fact and ambiguities in the state law are resolved in favor of the non-removing party.[26] If there is a possibility that the state court would uphold a cause of action against a non-diverse defendant based on the facts alleged, then that defendant has been properly joined.[27]

B. Evidence of Fraudulent Joinder

To determine the removability of a case, the court is not required to assess the merits of a case nor conduct a full-scale evidentiary hearing on the factual disputes affecting the ultimate issues.[28]

Where plaintiff fails to state a valid cause of action against a non-diverse defendant, this is evidence that can be used to support a claim for fraudulent joinder.[29]

III. VOLUNTARY / INVOLUNTARY RULE

A. "Voluntary" Dismissal

The plaintiff can voluntarily terminate his action against a defendant by filing a notice of dismissal, which automatically terminates the action as to the defendants who are the subjects of the notice.[30] Once the defendant answers the complaint or files a motion for summary judgment, the plaintiff must move for a dismissal under FRCP Rule 41(a)(2) and obtain a court order to

[25] *Lovell*, 103 F. Supp. 2d at 1237; *see also Kalawe*, 1991 U.S. Dist. LEXIS 20073, at *6-7 (holding that if a valid claim for fraudulent joinder of non-diverse defendants to defeat removal is raised, the court may "pierce the pleadings, consider the entire record, and determine the basis of joinder by any means available").
[26] McClelland v. Merck & Co., 2006 U.S. Dist. LEXIS 88766, *3-4 (D. Haw. 2006).
[27] *Kalawe*, 1991 U.S. Dist. LEXIS 20073, at *5-6.
[28] *Kalawe*, 1991 U.S. Dist. LEXIS 20073, at *12 (stating that "[j]urisdictional inquiry must not subsume substantive determination"); *see also Lovell*, 103 F. Supp. 2d at 1237 (holding that "[a] finding of fraudulent joinder is improper if the defendant's assertions go to 'the merits of the action as an entirety, and not to the joinder'").
[29] *See generally Kalawe*, 1991 U.S. Dist. LEXIS 20073, at *5-7.
[30] Concha v. London, 62 F.3d 1493, 1506 (9th Cir. 1995).

voluntary dismiss that defendant.[31]

B. Exceptions

There is no Hawai‘i case law which expressly recognizes an exception to the Voluntary/Involuntary Rule.

IV. WAIVER OF RIGHT TO REMOVE

A. Waiver by Defending

A defendant "may waive the right to remove to federal court where, after it is apparent that the case is removable, the defendant takes actions in state court that manifest his or her intent to have the matter adjudicated there, and to abandon his or her right to a federal forum."[32] The waiver of the right of removal must be "clear and unequivocal."[33] The court must first find that the defendant ascertained the removability of the action before it could find that the defendant waived its right by actively litigating in state court by defending the action.[34]

B. Waiver by Consent

There is no Hawai‘i case law which expressly addresses this issue.

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[31] Hamilton v. Shearson-Lehman American Express, Inc., 813 F.2d 1532, 1535 n.4 (9th Cir. 1987) (referencing cases which have held that other substantive motions, including motions to dismiss, were not the equivalent of a motion for summary judgment for purposes of voluntary dismissal under FRCP Rule 41(a)). Mayes v. Fujimoto, 181 F.R.D. 453, 455 (D. Haw. 1998); *see also* Foster v. A. H. Robins Co., 61 F. Supp. 2d 1121, 1122-24 (D. Haw. 1999) (holding that a death of a non-diverse defendant does not necessarily constitute a voluntary dismissal for purposes of removal proceedings because the action may be continued against the legal representative. The court also held that the fact that a plaintiff has not conducted discovery nor procured any expert as to the claims against the non-diverse defendant does not necessarily amount to a voluntary dismissal of that defendant. It also indicated that it may not be sufficient to constitute a voluntary dismissal where the non-diverse defendant has failed to appear in the action, but the plaintiff has not moved for default judgment.).

[32] *Paoa*, 2007 U.S. Dist. LEXIS 67596, at *19 (emphasis omitted) (citing EIE Guam Corp. v. Long Term Credit Bank of Japan, Ltd., 322 F.3d 635, 649 (9th Cir. 2003)).

[33] *Paoa*, 2007 U.S. Dist. LEXIS 67596, at *19 (holding that defending an action in state court by filing an answer, counterclaim and various motions, by themselves, are not necessarily interpreted as a manifestation of intent to adjudicate the matter in state court or to abandon defendant's rights to a federal forum) (citing *EIE Guam Corp.*, 322 F.3d at 649).

[34] *Paoa*, 2007 U.S. Dist. LEXIS 67596, at *19.

C. Waiver by Contract

Contractual waivers of removal may be binding "absent some evidence of fraud, undue influence, overweening bargaining power, or such serious inconvenience in litigating in the selected forum so as to deprive a party of a meaningful day in court."[35] The USDC has held that a forum selection clause, where a defendant contractually agreed to submit to a certain state court jurisdiction, waived the defendant's removal rights.[36]

V. PRACTICE POINTERS

A. Successful Strategies for Removal and Avoiding Remand

Since 28 U.S.C. § 1446(b) imposes a one-year statute of limitation to remove a case after commencement of the state court action, the removing defendant should take all necessary actions to seek early discovery regarding potentially fraudulently joined parties.

[35] Hamakua Sugar Co. v. Fiji Sugar Corp., 778 F. Supp. 503, 505 (D. Haw. 1991) (quoting Pelleport Investors, Inc. v. Budco Quality Theatres, Inc., 741 F.2d 273, 280 (9th Cir. 1984), *overruled on other grounds by* Powerex Corp. v. Reliant Energy Servs., __ U.S. __, 127 S. Ct. 2411 (2007)).
[36] *Hamakua Sugar Co.*, 778 F. Supp. at 504-05.

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I. POWER AND RIGHT TO REMOVE

A. The Parties

1. Defining "Parties in Interest"

A party is a real party in interest is a party who "possesses the right sought to be enforced."[1] Other courts in the Ninth Circuit have noted that real parties in interest are proper, necessary or indispensable parties to a suit.[2]

2. Presence of "Doe" Defendants

The controlling case law in Idaho would suggest that Doe defendants destroy diversity and preclude removal. The case, *Systems Associates, Inc. v. Motorola Communications & Electronics*,[3] has never been explicitly overturned but is contrary to current federal law which states: "[f]or purposes of removal . . . , the citizenship of defendants sued under fictitious names shall be disregarded."[4]

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[1] Idaho Potato Comm'r v. Wash. Potato Comm'r, 410 F. Supp. 171, 174 (D. Idaho 1975); *see also* FED. R. CIV. P. 17(a).
[2] Am. Triticale, Inc. v. Nytco Servs., Inc., 664 F.2d 1136, 1142 (9th Cir. 1981); Desert Empire Bank v. Ins. Co. of N. Am., 623 F.2d 1371, 1374 (9th Cir. 1980).
[3] 116 Idaho 615, 778 P.2d 737 (Idaho 1989),
[4] 28 U.S.C. § 1441(a).

In *Systems Associates*, the Supreme Court of Idaho held that the inclusion of "Doe" defendants in a lawsuit defeats diversity jurisdiction and precludes removal to federal court.[5] The Idaho court based it decision on two Ninth Circuit cases that also held that the presence of Doe defendants destroys diversity.[6] Both *Bryant* and *Hise* have been overturned.

3. Diversity for Putative Class Actions

a. Removal Pursuant to the Class Action Fairness Act

The Class Action Fairness Act ("CAFA") of 2005 provides that, in cases where there are at least 100 putative class members and the amount in controversy exceeds $5,000,000, only minimal diversity is required to invoke federal jurisdiction, *i.e.*, any member of the plaintiff class is a state different from any defendant.

A class action that has been removed pursuant to CAFA may be remanded, in the discretion of the district court in the "interests of justice and the totality of the circumstances" if: (a) more than one-third but less than two-thirds of the class members are citizens of the forum state; and (b) the "primary defendants" are citizens of the forum state. The circumstances the court must consider are involve the national or interstate nature of the claims; which state's law will govern the action; forum shopping; whether the forum state has a connection with the class, alleged harm or the defendants; predominance of one state's citizens in the plaintiff's class over those of other states; and whether similar actions have been filed in the preceding three years.[7]

The district court must remand the case if all of the following four factors are present: (a) more than two-thirds of the class members are citizens of the forum state; (b) at least one defendant, against whom "significant relief" is sought and whose conduct forms a "significant

[5] *Sys. Assocs.*, 116 Idaho at 617-18.
[6] *Id.* (citing Bryant v. Ford Motor Co., 832 F.2d 1080 (9th Cir. 1987); Hise v. Garlock, 841 F.2d 342 (9th Cir. 1988)).
[7] 28 U.S.C. § 1332 (d)(3).

basis" for the claims the proposed class asserts, is a citizen of the forum state; (c) "principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in the [forum] State"; and (d) no other class action complaints asserting the "same or similar factual allegations" have been filed in the last three years against any of the defendants.[8] The district court must also remand the case if more than two-thirds of the class members and the primary defendants are citizens of the forum state.[9]

CAFA does not apply to most securities class actions.[10] Therefore, without an additional basis by which to invoke federal jurisdiction such cases will be remanded.[11]

b. Other Class Actions Removals

For putative class actions that are not subject to CAFA (*i.e.*, less than 100 putative class members or the amount in controversy is less than $5,000,000), diversity jurisdiction is available where the named class representatives have diverse citizenship from all of the defendants, and the required amount in controversy is met.[12]

B. The Amount in Controversy

1. Establishing the Amount in Controversy

The party seeking to remove the case to a federal forum has the burden of establishing federal jurisdiction.[13] The party seeking removal must show that the parties are in complete diversity, and that the damages alleged to be at issue in the action exceed the jurisdictional

[8] 28 U.S.C. § 1332 (d)(4)(A).
[9] 28 U.S.C. § 1332 (d)(4)(B).
[10] 28 U.S.C. § 1453(d).
[11] Carmona v. Bryant, No. CV-06-78-S-BLW, 2006 WL 1043987 (D. Idaho April 19, 2006).
[12] Lumbermen's Underwriting Alliance v. Mobil Oil Corp., 612 F. Supp. 1166, 1168 n.2 (D. Idaho 1985).
[13] Wilson v. Union Security Life Ins. Co., 250 F. Supp. 2d 1260, 1262 (D. Idaho 2003).

minimum of $75,000, exclusive of interest and costs.[14] Thus, the amount in controversy is defined as an amount exceeding $75,000, exclusive of interest and costs.

2. Application When a Specific Dollar Amount is Not Pled

A court may consider whether it is facially evident from the complaint that more than $75,000 is in controversy; if it is not, the court will consider facts presented in the removal petition as well as any summary judgment type evidence relevant to the amount in controversy at the time of removal.[15] Where the amount in controversy is not specifically pled in the complaint, an appeal to a common-sense determination, without more, will not suffice to meet the burden of proof.[16]

If the amount in controversy is not pled in the original complaint, then the removing party "'must set forth in the removal petition itself, the *underlying facts* supporting its assertion that the amount in controversy exceeds [$75,000].'"[17] In *Zamperini*, the court held that because the removal petition was based on mere "conclusory allegations" without providing more evidence, the court remanded the case to state court.[18] Courts have determined that a party may meet its burden of proof regarding the amount in controversy by relying on evidence such as a settlement demand letter or an in-court admission by the opposing party's attorney.[19]

3. Amount in Controversy Where Equitable Relief is Sought

Idaho has no reported decisions on how the amount in controversy is met when equitable relief is sought. However, the Ninth Circuit, in an appeal arising from the District of Idaho, held

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[14] *Id.* at 1262 (citing 28 U.S.C. § 1332(a); Matheson v. Progressive Specialty Ins. Co., 319 F.3d 1089, 1090 (9th Cir. 2003)).
[15] Wilson v. Union Sec. Life Ins. Co., 250 F. Supp. 2d 1260, 1263 (D. Idaho 2003) (citing Matheson v. Progressive Specialty Ins. Co., 319 F.3d 1089, 1090 (9th Cir. 2003)).
[16] *Wilson*, 250 F. Supp. 2d at 1263.
[17] Zamperini v. Safeco Ins. Co. of Am., No. CV07-80-S-EJL, 2007 WL 710123, at *1 (D. Idaho Mar. 6, 2007) (quoting Gaus v. Miles, Inc., 980 F.2d 564, 567 (9th Cir. 1992)) (emphasis in original).
[18] *Id.*
[19] Cohn v. Petsmart, Inc., 281 F.3d 837, 840 (9th Cir. 2002) (settlement demand); Singer v. State Farm Mut. Auto. Ins. Co., 116 F.3d 373, 376-77 (9th Cir. 1997) (in-court admission).

that "in actions seeking declaratory or injunctive relief, it is well established that the amount in controversy is measured by the value of the object of the litigation."[20] In *Cohn*, the court held that the amount in controversy was satisfied because the "undisputed evidence" showed that the object of the litigation—trademark rights—were valued as being worth more than $100,000; thus exceeding the $75,000 requisite amount in controversy.[21]

4. Defeating Removal by Amending Relief Sought

Although Idaho has no reported cases on this matter, a recent Ninth Circuit decision held that post-removal amendments generally cannot defeat federal jurisdiction because the "propriety of removal is determined solely on the basis of the pleadings filed in state court."[22]

C. Time of Existence of Grounds for Removal

1. Event Triggering Thirty-Day Period for Actions Initially Removable

The United States Code provides that a notice of removal of a civil action "shall be filed within thirty days after receipt by the defendant . . . of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based."[23] In making this determination, "'notice of removability under § 1446(b) is determined through examination of the four corners of the applicable pleadings, not through subjective knowledge or a duty to make further inquiry.'"[24]

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[20] Cohn v. Petsmart, Inc., 281 F.3d 837, 840 (9th Cir. 2002) (citing Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 347 (1977)).
[21] *Cohn*, 281 F.3d at 840.
[22] Williams v. Costco Wholesale Corp., 471 F.3d 975, 976 (9th Cir. 2006) (citing Sparta Surgical Corp. v. Nat'l Ass'n of Sec. Dealers, Inc., 159 F.3d 1209, 1213 (9th Cir. 1998); O'Halloran v. Univ. of Wash., 856 F.2d 1375, 1379 (9th Cir. 1988)).
[23] 28 U.S.C. § 1446(b).
[24] Buckmeier v. Nevarez, No. CV-07-154-N-BLW, 2007 WL 2331045, at *2 (D. Idaho Aug. 13, 2007) (quoting Harris v. Bankers Life & Cas. Co., 425 F.3d 689, 694 (9th Cir. 2005)).

"If no ground for removability is found on the face of the initial pleading, the case is not removable at that stage and the first thirty day period does not apply."[25] Rather, a second thirty-day period applies. Under the second thirty day period, the "notice of removal may be filed within thirty days after the defendant receives an amended pleading, motion, order or other paper from which it can be ascertained from the face of the document that removal is proper."[26]

2. Event Triggering Thirty-Day Period for Actions Not Initially Removable

While Idaho has not spoken directly to this issue, the United States Supreme Court has determined that only actual service of process will commence the thirty-day removal time period.[27]

While there is no formal definition of "other paper" in Idaho, examples within the state include discovery responses.[28] Within the Ninth Circuit, "other paper" has been interpreted to mean "documents generated within the state court litigation."[29]

II. FRAUDULENT JOINDER

A. Test for Fraudulent Joinder

As a general matter, the joinder of an indispensable party defendant with the same citizenship as the plaintiff destroys diversity jurisdiction.[30] However, it the non-diverse

[25] *Buckmeier*, 2007 WL 2331045, at *1-2 (citing *Harris*, 425 F.3d at 694).
[26] *Id*.
[27] *See* Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc., 526 U.S. 344, 350 (1999) ("[O]ne becomes a party officially, and is required to take action in that capacity, only upon service of a summons or other authority-asserting measure stating the time within which the party served must appear and defend.").
[28] *See* Buckmeier v. Nevarez, No. CV-07-154-N-BLW, 2007 WL 2331045, at *1-2 (D. Idaho Aug. 13, 2007).
[29] Rose v. Beverly Health and Rehab. Servs., Inc., No. 1:06cv0067 AWI DLB, 2006 WL 2067060, at *5 (E.D. Cal. July 22, 2006) (citing Smith v. Int'l Harvester Co., 621 F. Supp. 1005, 1009 (D. Nev. 1985) (interrogatory answers and official Notice of Entry of Order of Dismissal constitute "other paper"); Riggs v. Cont'l Baking Co., 678 F. Supp. 236, 238 (N.D. Cal. 1988) (a deposition constitutes "other paper")).
[30] *See* 32 Am. Jur. 2d *Federal Courts* § 791.

defendant is fraudulently joined, then diversity jurisdiction is not destroyed, and the case may be brought in federal court.[31]

The District of Idaho has held that fraudulent joinder occurs where a resident defendant who does not have any real connection to the controversy is named as a party in order to defeat diversity jurisdiction.[32] Likewise, the Ninth Circuit has articulated that if "'the plaintiff fails to state a cause of action against a resident defendant, and the failure is obvious according to the settled rules of the state, the joinder of the resident defendant is fraudulent.'"[33]

B. Evidence of Fraudulent Joinder

The court will look first to the complaint itself to determine whether a cause of action exists against the allegedly fraudulently joined defendant.[34] The court may also look outside the four corners of the complaint. Evidence of fraudulent joinder may be set forth as a statement of facts showing that joinder of the defendant is "a sham or fraudulent device to prevent a removal."[35] The removal petition must be verified.[36] The court must take the statements in the removal petition to be true.[37] The plaintiff, however, has the opportunity to challenge the facts set forth in the removal petition, and it is defendants' burden to prove that removal is proper.[38]

III. VOLUNTARY / INVOLUNTARY RULE

A. "Voluntary" Dismissal

While Idaho case law has not spoken to this issue, the Ninth Circuit has held that when an event occurring after the filing of a complaint gives rise to federal jurisdiction, removability is

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[31] *Id.*
[32] Lincoln Mine Operating Co. v. Mfrs. Trust Co., 17 F. Supp. 499 (D. Idaho 1936).
[33] Ritchey v. Upjohn Drug Co., 139 F.3d 1313, 1318 (9th Cir. 1998) (quoting McCabe v. Gen. Goods Corp., 811 F.2d 1336, 1339 (9th Cir. 1987)).
[34] Ritchey v. Upjohn Drug Co., 139 F.3d 1313, 1318 (9th Cir. 1998).
[35] Lincoln Mine Operating Co. v. Mfrs. Trust Co., 17 F. Supp. 499, 501 (D. Idaho 1936) (citing Chesapeake & Ohio Ry. Co. v. Cockrell, 232 U.S. 146 152 (1914)).
[36] *Id.*
[37] *Id.*
[38] *Id.*

not automatic, but rather is governed by the "voluntary/involuntary" rule.[39] The voluntary-involuntary rule requires that a suit "remain in state court unless a 'voluntary' act of the plaintiff brings about a change that renders the case removable."[40] For example, if the plaintiff voluntarily dismissed non-diverse defendants, the case is removable. On the other hand, if the defendant takes some action that would make the case removable, such joining a federal entity, or making a counterclaim that invokes federal question jurisdiction, the case is not removable.[41]

The purpose of the "voluntary/involuntary" rule was articulated by the Supreme Court in *Great Northern Railway v. Alexander*.[42] There, the Court stated:

> The obvious principle of [the decisions developing the voluntary/involuntary rule] is that, in the absence of a fraudulent purpose to defeat removal, the plaintiff may by the allegations of his complaint determine the status with respect to removability of a case . . . when it is commenced, and that this power to determine the removability of his case continues with the plaintiff throughout the litigation, so that whether such a case [is] nonremovable when commenced shall afterwards become removable depends not upon what the defendant may allege or prove or what the court may, after hearing upon the merits, in invitum, order, but solely upon the form which the plaintiff by his voluntary action shall give to the pleadings in the case as it progresses towards a conclusion.[43]

B. Exceptions

As noted in the *Great Northern Railway* case, a plaintiff who includes fraudulent or sham defendants, or otherwise attempts to use fraudulent means to defeat diversity, will not be able to take advantage of the "voluntary/involuntary" rule.[44]

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[39] California *ex. rel.* Lungren v. Keating, 986 F.2d 346, 348 (9th Cir. 1993).
[40] *Id.* (quoting Self v. Gen. Motors, 588 F.2d 655, 657 (9th Cir. 1978)).
[41] *See Keating*, 986 F.2d at 348.
[42] 246 U.S. 276 (1918).
[43] *Id.* at 282.
[44] Great N. Ry. v. Alexander, 246 U.S. 276, 282 (1918).

IV. WAVIER OF RIGHT TO REMOVE

A. Waiver by Defending

In an appeal arising out of the District of Idaho, the Ninth Circuit held that a party's motion to quash a state court summons did not effect a waiver of the party's right to remove the case to federal court. *Phillips v. Mfrs. Trust Co.*[45] More recently, however, the Ninth Circuit has provided guidance with respect to waiver.[46] In *Resolution Trust Corp.*, the court stated:

> A party, generally the defendant, may waive the right to remove to federal court where, after it is apparent that the case is removable, the defendant takes actions in state court that manifest his or her intent to have the matter adjudicated there, and to abandon his or her right to a federal forum. A waiver of the right of removal must be clear and unequivocal. In general, the right of removal is not lost by action in the state court short of proceeding to an adjudication on the merits.[47]

The court then held that the defendant did not waive the right to removal by taking defensive action to avoid judgment. Although the defendant filed a petition for rehearing in state court, it concurrently filed a notice of removal and specifically stated in the petition for rehearing that the defendant intended to remove.[48]

B. Waiver by Consent

Idaho courts have not addressed this issue. The Ninth Circuit has held that a forum selection clause that confers jurisdiction to a state court, without conferring exclusive jurisdiction to the state court, will not preclude removal to federal court.[49]

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[45] 101 F.2d 723 (9th Cir. 1939).
[46] *See* Resolution Trust Corp. v. Bayside Developers, 43 F.3d 1230, 1240 (9th Cir. 1994).
[47] *Id.* (citations and quotations omitted).
[48] *Id.*
[49] Hunt Wesson Foods, Inc. v. Supreme Oil Co., 817 F.2d 75, 76-78 (9th Cir. 1987) (holding that "the forum selection clause does not confer exclusive and mandatory jurisdiction on the Orange County Superior Court and that the district court erred in remanding the action to state court").

C. Waiver by Contract

A party may waive its right to removal by operation of a forum selection clause in a contract. The clause need not be part of a negotiated contract, but it must "be able to pass 'judicial scrutiny for fundamental fairness.'"[50]

V. PRACTICE POINTERS

A. Successful strategies for removal and avoiding remand.

As noted in Section I, *Systems Associates, Inc. v. Motorola Communications & Electronics*,[51] has not been recognized by any Idaho court as having been overruled. The holding in the case, that Doe defendants destroy diversity and preclude removal, is contrary to federal law: "[f]or purposes of removal . . . , the citizenship of defendants sued under fictitious names shall be disregarded."[52]

[50] Fisk v. Royal Caribbean Cruises, Ltd., 141 Idaho 290, 295, 108 P.3d 990 (Idaho 2005) (quoting Carnival Cruise Lines, Inc., v. Shute, 499 U.S. 585, 595 (1991)).
[51] 116 Idaho 615, 778 P.2d 737 (Idaho 1989)
[52] 28 U.S.C. § 1441(a).

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I. POWER AND RIGHT TO REMOVE

A. The Parties

1. Defining "Parties in Interest"

Underlying Montana substantive law identifying the legal relationship between the parties as to who is the real party in interest as to the claim and is indispensable defines the term "parties in interest". For example, in *Weyers v. Larken, Inc.*, Defendant 1 claimed Defendant 2 was not a real party in interest and was fraudulently joined to destroy diversity. The question of whether Defendant 2 was a "real and substantial party to the action" was whether plaintiff could recover or sue Defendant 2 under the same act for the same remedy. In this case, the court determined that Plaintiff could have recovered against Defendant 2 in a separate cause of action; therefore, he was a real and substantial party and accordingly, the court granted the motion to remand.[1]

If parties sought to be joined are truly indispensable they shall be joined, even when it results in the destruction of diversity. Rule 19 factors a court considers include the following: (a) whether a party should be joined, and the feasibility of that joinder; and (b) whether "in equity and good conscience" the action should proceed without joinder. As to the latter inquiry, courts

[1] Weyers v. Larken, Inc., (D. Mont. Jan. 24, 1989 # CV-88-160-M-CCL) 1 MFR 122.

consider the following factors: (1) to what extent a judgment rendered absent the joined party would be prejudicial to the present parties; (2) extent to which such prejudice can be lessened if avoided; (3) whether judgment rendered absent joinder would be adequate; and (4) whether the plaintiff will have adequate remedy if the action is dismissed for non-joinder.[2]

A joint tortfeasor is not an indispensable party if they are jointly and severally liable.[3] In addition, where an insurance company (as third party plaintiff) has paid the entire loss suffered by the insured, it is a real party in interest and must sue under its own name. In the case of partial subrogation, both the subrogee and subroger are real parties in interest.[4]

2. Presence of "Doe" Defendants

The presence of "Doe" defendants does not destroy diversity and preclude removal. Generally, unidentified defendants are disregarded for purposes of determining diversity jurisdiction.

3. Diversity for Putative Class Actions

The District of Montana has not directly addressed this issue; thus, the general rule should apply, so that only "minimal diversity" is required.

B. The Amount in Controversy

1. Establishing the Amount in Controversy

The "amount in controversy" is defined as the amount alleged in the complaint unless it is shown the amount is not claimed in good faith. The amount in controversy does not generally include interest and costs, except where an action is based upon a prior judgment that awarded costs. "Where costs are fixed by a prior court judgment, the uncertainty which normally makes

[2] Eisenmenger v. Ethicon, (D. Mont. April 4, 1989 # CV-88-026-GF) 2 MFR 73.
[3] *Id.*
[4] Abraham v. Home Insurance Co., (D. Mont. March 3, 1989 # CV-86-122-M-CCL) 1 MFR 274. *See also* Pacific Indemnity Co. v. State farm Fire and Casualty Co. v. Johnson, (D. Mont. March 3, 2004 # CV-01-59-H-CSO) 32 MFR 123 (discussion and analysis of the real party in interest rule in full and partial subrogation claims).

such amount excludable is not a concern."[5] The jurisdictional amount can be established by combining actual damages with punitive damages.[6] On the other hand, two defendants with "separate and distinct" claims for $50,000 each cannot combine amounts sought in two separate and distinct claims to satisfy the jurisdictional amount.[7]

Moreover, Mont. Code Ann. § 25-4-311 forbids an allegation of the amount of damages in a personal injury action. Therefore, it is to be expected that evidence outside of the allegations will establish the amount in controversy. In this case, settlement demands of $750,000 and $475,000 provide "positive proof" that the amount in controversy exceeded the jurisdictional amount.[8]

2. Application When a Specific Dollar Amount is Not Pled

Determining the amount in controversy when a specific dollar amount is not met is established by taking account of other items, such as statements of damages, discovery responses, demand letters, or independent appraisal by the court in view of legal decisions or limitation of damages where it is legally certain that plaintiff cannot recover the amount claimed.

In *Berg v. Hulbert*, the defendant repeatedly refused to disclose its policy limits to the plaintiff, until plaintiff's counsel sent a demand letter claiming $100,000 in damages. Accordingly, the defendant removed to federal court pursuant to the "other paper" rule.[9] Plaintiff then determined that the policy limit was $50,000 and wrote a new demand letter for the policy limit. Ultimately, the court found that while demand letters may be used to establish amount in controversy, the court must be convinced by a preponderance of the evidence that the

[5] Vaughn v. State Farm Insurance, (D. Mont. Sept. 10, 1991 # CV-91-92-M-CCL) 11 MFR 30.
[6] Big Sky Chiropractic Clinic v. State Farm Mutual Automobile Insurance Company, (D. Mont. Dec. 31, 1991 # CV-91-037-BU) 11 MFR 333.
[7] Hartford Underwriters Insurance Co. v. Kuehn, (D. Mont. April 16, 2003 # CV-02-58-GF-SEH) 31 MFR 480.
[8] Sanders v. K Mart Corporation, (D. Mont. Feb. 1, 1994 # CV-93-60-H-CCL) 16 MFR 151
[9] *See* discussion *infra* Part I.C.2.

amount in controversy will exceed $75,000. Based on the factual circumstances surrounding the original demand letter, the court granted plaintiff's motion to remand, stating that the defendants could remove later should they discover the amount in controversy exceeds $75,000.[10]

3. Amount in Controversy Where Equitable Relief is Sought

If equitable relief is sought, the amount in controversy requirement is satisfied by establishing the value of the right to be protected. In *Smith v. Texaco, Inc.*, the court held that the amount in controversy was not readily ascertainable from the face of the complaint where the defendant claimed the necessary jurisdictional amount existed because the complaint mentioned that the plaintiff had suffered a severed arm. Ultimately, the court held that the complaint alone did not provide a factual basis for the amount in controversy. This was a case where the plaintiff was seeking access to documents, not where the plaintiff was seeking compensation for injury.[11]

4. Defeating Removal by Amendment of Pleadings

After removal, a plaintiff can defeat the federal court of jurisdiction by amendment of the jurisdictional amount; unless it is determined, that such amendment was not in good faith and only to deprive the court of jurisdiction. For example, in *Johnson v. Mountain West Farm Bureau, Mutual Insurance Co.*, Plaintiff's original complaint was dismissed because it did not adequately allege subject matter jurisdiction. Plaintiff then amended his complaint, wherein he claimed an additional $20,000 loss that was not included in the original complaint. This change was suspect, and the "amended complaint is independent evidence that the amount of damages was changed only to get into Federal Court." A party cannot simply change the amount in controversy; it must prove the amount by a preponderance of the evidence.[12]

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[10] Berg v. Hulbert, (D. Mont. Jan. 20, 2004 # CV-03-96-BU-RFC) 31 MFR 506.
[11] Smith v. Texaco, Inc., (D. Mont. Jan. 26, 1990 # CV-89-279-BLG-JFB) 4 MFR 480.
[12] Johnson v. Mountain West Farm Bureau, Mutual Insurance Co., (D. Mont. Feb. 5, 1998 # CV-97-15-GF-DWM) 23 MFR 259.

C. Time of Existence of Grounds for Removal

1. Event Triggering Thirty-Day Period for Actions Initially Removable

Generally, service or acceptance of service of the complaint triggers the thirty-day removal period.[13] In multi-defendant cases, Montana courts follow the "last-served" defendant rule.[14]

2. Event Triggering Thirty-Day Period for Actions Not Initially Removable

If the case not removable on the initial pleading, §1441 provides that, "a notice of removal may be filed within thirty days of receipt by defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may be first ascertained that case is one which is, or has become removable..."

Thirty-days is properly measured from the time the defendant had notice the action was removable. If the defendant is on notice when the complaint is served, then the defendant has thirty days from service. Otherwise, the defendant has thirty days from notice through discovery, amended pleadings or otherwise.[15]

Service or acceptance of service of the amended pleading, motion, order, or paper constitutes "service or otherwise." Examples of "other paper" include demand letters, discovery responses, and statements of claim.[16]

[13] Plastinetics USA, Inc. v. Franklin Plastinetics, Inc., (D. Mont. Sept. 22, 1999 # CV-99-72-GF-DWM) 25 MFR 267 (30 days begins on the date that the Defendant signed the acknowledgment of service, not the date the complaint and summons were mailed).
[14] Pfau v. Hartford Casualty Insurance Co., (D. Mont. Dec. 9, 2003 # CV-03-78-BU-SEH) 31 MFR 482.
[15] Caldwell v. Blakely Crop Hail, Inc., (D.Mont. Aug. 4, 1989 # CV-89-110-GF) 3 MFR 144
[16] Birkenbuel v. M.C.C. Construction Corp., (D. Mont. May 8, 1997 # CV-97-19-GF-DWM) 22 MFR 180

II. FRAUDULENT JOINDER

A. Test for Fraudulent Joinder

Joinder is fraudulent where the plaintiff clearly fails to state a cause of action against a resident defendant in terms of settled state law.[17] Although the Ninth Circuit has not provided specific standards for determining whether joinder is fraudulent, "[s]trong presumptions lie against a finding of fraudulent joinder."[18] Nevertheless, it must appear beyond a doubt that plaintiff can prove no set of facts to support claim entitling relief against joined defendant.

B. Evidence of Fraudulent Joinder

Affidavits as to facts and relationship between the parties as to viability of claim constitute evidence of fraudulent joinder; however, conclusory statements in affidavits do not overcome plaintiff's allegations.

III. VOLUNTARY / INVOLUNTARY RULE

A. "Voluntary" Dismissal

Generally, a Rule 41(a) dismissal or amendment of complaint deleting party or Rule 41(b) by court constitutes a "voluntary" dismissal.

B. Exceptions

The court in *Hartman v. Burlington Northern Santa Fe Railway Co.*, refused to read 28 U.S.C. § 1446(b) so liberally as to find an exception in the case of fraudulent joinder. The purpose of the one-year limitation is to prohibit removal "after substantial progress has been made in state court."[19]

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[17] Dickerman v. W.R. Grace & Co., (D. Mont. Oct. 11, 2000 # CV-00-130-M-DWM) 27 MFR 270.

[18] Ball v. International Paper Co., (D. Mont. Aug. 24, 2004 # CV-04-10-H-DWM) 32 MFR 439 (Some district courts in the 9th Circuit have compared the test to a Rule 12(b)(6) analysis, under which a claim is not dismissed "unless is appears beyond doubt that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief.").

[19] Hartman v. Burlington Northern Santa Fe Railway Co., (D. Mont. Aug. 13, 2001 # CV-01-109-BLG-RWA) 29 MFR 132.

IV. WAIVER OF RIGHT TO REMOVE

A. Waiver by Defending

Short of proceeding to adjudication on the merits, waiver will not occur by a party's defensive action in the state court.[20] For example, the filing of a motion to dismiss in state court does not constitute waiver of removal.[21] Generally, initial appearances, acknowledgment of service, and standard motions to dismiss do not waive timely filed removal. A defendant can waive its right to removal, however, by proceeding to defend an action in state court or otherwise invoking processes of that court if there is substantial involvement in the state court action or the defendant is not diligent in removing action where removal jurisdiction expected, but not triggered until later.[22]

B. Waiver by Consent

Generally, a defendant's consent to plaintiff's filing of a suit in state court does not waive the defendant's right to remove.

C. Waiver by Contract

Generally, contractual waivers are not enforceable in view of Montana's emphasis on constitutionally protected right to sue. "[T]he parties may not confer subject matter jurisdiction upon the federal courts by stipulation, and lack of subject matter jurisdiction cannot be waived by the parties or ignored by the court."[23]

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[20] Acosta v. Citicorp Acceptance Co., (D. Mont. April 28, 1989 # CV-89-041-GF) 2 MFR 180
[21] Marcy v. Delta Air Lines, Inc., (D. Mont. Sept. 6, 1994 # CV-94-021-BU-JDS) 18 MFR 391.
[22] *But see id.* (Defendants moved within 30 days when amount in controversy first became ascertainable though an admission to a request for admission that the amount in controversy exceeded the jurisdiction amount for removal).
[23] See Jones v. Associates Financial Services Co. of Montana, Inc., in Part 6. (D. Mont. April 14, 1997 # CV-96-013-BU) 22 MFR 101 citing Pacific National Inc. Co. v. Transport Ins. Co., 341 F.2d 514, 516 (8th Cir. 1965), *cert denied*, 381 U.S. 912 (1965).

V. PRACTICE POINTERS / PITFALLS

In particular, practitioners not admitted to the Montana Bar must comply with the *pro hac vice* requirements under L.R. 83.3(e).

A. Well-Pleaded Complaint / Artful Pleading

Generally, a plaintiff may choose to pursue state law claims in state court to the exclusion of other federal claims that do not appear on the face of the pleadings. However, a "well-pleaded complaint" cannot resist removal to federal court where the claims are entirely preempted by federal law.[24]

An artfully plead complaint is one that in reality arises under federal law and must be re-characterized as such despite the fact that it purports to rely solely on state law. This is a narrow exception and has been applied in the Ninth Circuit only when "the particular conduct complained of [is] governed exclusively by federal law."[25]

B. Wrong Jurisdiction

In *Dakota Steel & Supply Co. v. St. Paul Fire and Marine Insurance Co.*, defendants removed a South Dakota state claim to Montana federal court. The defendants sought transfer to South Dakota federal court. The court ruled that it could only remand back to the state court, and that it was not authorized to transfer to another federal court under 28 USC § 1447.[26]

[24] Fritel v. Blue Cross Blue Shield of Montana, (D. Mont. Aug. 8, 1990 # CV-90-110-BLG-JDS) 6 MFR 369.
[25] *Id.*
[26] Dakota Steel & Supply Co. v. St. Paul Fire and Marine Insurance Co., (D. Mont. April 20, 1989 # CV-89-4-BLG-JFB) 2 MFR 165.

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I. POWER AND RIGHT TO REMOVE

A. The Parties

1. Defining "Parties in Interest

To determine diversity, courts consider the citizenship of all properly joined and served defendants.[1] The Supreme Court held that an entity that has not been named or joined as a defendant to the action cannot be considered a real party in interest for purposes of destroying diversity.[2]

In addition, courts can disregard the citizenship of a named party if that party is not the real party in interest.[3] For example, improperly or collusively named parties under 28 U.S.C. § 1359, state agencies named when the suit is really against the state itself, parties named to satisfy state pleading rules, and parties with no stake in the controversy can all be disregarded for determining diversity because they are not real parties to the controversy.[4]

[1] *See* Lincoln Property Co. v. Roche, 546 U.S. 81, 90, 93-94 (2005); Abrego v. Dow Chemical Co., 443 F.3d 676, 680 (9th Cir. 2006).
[2] *Lincoln Property*, 546 U.S. at 93-94.
[3] *Id.* at 91-93.
[4] *Id.*

2. Presence of "Doe" Defendants

In *Cowan v. Central Reserve Life of North America Insurance Co.*,[5] the court held that the 1988 amendment to §1441(a), "clearly requires district courts to ignore citizenship of Doe defendants when evaluating petitions for removal."[6] The court went on to state that "as long diversity of citizenship exists among known, named parties, and other diversity requirements are met, removal is proper."[7] In addition, "the presence of fictitious defendants neither creates a presumption that diversity is destroyed, nor requires Doe defendants to be named, abandoned, or dismissed before removal is attempted."[8]

3. Diversity for Putative Class Actions

The Class Action Fairness Act of 2005 ("CAFA"),[9] confers federal jurisdiction upon class action lawsuits that contain 100 or more proposed plaintiffs, where the amount in controversy exceeds the sum or value of $5,000,000, and minimal diversity requirements are met.[10] Minimal diversity requirements are satisfied if any class member is a citizen of a state different from any defendant.[11]

B. The Amount in Controversy

1. Establishing the Amount in Controversy

Typically, "the amount in controversy is determined from the face of the pleadings."[12] The amount in controversy includes attorneys' fees and punitive damages.[13]

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[5] 703 F. Supp. 64 (D. Nev. 1989).
[6] *Id.* at 65
[7] *Id.*
[8] *Id.*
[9] 28 U.S.C. § 1332(d).
[10] Serrano v. 180 Connect, Inc., 478 F.3d 1018, 1020-21 (9th Cir. 2007).
[11] *Abrego*, 443 F.3d at 680.
[12] Garcia v. Dawahare, 2006 U.S. Dist. LEXIS 68040, at *4 (2006).
[13] *Id.* at *5-6.

2. Application When a Specific Dollar Amount is Not Pled

If the amount in controversy is "not facially apparent from the complaint" or if the complaint specifies damages in an amount less than the jurisdictional amount, "the removing defendant must support federal jurisdiction by setting forth facts that support a finding of the requisite amount."[14] The removing defendant must prove by a preponderance of evidence that the amount in controversy exceeds the jurisdictional amount.[15] The Ninth Circuit will consider "facts presented in the removal petition as well as any 'summary judgment type evidence relevant to the amount in controversy at the time of removal.'"[16]

3. Amount in Controversy Where Equitable Relief is Sought

When declaratory or injunctive relief is sought, "it is well established that the amount in controversy is measured by the value of the object of the litigation."[17] In *Cohn*, the heart of the plaintiff's suit was his request for injunctive and other equitable relief.[18] The court found that the plaintiff's settlement letter, which demonstrated his assessment of the value of his claim, was sufficient evidence to establish the amount in controversy.[19]

4. Defeating Removal by Amending Relief Sought

"Jurisdiction must be analyzed from the basis of the pleadings at the time of removal" and not from subsequent amendments.[20]

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[14] *Id.*; McCaa v. Mass. Mutual Life Insurance Co., 330 F. Supp. 2d 1143, 1145 (D. Nev. 2004).
[15] *McCaa*, 330 F. Supp. 2d at 1145.
[16] Valdez v. Allstate Ins. Co., 372 F.3d 1115, 1117 (9th Cir. 2004) (quoting Matheson v. Progressive Specialty Ins. Co., 319 F.3d 1089, 1090 (9th Cir. 2003).
[17] Cohn v. Petsmart, Inc., 281 F.3d 837, 840 (9th Cir. 2002) (quoting Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 347, 53 L. Ed. 2d 383, 97 S. Ct. 2434 (1977).
[18] *Id.*
[19] *Id.* at 840.
[20] Sparta Surgical Corp. v. National Association of Securities Dealers, 159 F.3d 1209, 1213 (9th Cir. 1998) (holding that the plaintiff could not compel a remand by amending the complaint).

C. Time of Existence of Grounds for Removal

1. Event Triggering Thirty-Day Period for Actions Initially Removable

If the basis for removal is clear from the initial pleading, the thirty-day removal period begins with defendant's receipt of the complaint or service of the summons.[21] Removability must be apparent from the "four corners of the applicable pleadings, not through subjective knowledge or a duty to make further inquiry."[22]

2. Event Triggering Thirty-Day Period for Actions Not Initially Removable

Under this provision, it appears that "service or otherwise" merely requires receipt by the removing defendant of a paper from which it is first ascertainable from the face of the document that the action is removable.[23]

Courts have construed "other paper" broadly to include correspondence. In *Harris v. Bankers Life and Casualty Co.*,[24] the court found a letter from plaintiffs counsel to defense counsel constituted "other paper" under the statute.[25] Similarly, in *Babasa v. Lenscrafter, Inc.*,[26] the court found that a letter sent in preparation for mediation served as proper notice that the claim had become removable.[27]

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[21] Lopez v. Wal-mart Stores, Inc., 2008 U.S. Dist. LEXIS 4831, at *2 (2008).
[22] Fee v. Wal-mart Stores, Inc., 2006 U.S. Dist. LEXIS 80406, at *5 (D. Nev. 2006) (quoting Harris v. Bankers Life and Casualty Co., 425 F.3d 689, 694 (9th Cir. 2005).
[23] *Harris*, 425 F.3d at 694; *see also* Babasa v. Lenscrafter, Inc., 498 F.3d 972 (9th Cir. 2007).
[24] 425 F.3d 689 (9th Cir. 2005).
[25] *Id.* at 696.
[26] 498 F.3d 972 (9th Cir. 2007).
[27] *Id.*; *see also* Fee v. Wal-mart Stores, Inc., 2006 U.S. Dist. LEXIS 80406, at *6 (D. Nev. 2006) (finding that the Second Supplemental Production of Documents and Witness List was the document that first allowed the defendant to ascertain removability conclusively).

II. FRAUDULENT JOINDER

A. Test for Fraudulent Joinder

In Nevada, fraudulent joinder "occurs when a plaintiff fails to state a cause of action against a resident defendant, and the failure is obvious according to the settled rules of the state…"[28] The removing defendant has the burden of establishing that the plaintiff failed to state a claim against the resident defendant.[29] The standard for fraudulent joinder is "whether there is any possibility that a claim can be stated against the allegedly 'sham' defendants."[30]

B. Evidence of Fraudulent Joinder

Fraudulent joinder "serves as an exception to the general rule that a court must rely solely on the face of the complaint to determine if complete diversity between the plaintiffs and defendants is present."[31] In deciding claims of fraudulent joinder, the Court "may pierce the pleadings" and consider "summary judgment type evidence such as affidavits and deposition testimony."[32] Evidence demonstrating that the non-diverse defendant had "no real connection with the controversy" could establish the fraudulent joinder of that defendant.[33]

III. VOLUNTARY / INVOLUNTARY

A. "Voluntary" Dismissal

In order for a dismissal to be "voluntary," the plaintiff must act voluntarily to initiate the change that renders the case removable.[34] If the dismissal was the result of an action by either

[28] Knutsen v. Allis-Chalmers Corp., 358 F. Supp. 2d 983, 993 (D. Nev. 2005) (quoting Ritchey v. Upjohn Drug Company, 139 F.3d 1313, 1318 (9th Cir. 1998)).
[29] *Id.* at 994.
[30] *Id.* at 995.
[31] *Knutsen*, 358 F. Supp. 2d at 993.
[32] Kite v. Zimmer US, Inc., 2006 U.S. Dist. LEXIS 85420 *4 (D. Nev. 2006) (quoting Morris v. Princess Cruises, Inc., 236 F.3d 1061, 1068 (9th Cir. 2001)).
[33] *Ritchey*, 139 F.3d 1318 (quoting Wilson v. Republic Iron & Steel Co., 257 U.S. 92, 97-99, 42 S. Ct. 35, 37-38, 66 L. Ed. 144 (1921)).
[34] Shemp v. Yamaha Corp. of America, 2006 U.S. Dist. LEXIS 66786, at *8-9 (D. Nev. 2006).

the defendant or the court, the case is not removable.[35] In addition, the failure of the plaintiff to do something does not constitute a voluntary action under this rule.[36] Courts require the plaintiff to act affirmatively in order to satisfy the voluntary/involuntary rule.[37]

B. Exceptions

Fraudulent joinder is a recognized exception to the voluntary/involuntary rule.[38]

IV. WAIVER OF RIGHT TO REMOVE

A. Waiver by Defending

After it is apparent that the case is removable, a defendant may waive its right to removal by taking actions in the "state court that manifest his or her intent to have the matter adjudicated there, and to abandon his or her right to federal forum."[39] "A waiver of the right to removal must be clear and unequivocal" and the right is generally "not lost by action in the state court short of proceeding to an adjudication on the merits."[40]

V. PRACTICE POINTERS / PITFALLS

A. Successful Strategies for Removal and Avoiding Remand

In order to remove an action successfully, Defendant must be able to establish by a preponderance of the evidence that the amount in controversy requirement is satisfied. Therefore, unless it is facially apparent from the face of the complaint, Defendant must submit factual evidence to meet this burden. Defendant cannot rely upon conclusory allegations or vague statements.

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[35] *Id.* at *9 (citing Merritt V. Mazda Motor of Am., Inc., 103 F. Supp. 2d 1305, 1309 (M.D. Ala. 2000)).
[36] *Id.* at *13.
[37] *Id.* at *14 (holding that the plaintiff's failure to file an opposition to the defendant's motion to dismiss was "not an affirmative act necessary to overcome the voluntary-involuntary rule's bar to removal").
[38] *Knutsen*, 358 F. Supp. 2d at 993 (stating that because of the voluntary/involuntary rule, the defendants cannot argue that the case is removable by virtue of the state court's grant of summary judgment but they are entitled to argue and prove that the case is removable due to fraudulent joinder).
[39] Lucarelli v. Renal Treatment Centers-Illinois, Inc., 2008 U.S. Dist. LEXIS 7773, at *5 (D. Nev. 2008) (quoting Resolution Trust Co. v. Bayside Developers, 43 F.3d 1230, 1240 (9th Cir. 1994).
[40] *Id.* (quoting *Resolution Trust Co.*, 43 F.3d at 1240).

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I. POWER AND RIGHT TO REMOVE

A. The parties

1. Defining "Parties in Interest"

The District of Oregon follows the Ninth Circuit holding that whether a party is a "real party in interest" depends on whether that party is entitled to enforce the right sued upon under the applicable law.[1]

2. Presence of "Doe" Defendants

There is no reported case on this issue in the District of Oregon. The most recent reported case on this issue in the Ninth Circuit rejected a plaintiff's attempt to avoid removal through naming Doe defendants. That court pointed to the portion of the removal statute providing that "[f]or purposes of removal ..., the citizenship of defendants sued under fictitious names shall be disregarded."[2]

3. Diversity for Putative Class Actions

There is no reported case on this issue in the District of Oregon. In cases filed or removed pursuant to the federal Class Action Fairness Act, federal jurisdiction over a class action lawsuit requires only "minimal" diversity: that one member of the proposed class be a

[1] Am. Triticale, Inc. v. Nytco Services, Inc., 664 F.2d 1136, 1141 (9th Cir. 1981).
[2] Bryant v. Ford Motor Co., 886 F.2d 1526, 1528 (9th Cir. 1989), *cert. denied*, 493 U.S. 1076 (1990); 28 U.S.C. § 1441(a).

citizen of a different state than the defendant.[3] The Ninth Circuit requires the defendant merely to affirmatively allege, not prove, diversity.[4]

B. The Amount in Controversy

1. Establishing the Amount in Controversy

The allegations in the Complaint are generally considered to state the amount in controversy, where money damages are sought, unless the party disputing removal can show to a legal certainty that the plaintiff cannot recover an amount in excess of the $75,000 minimum for diversity jurisdiction. The Ninth Circuit includes attorney fees in the amount in controversy, in all cases in which a statute or contract specifically provides for either mandatory or discretionary recovery of fees.[5]

Punitive damages are also part of the amount in controversy. (Note that punitive damages cannot be pled in Oregon state court until the plaintiff demonstrates a prima facie case for them. Generally, the original Complaint will instead contain an allegation stating the plaintiff's intent to amend the Complaint to allege a claim for punitive damages.) The Ninth Circuit permits the District Court to consider the potential for punitive damages for purposes of determining the amount in controversy—even where the plaintiff has not yet specifically requested punitive damages.[6]

2. Application When a Specific Dollar Amount is Not Pled

Oregon requires the amount of money damages to be pled in the Complaint.[7] The demand for judgment acts as a cap on the amount that may be awarded in judgment.[8] The

[3] 28 U.S.C. § 1332(d)(2)(A).
[4] Kanter v. Warner-Lambert Co., 265 F.3d 853, 857 (9th Cir. 2001).
[5] Galt G/S v. JSS Sandanavia, 142 F.3d 1150, 1155-56 (9th Cir. 1998).
[6] Gibson v. Chrysler Corp., 261 F.3d 927, 946 (9th Cir. 2001), *cert. denied* 122 S Ct 903 (2002).
[7] ORCP 18B.
[8] ORCP 67C(2).

defendant can, as a result, force the plaintiff to amend the complaint to specify the dollar amount sought, thereby establishing the amount in controversy.

3. Amount in Controversy Where Equitable Relief is Sought

Injunctive relief is valued according to the nature and value of the right at issue.[9] The Ninth Circuit analyzes the amount in controversy from the plaintiff's viewpoint.[10]

For example, when the skater Tonya Harding sued for an injunction to stop disciplinary hearings that could have prevented her from competing in the Olympics, the District of Oregon determined that the amount in controversy was the value of her right to skate in that competition.[11] A purely intangible right, however, cannot be valued and cannot be used to satisfy the amount in controversy requirement.

The value of the equitable relief sought cannot be aggregated but must be viewed as the value to the individual plaintiff.[12]

4. Defeating Removal by Amending Relief Sought

The Ninth Circuit has not considered this issue. In the absence of guidance from the Ninth Circuit, the District of Oregon subscribes to the analysis from the Eleventh, Sixth, and Seventh Circuits, all of which have held that jurisdiction attaches at the time of removal, and subsequent events cannot deprive the Court of jurisdiction. Subsequent amendments shrinking the amount in controversy do not defeat jurisdiction.[13]

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[9] Snow v. Ford Motor Co., 561 F.2d 787, 790 (9th Cir. 1977).
[10] *Snow*, 561 F.2d at 790-91; Sanchez v. Monumental Life Ins. Co., 102 F.3d 398, 405 n.6 (9th Cir. 1996).
[11] Harding v. U.S. Figure Skating Ass'n, 851 F. Supp. 1476, 1480-81 (D. Or. 1994).
[12] Navarro-Rice v. First USA Bank, 984 F. Supp. 1312, 1316 (D. Or. 1997)
[13] American Dental Indus., Inc. v. EAX Worldwide, Inc., 228 F. Supp. 2d 1155, 1157 (D. Or. 2002).

C. Time of Existence of Grounds for Removal

1. Event Triggering Thirty-Day Period for Actions Initially Removable

The District of Oregon follows the "receipt rule" (the 30 days are triggered when the defendant actually receives a copy of the complaint by any means), rather than the "service rule", (trigger date is the date when service is completed).[14] Where multiple defendants were served at different times, there is a split of authority in the District of Oregon regarding whether the trigger is the service to the first defendant served, or the service to the defendant seeking removal. The Ninth Circuit has not ruled on that issue.[15]

2. Event Triggering Thirty-Day Period for Actions Not Initially Removable

There is no clear decision on this issue from the District of Oregon or the Ninth Circuit. It seems likely that courts will follow the "receipt rule" here also, in light of the Ninth Circuit's preference for construing the rules strictly against removal.[16]

The Ninth Circuit has not ruled on this issue. An unreported decision by the District of Oregon followed decisions from other courts that "the 'other paper' for the purposes of triggering removal jurisdiction under section 1446(b) must be generated within the case," and that a new appellate decision did not constitute "other paper."[17]

II. FRAUDULENT JOINDER

A. Test for Fraudulent Joinder

The Ninth Circuit has not yet published an opinion addressing the fraudulent misjoinder rule. It has ruled, though, that courts should carefully consider the motive of a plaintiff seeking

[14] Chart Development Corp. v. West Slope Water Dist., 22 F. Supp. 2d 1169, 1170 (D. Or. 1998).
[15] *See, e.g.*, United Traffic Consultants, Inc. v. Premium Logistics, Inc., 2001 WL 34039477, *4 (D. Or. Nov. 16, 2001).
[16] *See, e.g.*, Gaus v. Miles, Inc., 980 F.2d 564, 566 (9th Cir. 1992).
[17] Deller v. Portland General Elec. Co., 1991 WL 35960, *2 (D.Or. Mar. 8, 1991) (citing Coman v. Int'l Playtex, Inc., 713 F. Supp. 1324 (N.D. Cal. 1989)); Johnson v. Trans World Airlines, Inc., 660 F. Supp. 914 (C.D. Cal. 1987).

the joinder of a non-diverse defendant, in determining whether to grant the plaintiff leave to amend his original complaint. Courts will permit the joinder, and return the case to state court, where there is no evidence of an improper motive and the new defendant is a reasonable and appropriate addition to the case.[18]

"If the plaintiff fails to state a cause of action against a resident defendant, and the failure is obvious according to the settled rules of the state, the joinder of the resident defendant is fraudulent."[19] While the courts ordinarily look only to the plaintiff's pleadings to determine whether a cause of action is stated, they will go further where fraudulent joinder is an issue. "The defendant seeking removal to the federal court is entitled to present the facts showing the joinder to be fraudulent."[20]

B. Evidence of Fraudulent Joinder

Evidence that the new defendants in the action cannot be held liable to the plaintiff on any theory.[21]

III. VOLUNTARY / INVOLUNTARY RULE

A. "Voluntary" Dismissal

A voluntary dismissal is a dismissal initiated by the plaintiff by filing a notice with the court and the parties, and serving the notice on the parties no less than five days before the trial date. (Where counterclaims have been filed, the plaintiff must instead file a stipulation of dismissal signed by the adverse parties.) Such a dismissal is without prejudice unless the plaintiff has previously dismissed another action against the same parties.[22]

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[18] Desert Empire Bank v. Ins. Co. of N. Am., 623 F.2d 1371, 1376 (9th Cir. 1980).
[19] McCabe v. General Foods Corp., 811 F.2d 1336, 1339 (9th Cir. 1987).
[20] *McCabe*, 811 F.2d at 1339; Ritchey v. Upjohn Drug Co., 139 F.3d 1313, 1318 (9th Cir. 1998).
[21] Ritchey v. Upjohn Drug Co., 139 F.3d 1313, 1318 (9th Cir. 1998).
[22] ORCP 54A.

B. Exceptions

The District of Oregon follows the "voluntary-involuntary," ruling that an action cannot be removed unless a voluntary act of the plaintiff causes a change that makes the case removable.[23] There is no record of the District of Oregon or the Ninth Circuit having considered exceptions for fraudulent joinder or for any other reason.

IV. WAIVER OF RIGHT TO REMOVE

A. Waiver by Defending

No recent reported decisions on this issue were found. A 1963 decision held that the defendant had not waived its right to remove the case to federal court by filing a motion in the original state action for a change of venue to another county.[24]

In the dictum of a recent unreported decision, the District of Oregon recognized a previous Ninth Circuit rulings that a defendant's appearance in state court does not waive the right to removal unless it demonstrates a "clear and unequivocal" intent to waive that right, and that "merely defending against a temporary restraining order or request for an injunction in state court is not sufficient to constitute a waiver of the right to removal."[25]

B. Waiver by Consent

No Oregon decisions were found in which this issue arose.

C. Waiver by Contract

Such waivers are binding only where the contractual waiver is clearly mandatory and designates an exclusive forum. If the language of the forum selection clause is non-mandatory,

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[23] Self v. General Motors Corp., 588 F.2d 655, 659 (9th Cir. 1978), cited in Leong v. Taco Bell Corp., 991 F. Supp. 1237, 1238 (D. Or. 1998)).
[24] Kemp v. Utah Const. & Min. Co., 225 F. Supp. 250, 253 (D. Or. 1963).
[25] Thrifty Supply Co. of Seattle, Inc. v. Slakey Bros., 2004 WL 1686945, *3 (D. Or. July 26, 2004) (citing Resolution Trust Corp. v. Bayside Developers, 43 F.3d 1230, 1240 (9th Cir. 1995)).

the forum selection clause will not preclude removal.[26] "When only jurisdiction is specified the clause will generally not be enforced without some further language indicating the parties' intent to make jurisdiction exclusive."[27]

For example, in a recent unreported case from the District of Oregon, an employment agreement with a clause stating that the agreement "shall be construed, interpreted and enforced under the laws, and in the courts, of the State of Oregon" was held to be permissive, not exclusive. The court pointed to direction from the Ninth Circuit that a forum selection clause must contain mandatory and exclusive language in order to require litigation of disputes in a particular court, and held that the defendant had not waived her right to removal.[28]

V. PRACTICE POINTERS

A. Successful Strategies for Removal and Avoiding Remand

Because Oregon federal courts calculate the 30 days for removal from the date when the defendant receives a copy of the Complaint through any means, it is important for clients to retain counsel as soon as possible, and for counsel to quickly determine the advantages and disadvantages of removal (some of which are outlined in the following subsection), and move for removal promptly if advisable.

The plaintiff should identify the amount sought in the original Complaint, under ORCP 18. If the amount claimed is less than the "amount in controversy" limit, the defendant may still have grounds for removal on the argument that the amount in controversy is more than that identified, if the claims would permit the plaintiff to seek punitive damages, and if attorney fees are available under contract and/or statute. If the plaintiff has failed to identify the amount sought in its original Complaint, and there is no basis to contend that the amount in controversy

[26] Hunt Wesson Foods, Inc. v. Supreme Oil Co., 817 F.2d 75, 77 (9th Cir. 1987).
[27] Docksider, Ltd. v. Sea Technology, Ltd., 875 F.2d 762, 764 (9th Cir. 1989).
[28] Morton & Associates, LLC v. McCain Foods USA, Inc., 2005 WL 3088359, *5 (D.Or. Nov. 15, 2005).

is necessarily greater than the federal limit, the courts are very likely to grant a motion to make the damages more definite and certain, under ORCP 21. Once the amount in controversy is made clear—if it exceeds the federal minimum—then the defendant should be able to remove the case under 28 USC §1446(b).

Forum selection clauses should be examined closely to determine whether they are mandatory and exclusive; if a clause does not provide that the named court is the sole possible venue for disputes, it probably will not serve as a sufficient basis for remand.

B. Strategic Advantages of Federal and State Court

In state court, the amended ORCP 47C now permits a defendant to move for summary judgment on the grounds that there is insufficient evidence of the allegations, thereby forcing the plaintiff to foreshadow its case at trial by demonstrating the evidence it believes support the allegations.

Many lawyers believe that federal judges—magistrates and Article II judges both—are more willing to grant summary judgment against a plaintiff than the average state court judge.

Oregon pleading rules are more strict than the simple notice requirements of federal court. Parties must state "a plain and concise statement of the ultimate facts constituting a claim for relief."[29]

Oregon law does not permit interrogatories. However, Oregon courts do not limit depositions to a presumptive seven hours, and depositions of key witnesses commonly stretch over multiple days where the facts are complex.

With regard to expert witnesses, Oregon operates on a system known informally as "trial by ambush." Neither party need disclose their experts or expert reports, and the party seeking to overcome summary judgment often may do so by submitting an attorney's affidavit that the party

[29] ORCP 18.

has retained an expert witness who will create a question of fact as to the matter at issue in the motion.

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I. POWER AND RIGHT TO REMOVE

A. The Parties

1. Defining "Parties in Interest"

The term "parties in interest" is defined as "one who, under the substantive law of the case, possesses and is entitled to enforce the right in question. To qualify as a real party in interest, one must: (1) have a present and substantial interest in the action, beyond mere expectancy, and (2) directly benefit from the relief sought, such that if successful, he or she would be entitled to fruits recovered.[1]

2. Presence of "Doe" Defendants

Prior to 1988, joining a "John Doe" defendant whose domicile was not alleged would prevent diversity.[2] However, 28 U.S.C. § 1441(a) was amended in 1988 to provide that the citizenship of defendants sued under fictitious names is ignored for removal purposes.

3. Diversity for Putative Class Actions

To establish diversity in a putative class action, the following requirements are met: (1) any class member is a citizen of a state different from any defendant, i.e., complete diversity is

[1] Triplett v. Dairyland Ins. Co., 12 Wash. App. 912, 915, 532 P.2d 1177 (1975); Northwest Indep. Forest Mfrs. v. Dept. of Labor & Indust., 78 Wash. App. 707, 716, 899 P.2d 6 (1995).
[2] Bryant v. Ford Motor Co., 844 F.2d 602, 605 (9th Cir. 1987).

not required; (2) the class is comprised of over 100 members or more; and (3) the aggregate amount in controversy exceeds $5,000,000 (former $75,000 damage requirement for each class member no longer applies).[3]

B. The Amount in Controversy

1. Establishing the Amount in Controversy

The Ninth Circuit makes clear that the "amount in controversy" is the amount of damages that are alleged in the complaint.[4] Whether an action is removable is determined by examination of the four corners of the complaint.[5]

2. Application When a Specific Dollar Amount is Not Pled

Where the complaint does not allege a specific dollar amount, the burden lies with the defendant to establish by a preponderance of the evidence that the amount in controversy satisfies the jurisdictional minimum.[6]

In the Western District of Washington, the local rules require that where the complaint does not specify the amount prayed for, the Notice of Removal must contain bases for the defendant's good faith belief that the jurisdictional amount in controversy requirement has been met.[7] Although no comparable rule exists in the Eastern District of Washington, it would be prudent to follow the approach outlined above regardless.

3. Amount in Controversy Where Equitable Relief is Sought

Where relief other than money damages is sought, the court may consider facts stated in the Notice of Removal for guidance.[8] Alternatively, the court may require submission of

[3] 28 U.S.C. § 1332 (Class Action Fairness Act amended 28 U.S.C. § 1332 and FRCP 23 in 2005, expanding the requirements for class action diversity).
[4] Gaus v. Miles, Inc., 980 F.2d 564, 566 (9th Cir. 1992).
[5] Harris v. Bankers Life & Cas. Co., 425 F.3d 689 (9th Cir. 2005).
[6] Cohn v. Petsmart, Inc., 281 F.3d 837, 839 (9th Cir. 2002); *Gaus*, 980 F.2d at 566-67.
[7] Local Rule 101(a) for the Western District of Washington.
[8] *Gaus*, 980 F.2d at 566.

declarations relevant to the amount in controversy at the time of removal.[9] Still other courts may accept assertions of the defendant regarding the amount in controversy where such assertions are not disputed by the plaintiff.[10]

4. Defeating Removal by Amending Relief Sought

Because an amendment of a complaint is a change or disclosure made voluntarily by the plaintiff, a case not originally removable may be removable to Federal Court. [11]

B. Time of Existence of Grounds for Removal

1. Event Triggering Thirty-Day Period for Actions Initially Removable

In Washington, the 30-day time period is triggered by actual service of the complaint upon the first defendant.[12] The Ninth Circuit district courts are split regarding whether to apply the first served defendant rule. Some district courts hold that the 30-day period is triggered as to all defendants when the first defendant is served with the complaint.[13] Other district courts apply the "last served" rule, holding that each defendant has 30 days from the date that defendant is served to file a Notice of Removal.[14]

2. Event Triggering Thirty-Day Period for Actions Not Initially Removable

The majority rule dictates that where the civil rules require a defendant to be served with both a summons and copy of the complaint, the 30 day time period is triggered by actual service of the complaint on the first defendant. In states where the civil rules require only a summons be served on a defendant where: (1) the complaint has been filed and is publicly available, the 30-day period is triggered when the first defendant is served with a summons; or (2) if the complaint

[9] Singer v. State Farm Mut. Auto. Ins. Co., 116 F.3d 373, 377 (9th Cir. 1997).
[10] Bosinger v. Phillips Plastics Corp., 57 F. Supp.2d 986, 989 (S.D. Cal. 1999).
[11] California ex rel. Lungren v. Keating, 986 F.2d 346, 348 (9th Cir. 1993).
[12] Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc., 526 U.S. 344, 354, 119 S. Ct. 1322 (1999).
[13] *See e.g.*, McAnnaly Enters. Biggs Corp. v. Wilen, 97 F. Supp. 2d 1040, 1044 (D. Nev. 2000).
[14] Ford v. New United Motors Mfg., Inc., 857 F. Supp. 707, 710 (N.D. Cal. 1994).

has not been filed when the first defendant is served with a summons, the 30-day period is tolled upon the filing of the complaint.[15]

Other paper constitutes any document from which it is facially ascertainable that removal is proper. "Notice of removal may be filed within thirty days after the defendant received an amended pleading, motion, order or other paper from which it can be ascertained from the face of the document that removal is proper."[16]

II. FRAUDULENT JOINDER

A. Test for Fraudulent Joinder

Properly joined defendants may prove that a resident defendant was "fraudulently joined" by a showing, that plaintiff has no reasonable basis for the claim against the resident defendant, and no colorable ground for recovery against the resident defendant.[17] The burden of proving that a defendant has been fraudulently joined remains with the defendant.[18]

B. Evidence of Fraudulent Joinder

Where the plaintiff has failed to state a cause of action against a resident defendant and the failure is obvious according to settled state law.[19]

III. VOLUNTARY / INVOLUNTARY RULE

A. "Voluntary" Dismissal

Voluntary dismissal is a voluntary act whereby plaintiff dismisses a party or parties of defendant rendering the case removable.[20]

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[15] *Murphy Bros., Inc.*, 526 U.S. at 354; Roe v. O'Donohue, 38 F.3d 298 (7th Cir. 1994).
[16] Harris v. Bankers Life & Cas. Co. 425 F.3d 689, 69 (9th Cir. 2005).
[17] Morris v. Princess Cruises, Inc., 236 F.3d 1061, 1067 (9th Cir. 2001).
[18] Kohler v. Inter-Tel Techs., 244 F.3d 1167, 1170 n.3 (9th Cir. 2001).
[19] *Id.*
[20] Self v. General Motors Corp., 588 F.2d 655 (9th Cir. 1978); People of State of Cal. v. Keating, 986 F.2d 346 (9th Cir. 1993).

B. Exceptions

The principles underlying the voluntary / involuntary rule make clear that the rule applies only in the absence of fraudulent purpose to defeat removal. [21]

IV. WAIVER OF RIGHT TO REMOVE

A. Waiver by Defending

Mere defensive action to avoid judgment being entered automatically against a party does not equate to intent to litigate in state court and hence does not waive the right to remove.[22] A defendant's right to remove must be waived clearly and unequivocally; filing an answer or a motion or engaging in discovery is not sufficient to constitute waiver.[23] Waiver may occur where, after it is apparent that the case is removable, defendant takes action that makes clear his or her intent to have the matter adjudicated in state court.[24] Note: The filing of a permissive counterclaim and/or a motion to dismiss have been held to constitute a waiver of defendant's right to remove.[25]

B. Waiver by Consent

A party is entitled to contractually waive its right to remove via a forum selection clause so long as the waiver clause contains mandatory language designating explicitly that the forum is exclusive.[26]

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[21] *Id* at 659.
[22] *See id.*
[23] Swett v. Schenk, 792 F.2d 1447, 1451 (9th Cir. 1986).
[24] Resolution Trust Corp. v. Bayside Developers, 43 F.3d 1230, 1240 (9th Cir. 1994); George v. Al-Saud, 478 F. Supp. 773, 774 (N.D. Cal. 1979).
[25] Sood v. Advanced Computer Techniques, Corp., 308 F. Supp. 239, 242 (E.D. Va. 1969). Hill v.Citicorp, 804 F. Supp. 514, 517 (S.D.N.Y. 1992).
[26] Pelleport Investors, Inc. v. Budco Quality Theaters, Inc., 741 F.2d 273 280 (9th Cir. 1984); N. Cal. Dist. Council of Laborers v. Pittsburg-Des Moines Steel Co., 69 F.3d 1034, 1037 (9th Cir. 1995).

C. Waiver by Contract

As a general rule, once waived, the right to removal is waived for all time and as to all defendants, regardless of changes in the case occurring subsequently.[27]

V. PRACTICE POINTERS

Where a removing defendant anticipates that the plaintiff may file a motion for remand, the defendant might choose not to submit detailed legal arguments in the Notice of Removal. Under such circumstances, it is advantageous to reserve the legal analysis of the basis for removal as opposition to the motion to remand.

[27] Dunn v. Gaiam, Inc., 166 F. Supp.2d 1273, 1279-80 (C.D. Cal. 2001).

10TH CIRCUIT

COLORADO

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I. POWER AND RIGHT TO REMOVE

A. The Parties

1. Defining "Parties in Interest"

For purposes of diversity jurisdiction (whether on a removed case or one originally filed in federal court), Colorado federal courts only consider the citizenship of the "real parties in interest."[1] The real party in interest is "the party who, by virtue of the substantive law, has the right to invoke the aid of the court to vindicate the legal interest in question."[2]

2. Presence of "Doe" Defendants

The presence of "Doe" defendants does not destroy diversity.[3]

3. Diversity for Putative Class Actions

The Class Action Fairness Act ("CAFA")[4] now controls questions of diversity in putative class actions exceeding $5 million in controversy.[5] The CAFA departs from the complete diversity requirement, and requires only minimal diversity if the amount in controversy exceeds

[1] Cunningham v. BHP Petroleum Great Britain, PLC, 427 F.3d 1238, 1244 (10th Cir. 2005).
[2] National Propane Corp. v. Miller, 18 P.3d 782, 785 (Colo. Ct. App. 2000); *see also* U.S. Fax Law Ctr., Inc. v. iHire, Inc., 373 F. Supp. 2d 1208, 1210-11 (2005) ("A 'real party in interest' is a party that has a substantive right that is enforceable under applicable substantive law.").
[3] *See, e.g.,* Smith v. Currency Trading Int'l, Inc., 10 F. Supp. 2d 1189 (D. Colo. 1998) ("John Doe" defendant did not prevent removal on basis of diversity jurisdiction).
[4] Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified in scattered sections of 28 U.S.C.).
[5] *See, e.g.,* 28 U.S.C. §§ 1332(d), 1453.

$5 million.[6] However, in multi-party cases not subject to the CAFA (for example other multi-plaintiff actions), traditional rules of diversity still apply and require complete diversity. Only the named parties will be considered in determining whether diversity of citizenship exists.[7]

B. The Amount in Controversy

1. Establishing the Amount in Controversy

As with all questions of removal jurisdiction, the removing party bears the burden to show that the case meets the statutory minimum amount in controversy.[8] "The amount in controversy ordinarily is determined by the allegations of the complaint, or, where they are not dispositive, by the allegations in the notice of removal."[9] According to 28 U.S.C. § 1332, the amount in controversy cannot include "interest and costs."[10] The Tenth Circuit has also declined to aggregate attorneys fees when measuring the amount in controversy in class actions.[11] The removing party must show that the jurisdictional threshold is met by a preponderance of the evidence.[12]

2. Application When a Specific Dollar Amount is Not Pled

If the complaint lacks allegations sufficient to satisfy the jurisdictional threshold, a removing party should provide independent facts demonstrating that the amount in controversy is greater than $75,000. Cursory conclusions contained in the petition for removal (even if based

[6] 28 U.S.C. § 1332(d)(2)(A) ("The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000 . . . and is a class action in which . . . any member of a class of plaintiffs is a citizen of a State different from any defendant.").
[7] *See* MOORE'S FEDERAL PRACTICE § 23.63[3][b] (3d ed. 2007).
[8] Martin v. Franklin Capital Corp., 251 F.3d 1284, 1289 (10th Cir. 2001).
[9] Laughlin v. Kmart Corp., 50 F.3d 871, 873 (10th Cir. 1995).
[10] 28 U.S.C. § 1332.
[11] *Martin*, 251 F.3d at 1293.
[12] *Id*. at 1290.

on the complaint) are generally insufficient.[13] Furthermore, a removing party cannot rely on the state court civil cover sheet as the only evidence that a case meets the minimum amount.[14]

3. Amount in Controversy Where Equitable Relief is Sought

In cases seeking declaratory and injunctive relief, the amount in controversy is measured by the value of the object of the litigation. The Tenth Circuit has followed what has commonly been referred to as the "either viewpoint rule" which considers either the value to the plaintiff or the cost to the defendant of injunctive and declaratory relief as the measure of the amount in controversy for purposes of meeting the jurisdictional minimum.[15]

The CAFA alters the amount in controversy requirements for large class action claims involving more than $5 million in the aggregate.[16] However, in CAFA "mass action" cases, each plaintiff still must meet the $75,000 amount individually.[17] Only unusual circumstances, like when the plaintiffs share an interest in the same piece of real estate or insurance policy, permit aggregation among plaintiffs in non-CAFA cases.[18]

C. Time of Existence of Grounds for Removal

1. Event Triggering Thirty-Day Period for Actions Initially Removable

Under 28 U.S.C. § 1446(b), "the removal period does not begin until the defendant is able 'to intelligently ascertain removability so that in his petition for removal he can make a

[13] *Id.* at 1291-92.
[14] *See, e.g.*, Harding v. Sentinel Ins. Co., Ltd., 490 F. Supp. 2d 1134 (D. Colo. 2007) (remanding to state court when plaintiff checked box on cover sheet indicating it was seeking more than $100,000, but defendant did not provide independent evidence that jurisdictional minimum was satisfied).
[15] Lovell v. State Farm Mut. Auto. Ins. Co., 466 F.3d 893, 897 (10th Cir. 2006).
[16] *See* 28 U.S.C. §§ 1332(d), 1453 (allowing removal when aggregation of class claims meets $5 million minimum).
[17] 28 U.S.C. § 1332(d)(11)(B)(i).
[18] *Lovell*, 466 F.3d at 897-98; *see also* Elliott Indus. Ltd. P'ship v. BP Am. Prod. Co., 407 F.3d 1091, 1105 (10th Cir. 2005) ("The paradigm cases for permitting the aggregation of claims 'are those which involve a single indivisible res, such as an estate, a piece of property (the classic example), or an insurance policy. These are matters that cannot be adjudicated without implicating the rights of everyone involved with the res.'") (citation omitted).

simple and short statement of the facts.'"[19] Once removal is apparent, the removing party has thirty days in which to remove.

2. Event Triggering Thirty-Day Period for Actions Not Initially Removable

The removing party need not investigate claims in the complaint to determine removability.[20] However, the removing party must stay abreast of all facts relating to removal. The Tenth Circuit has followed the majority of courts by holding that the term, "other paper," found in § 1441 includes pleadings, written documents, and depositions. Thus, information derived in discovery may put a defendant on notice of removability and trigger the thirty-day deadline.[21]

In cases with multiple defendants, Colorado federal courts typically follow the "first-served" rule to start the clock on removal.[22] Accordingly, the deadline begins to run when the first defendant is served or becomes aware of the ability for removal.[23] This contrasts with the minority "last-served" rule, wherein the statute begins to run when the last defendant is served.[24] Since uniformity among multiple defendants is required to remove a case, the first-served defendant should move quickly to alert co-defendants to preserve the right of removal.

Much like a defendant may miss the removal deadline; a plaintiff may waive its right to remand if it fails to object to the timeliness of removal. However, subject matter jurisdiction must be otherwise appropriate in the federal court (*i.e.*, a plaintiff cannot waive its right to

[19] Huffman v. Saul Holdings Ltd. P'ship, 194 F.3d 1072, 1078 (10th Cir. 1999) (citation omitted).
[20] Akin v. Ashland Chem. Co., 156 F.3d 1030, 1036 (10th Cir. 1998), *cert. denied*, 526 U.S. 1112 (1999).
[21] *Huffman*, 194 F.3d at 1078.
[22] Cellport Sys., Inc. v. Peiker Acustic GmbH & Co. KG, 335 F. Supp. 2d 1131, 1132-33 (D. Colo. 2004)
[23] *Id.*; *see also* Smola v. Trumbull Ins. Co., 317 F. Supp. 2d 1232 (D. Colo. 2004).
[24] *See, e.g., Cellport Sys.*, 335 F. Supp. 2d at 1133.

challenge diversity of citizenship or the amount in controversy) and the timing flaw must be merely a procedural defect.[25]

II. FRAUDULENT JOINDER

A. Test for Fraudulent Joinder

Fraudulent joinder refers to those circumstances where the plaintiff has joined a non-diverse defendant solely for the purpose of defeating diversity jurisdiction in federal court. In other words, "[i]f the plaintiff fails to state a cause of action against the resident defendant who defeats diversity, and the failure is obvious according to settled rules of the state, the joinder of the resident defendant is fraudulent."[26] In such cases, removal is proper despite the purported inclusion of non-diverse defendants.[27]

To establish fraudulent joinder, the removing party has two options. It must either prove, "that the Plaintiffs committed outright fraud in pleading the jurisdictional facts, or that the Plaintiffs have no possibility of recovery against [the non-diverse defendants]."[28] The burden for a party claiming fraudulent joinder is "extremely heavy."[29] "The removing party must prove the non-liability of the non-diverse defendant as a matter of fact or law."[30] "If there is even a possibility that the state court would find that the complaint states a cause of action against the resident defendant, the federal court must find that the joinder was proper and remand the case to state court."[31]

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[25] *Huffman*, 194 F.3d at 1076-77.
[26] Frontier Airlines, Inc. v. United Airlines, Inc., 758 F. Supp. 1399, 1403 (D. Colo. 1989).
[27] *See* Todd Holding Co., Inc. v. Super Valu Stores, Inc., 744 F. Supp. 1025, 1027 (D. Colo. 1990).
[28] Apodaca v. Allstate Ins. Co., No. 06-CV-00952 MSK-MEH, 2007 WL 678625, at *2 (D. Colo. Feb. 28, 2007).
[29] Estate of Hill v. Allstate Ins. Co., 354 F. Supp. 2d 1192, 1196 (D. Colo. 2004).
[30] *Id.* (internal quotes omitted); *see also* Blackwood v. Thomas, 855 F. Supp. 1205, 1206 (D. Colo. 1994).
[31] *Frontier Airlines*, 758 F. Supp. at 1404.

B. Evidence of Fraudulent Joinder

Since fraudulent joinder is a jurisdictional issue, the parties litigating over removal and/or remand may rely on evidence outside of the pleadings.[32] The removing party may submit affidavits and deposition transcripts to show that the joinder was a "sham or fraudulent device to prevent removal."[33] Likewise, a plaintiff may oppose removal by using similar evidentiary submissions.[34] The evidentiary review, however, is somewhat limited, "the court may not 'pre-try' claims to determine whether there is a possibility of recovery against the resident defendant."[35]

III. THE VOLUNTARY/INVOLUNTARY RULE

A. "Voluntary" Dismissal

The "voluntary/involuntary rule" ("the Rule"), which often is related to the issue of joinder, still exists and is enforced by Colorado federal courts.[36] "This rule requires that an action not originally removable when filed be decided in state court unless a 'voluntary' act of the plaintiff has brought about a change rendering the case removable."[37] Thus, when a plaintiff names both diverse and non-diverse defendants, and the non-diverse defendants successfully move to dismiss claims, the Rule precludes removal because the act that brought about removability (*i.e.*, the non-diverse defendant's dismissal) was not a voluntary act of the plaintiffs.[38]

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[32] *Estate of Hill*, 354 F. Supp. 2d at 1196.
[33] *Frontier Airlines*, 758 F. Supp. at 1404.
[34] *Id.* at 1405 (noting that a plaintiff's burden in opposing removal is lighter than in opposing summary judgment).
[35] *Id.* at 1404; *see also Estate of Hill*, 354 F. Supp. 2d at 1196 (court "may not conduct a full-scale evidentiary hearing").
[36] *See Todd Holding Co.*, 744 F. Supp. at 1027.
[37] *Id.; see also Blackwood*, 855 F. Supp. at 1207.
[38] *Blackwood*, 855 F. Supp. at 1207 (non-diverse defendant dismissed on motion to dismiss; case remanded).

B. Exceptions

The most commonly noted exception to the Rule is fraudulent joinder.[39] Given the difficult burden a defendant has in showing fraudulent joinder,[40] Colorado federal courts have been reluctant to retain jurisdiction when the Rule applies.[41]

IV. WAIVER OF RIGHT TO REMOVE

A. Waiver by Defending

"[A] waiver of one's statutory right to remove a case from a state to a federal court must be 'clear and unequivocal.'"[42] Thus, preliminary participation in the state court proceedings – filing an answer, for example – will not waive a party's right to remove. Even the filing of a motion for summary judgment will not effect a waiver if the motion was filed before it was "unequivocally apparent" that the case was removable.[43]

B. Waiver by Consent

If a party merely consents to jurisdiction in a forum, the consent does not operate to waive the right to remove.[44]

C. Waiver by Contract

Contractual clauses that mandate litigation in a particular forum can waive a party's right to remove.[45] For example, the Colorado Federal Court recently held that a contractual clause specifying that disputes would be settled in either Colorado state court or Colorado federal court

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[39] *See id.* at 1206*; Todd Holding Co.*, 744 F. Supp. at 1027-28; *Blackwood*, 855 F. Supp. at 1207.
[40] *See* Section II, *supra.*
[41] *See Blackwood*, 855 F. Supp at 1207 (remanding case to state court).
[42] Milk 'n' More, Inc. v. Beavert, 963 F.2d 1342, 1346 (10th Cir. 1992) (citation omitted).
[43] *Akin*, 156 F.3d at 1036 ("a defendant who actively invokes the jurisdiction of the state court and interposes a defense in that forum is not barred from the right to removal in the absence of adequate notice of the right to remove").
[44] SBKC Serv. Corp. v. 1111 Prospect Partners, L.P., 105 F.3d 578, 581-82 (10th Cir. 1997) (no waiver where clause did not confine commencement of litigation exclusively to state court); *see also* QFA Royalties, LLC v. Majed, No. 06-CV-01506-LTB-MEH 2006 WL 3500618, at *2-*3 (D. Colo. Dec. 1, 2006) (clause specifying litigation in either Colorado state or federal court did not waive right to remove).
[45] *See, e.g.*, Excell, Inc. v. Sterling Boiler & Mech., Inc., 106 F.3d 318, 320-21 (10th Cir. 1997); American Soda, LLP v. U.S. Filter Wastewater Group, Inc., 428 F.3d 921, 927 (10th Cir. 2005).

did not preclude removal because the clause did not mandate litigation in state court, merely in a court in Colorado.[46] In these cases, interpretation of the contractual provision, whether the forum-selection clause is mandatory or permissive, becomes pivotal to the issue of removal.[47]

V. PRACTICE POINTERS

Removal in Colorado requires careful attention to details. Subject matter jurisdiction is compulsory and Colorado federal judges make repeated references to their strict construal of removal and jurisdiction statutes. Given the harsh consequences of the "first-served" rule in Colorado, all defendants must coordinate and communicate to ensure timely removal. Judges will summarily reject non-conforming removal papers *sua sponte*[48] and they readily remand cases that do not comport with the appropriate jurisdictional statutes and local rules.[49] Strict adherence means that a removing party should ensure its notice of removal is supported by affidavits or discovery as necessary.

Further, the parties must stay abreast of the state court proceedings to make sure that the notice of removal includes all state court pleadings, motions and other papers and it should ensure no hearings or conferences have been scheduled in the state court, or that it notifies the federal court of any such hearings. Lastly, the removing party should be aware that the Colorado federal courts require both a Civil Cover Sheet and a Supplemental Civil Cover Sheet to be filed with the notice of removal.[50]

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[46] *QFA Royalties*, 2006 WL 3500618, at *2-*3.
[47] *See* ADT Sec. Servs., Inc. v. Apex Alarm, LLC, 430 F. Supp. 2d 1199 (D. Colo. 2006); *see also QFA Royalties*, 2006 WL 3500618, at *2-*3.
[48] *See* 28 U.S.C. 1446(c)(4).
[49] *See, e.g.*, D.C.COLO.LCivR 81.1 (requiring a removing party to notify the state court of removal and attach all state court pleadings, motions and other papers to its notice of removal).
[50] D.C.COLO.LCivR 3.1B. The cover sheets are available on the District Court for Colorado's Website, *available at* http://www.co.uscourts.gov/Forms.aspx.

KANSAS

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I. POWER AND RIGHT TO REMOVE

A. The Parties

Under the removal statutes, a party seeking removal on diversity grounds must initially satisfy "complete diversity," i.e., all defendants must be diverse from all plaintiffs. When federal-court jurisdiction is predicated on the parties' diversity of citizenship,[1] removal is permissible "only if none of the parties in interest properly joined and served as defendants is a citizen of the state in which [the] action [was] brought."[2]

Accordingly, defendants may remove an action based on diversity of citizenship if there is complete diversity between all named plaintiffs and all named defendants, and no defendant is a citizen of the forum State.[3] If even one of the state court defendants is domiciled in the same state as any plaintiff, diversity jurisdiction is lacking and removal is improper.[4] For complete

[1] *See* 28 U.S.C. § 1332 (2007).
[2] 28 U.S.C. § 1441(b).
[3] *See* Lincoln Property Co. v. Roche, 546 U.S. 81, 83-84 (2005).
[4] *See* 28 U.S.C. §§ 1332, 1441, 1446, 1447.

diversity to exist in a removed case, diversity must be present both at the time the notice of removal is filed in federal court and at the time the state court action was commenced.[5]

1. Defining "Parties in Interest"

For purposes of diversity jurisdiction, Kansas courts consider only the citizenship of the "real parties in interest."[6] The real party in interest is "the one who, under applicable substantive law, has the legal right to bring suit."[7]

2. Presence of "Doe" Defendants

Plaintiffs may not defeat diversity by naming "John Does." Under the federal removal statutes, the presence of "John Doe" defendants at the commencement of an action creates no impediment to removal. Section 1441(a) of Title 28 provides that, "[f]or purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded."[8] The Tenth Circuit holds, consistent with the text of 28 U.S.C. § 1441(a), that the citizenship of "John Doe" defendants should be disregarded when considering the propriety of removal under 28 U.S.C. §§ 1441(a) and 1332.[9]

Nevertheless, if the plaintiff adds a non-diverse party to the complaint at any time prior to final judgment, the case must be remanded to state court. Specifically, 28 U.S.C. § 1447(c) provides that "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded."[10] Further, § 1447(e) states: "[i]f after removal

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[5] *See* AG Services of America, Inc. v. Metsker, No. 03-4228-SAC, 2004 WL 1834639, at *1 (D. Kan. May 26, 2004).
[6] Cunningham v. BHP Petroleum Great Britain, PLC, 427 F.3d 1238, 1244 (10th Cir. 2005).
[7] Boeing Airplane Co. v. Perry, 322 F.2d 589 (10th Cir. 1963), *cert. denied*, 84 S.Ct. 516, 375 U.S. 984, 11 L.Ed.2d 472. *See also* Scheufler v. General Host Corp., 895 F.Supp. 1416 (D. Kan. 1995), *aff'd*, 126 F.3d 1261 ("'Real party in interest' is party that has substantive right that is enforceable under applicable substantive law").
[8] 28 U.S.C. § 1441(a).
[9] Australian Gold Inc. v. Hatfield, 436 F.3d 1228, 1235 (10th Cir. 2006) (plaintiffs' naming of ten (10) alleged co-conspirator "John Does" in the complaint did not preclude removal of plaintiffs' state-law claim to federal court on basis of diversity of citizenship).
[10] 28 U.S.C. § 1447(c).

the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State Court."[11] Although § 1447(e) speaks of joinder, the Tenth Circuit has held it to apply when the complaint is amended to replace "John Doe" defendants with defendants identified by name.[12]

Most recently, the Tenth Circuit addressed the issue of whether subsequent identification of potential defendants destroys complete diversity thus requiring remand to state court. In *McPhail v. Deere & Co. and John Does 1 – 3*,[13] the Court of Appeals held that the *potential* replacement of "John Doe" defendants with defendants identified by name did *not* destroy the diversity of the parties in the removed action for purposes of diversity jurisdiction in federal court.[14]

The Court noted, however, under § 1447(e), a plaintiff does not have an absolute right to join such parties. Consequently, Federal Rule of Civil Procedure 15(a)(2) allows amendments only with leave of the opposing party or the court.[15] Furthermore, pursuant to Rule 19, the district court must determine whether the party sought to be joined is indispensable. If so, Rule 19 requires the court to either join the party, in which case remand is necessary under § 1447(e), or deny joinder, in which case Rule 19(b) also requires dismissal of the action.[16] If the defendant is not indispensable, Rule 20(a)(2) permits joinder at the discretion of the district court.[17]

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[11] 28 U.S.C. § 1447(e).
[12] *See, e.g.*, McPhail v. Deere & Co., --- F.3d ----, 2008 WL 2514157 (10th Cir. June 25, 2008).
[13] --- F.3d ----, 2008 WL 2514157 (10th Cir. June 25, 2008).
[14] *See id.*
[15] *Id* at *3. Conversely, Fed. R. Civ. P. 15(a)(1) allows for some amendments to a complaint to be made as a matter of course prior to the filing of a responsive pleading.
[16] Additionally, Federal Rule of Civil Procedure 19(b) allows the case to go forward if the district court determines "in equity and good conscience" that it should proceed without the indispensable party. Rule 19(b) sets forth several factors for making this determination. The *McPhail* Court noted that in such a situation, the non-diverse party, having been left out of the litigation, is no longer an impediment to diversity jurisdiction. *See McPhail*, 2008 WL 2514157, at *12 n.2.
[17] *Id.* at *8. *See also* State Distrib., Inc. v. Glenmore Distill. Co., 738 F.2d 405, 416-17 (10th Cir. 1984).

In exercising this discretion, the district court typically considers several factors including whether the amendment will result in undue prejudice, whether the delay in the request was undue and inexplicable, and whether offered in good faith.[18] If the district court determines that joinder is appropriate, § 1447(e) requires remand to state court.[19] If the district court decides otherwise, it "may deny joinder."[20]

3. Diversity for Putative Class Actions

Most recently, Congress significantly expanded federal subject matter jurisdiction over class action lawsuits. The Class Action Fairness ("CAFA"),[21] enacted into law February 18, 2005, amended the federal diversity jurisdiction statute, 28 U.S.C. § 1332,[22] and explicitly provides for diversity jurisdiction in a class action under Federal Rule of Civil Procedure 23 where: (1) the proposed class has at least 100 members,[23] (2) the amount in controversy exceeds $5 million after combining claims, exclusive of interest and costs,[24] and (3) there is diversity of citizenship between one plaintiff class member and one defendant.[25]

The Act is not retroactive to cases commenced before February 18, 2005.[26] The term "commenced," in the provision stating that CAFA applies to actions commenced after February 18, 2005, refers to when the action was originally commenced in state court, as determined by the state's own rules of procedure, and not the date of removal to federal court.[27]

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[18] *McPhail*, 2008 WL 2514157, at *3.
[19] 28 U.S.C. § 1447(e).
[20] 28 U.S.C. § 1447(e).
[21] Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified in scattered sections of 28 U.S.C.).
[22] Pub. L. No. 109-2, 119 Stat. 4 (2005).
[23] 28 U.S.C. § 1332(d)(5)(B).
[24] 28 U.S.C. § 1332(d)(2).
[25] 28 U.S.C. § 1332(d)(2).
[26] Lovell v. State Farm Mut. Auto. Ins. Co., 466 F.3d 893 (10th Cir. 2006).
[27] Pritchett v. Office Depot, Inc., 420 F.3d 1090 (10th Cir. 2005).

Furthermore Section 5 of the Act creates a new removal statute, 28 U.S.C. § 1453,[28] which exclusively governs the removal of class actions. The statute provides that the general removal provisions in place, under 28 U.S.C. § 1446, continue to apply to class actions, except where they are inconsistent with the provisions of the new statute.[29] Essentially, this means that a defendant must still file a notice of removal containing a short and plain statement of the grounds for removal within thirty-days after receiving a copy of the complaint,[30] and removal is still premised on the existence of original jurisdiction.[31] Similarly, if the action was not removable at the time of filing, the defendant may also remove if the case later becomes removable.[32]

More importantly, the statute makes three major modifications to the general removal provisions: (1) it eliminates the one-year time limitation on removing cases, (2) it makes a defendant's citizenship in the forum state irrelevant, and (3) it allows any defendant to remove.[33] Accordingly, in qualifying class actions, only a single plaintiff need be diverse with regard to a single defendant for a district court to exercise jurisdiction over the class action.

[28] *See* Class Action Fairness Act of 2005 § 5 (codified at 28 U.S.C. § 1453).
[29] 28 U.S.C. § 1453(b).
[30] 28 U.S.C. § 1446(a)-(b) (2006).
[31] 28 U.S.C. § 1446(a) (2006).
[32] 28 U.S.C. § 1446(b).
[33] 28 U.S.C. § 1453(b).

B. The Amount in Controversy

1. Establishing the Amount in Controversy

Subject matter jurisdiction under 28 U.S.C. § 1332(a) requires, in addition to diversity of citizenship, an amount in controversy in excess of "$75,000, exclusive of interest and costs."[34] The court determines the amount in controversy based on the petition, or, where the petition is unclear, from the notice of removal.[35] Where a plaintiff pleads an open-ended amount in controversy (i.e., "more than $50,000"), the defendant must prove by at least a preponderance of the evidence that the amount in controversy exceeds $75,000.[36]

Although the Tenth Circuit's opinions have not been entirely clear on the issue, the approach recently adopted in *McPhail v. Deere & Co.*[37] is consistent with their holdings and analysis. In clarifying the proper role of the "preponderance of the evidence" standard, the Court of Appeals held:

> a proponent of federal jurisdiction must, if material factual allegations are contested, prove those jurisdictional facts by a preponderance of the evidence. Once the facts have been established, uncertainty about whether the plaintiff can prove its substantive claims, and whether damages (if the plaintiff prevails on the merits) will exceed the threshold, does not justify dismissal. Only if it is "legally certain" that the recovery (from plaintiff's perspective) or cost of complying with the judgment (from defendant's) will be less that the jurisdictional floor may the case be dismissed.[38]

In other words, "the defendant must affirmatively establish jurisdiction by proving jurisdictional *facts* that [make] it *possible* that $75,000 [is] in play."[39] Moreover, "[i]t is only the

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[34] 28 U.S.C. § 1332(a).
[35] Laughlin v. Kmart Corp., 50 F.3d 871, 873 (10th Cir. 1995).
[36] Green v. Harsco Corp., No. 99-5139, 2000 WL 745353, at *3 (10th Cir. May 25, 2000); *see also* Martin v. Franklin Cap. Corp., 251 F.3d 1284, 1290 (10th Cir. 2001).
[37] --- F.3d ----, 2008 WL 2514157 (10th Cir. June 25, 2008).
[38] *Id.* at *7.
[39] *Id.* at *6.

jurisdictional facts that must be proven by a preponderance – not the legal conclusion that the statutory threshold amount is in controversy."[40]

In any case, a useful tool for defendants is Kansas Supreme Court Rule 118, which allows a defendant to seek specific information about the plaintiff's claimed damages.[41] All too frequently, where a plaintiff's state court complaint does not allege an amount in controversy that exceeds the federal jurisdictional amount, the ensuing notice of removal will likewise fail to allege the requisite jurisdictional amount properly.[42]

Removal cannot be based simply upon conclusory allegations.[43] If it is not facially apparent from the complaint that the plaintiff's claims exceed $75,000, the removing attorney may support federal jurisdiction by setting forth the facts in controversy – preferably in the removal notice, but sometimes by affidavit – that support a finding of the requisite amount in controversy.[44] However, if the defendant does not have access to information sufficient to support a claim of federal jurisdiction, Kansas Supreme Court Rule 118 provides an excellent vehicle through which jurisdiction or lack thereof may be established or confirmed.[45]

Kansas Supreme Court Rule 118 provides, in pertinent part: "the party against whom relief is sought may serve on the party seeking relief a written request of the actual amount of monetary damages being sought in the action." [46] Accordingly, a defendant may request a statement of plaintiff's monetary damages pursuant to Rule 118.[47] As the court in *Honeycutt v.*

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[40] *Id.*
[41] KAN. R. DIST. CT. 118; Honeycutt v. Dillard's Inc., 989 F. Supp. 1375, 1377 (D. Kan. 1997).
[42] *Honeycutt*, 989 F. Supp. at 1377.
[43] *Id.*
[44] *Laughlin*, 50 F.3d at 873; *Honeycutt*, 989 F. Supp. at 1377.
[45] *Honeycutt*, 989 F. Supp. at 1377.
[46] KAN. R. DIST. CT. 118.
[47] A request under Rule 118 need not be made within thirty (30) days after service of complaint. KAN. R. DIST. CT. 118.

Dillard's Inc.[48] observed, "[i]f more attorneys utilized this procedure, fewer attorneys would be surprised to discover that their cases had been summarily remanded on the Court's own motion under 28 U.S.C. § 1446(c)(4)."[49]

Ultimately, the court has a duty to assess its jurisdiction independently, which means that removal is not automatically proper, even if the parties agree that the amount in controversy exceeds $75,000. Consequently, a plaintiff may disclaim damages over a certain amount. A plaintiff who wants to prevent removal in a case where the parties are diverse should consider disclaiming damages more than $74,999 in the petition.

2. Application When a Specific Dollar Amount is Not Pled

A removing defendant claiming diversity jurisdiction in the face of a silent complaint must prove facts necessary to support its assertion that the case may involve more than the jurisdictional minimum.[50] Accordingly, the proponent of federal jurisdiction must affirmatively establish jurisdiction by proving contested jurisdictional *facts* that make it *possible* that $75,000 is at stake.[51] Once those underlying facts are proven, a defendant (like a plaintiff) is entitled to stay in federal court unless it is "legally certain" that the recovery will be less than the jurisdictional floor.[52] Moreover, if the amount is uncertain, then there is *potential controversy*, which is to say that at least $75,000 is in controversy in the case.[53]

The removing defendant, as the proponent of federal jurisdiction, must establish what the plaintiff stands to recover.[54] A plaintiff, however, cannot avoid removal merely by declining to

[48] 989 F. Supp. 1375 (D. Kan. 1997).
[49] *Id.* at 1377. Under 28 U.S.C. § 1446(c)(4), the district court is independently required to promptly examine the notice and, if it clearly appears from the face of the notice and any exhibits annexed thereto that removal should not be permitted, make an order for summary remand. *Id.*
[50] *McPhail*, 2008 WL 2514157, at *6.
[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] *Id.* at *5.

allege the jurisdictional amount.[55] Still, in the absence of an explicit demand for more than $75,000, the defendant must show how much is in controversy through other means.[56]

There are several ways in which the removing party may demonstrate the amount in controversy – by contentions, interrogatories, or admissions in state court; by calculation from the complaint's allegations; by reference to the plaintiff's informal estimates or settlement demands; or by introducing evidence in the form of affidavits from the defendant's employees or experts, about how much it would cost to satisfy the plaintiff's demands.[57] The list is not exclusive; moreover, "this demonstration may be made from either side's viewpoint (what a judgment would be worth to the plaintiff, or what compliance with an injunction would cost the defendant)."[58]

First, the defendant may rely on an estimate of the potential damages from the allegations in the complaint.[59] A complaint that presents a combination of facts and theories of recovery that may support a claim in excess of $75,000 can provide a basis for removal to federal court.[60] Based on these allegations and the nature of the damages sought, the complaint on its face may be sufficient by itself to support removal.[61]

Second, beyond the complaint itself, other documentation can provide the basis for determining the amount in controversy – either interrogatories obtained in state court before removal was filed, or affidavits or other evidence submitted in federal court afterward.[62] As recently noted by the Tenth Circuit, this method roughly parallels a plaintiff's right, under Federal Rule of Civil Procedure 10(c), to make "[a] copy of a written instrument that is an

[55] *McPhail*, 2008 WL 2514157, at *7.
[56] *Id.*
[57] *Id.*
[58] *Id.* (citing Meridian Security Ins. Co. v. Sadowski, 441 F.3d 536, 540-43 (7th Cir. 2006)).
[59] *Id.* at *9.
[60] *McPhail*, 2008 WL 2514157, at *7.
[61] *Id.*
[62] *Id.*

exhibit to a pleading … a part of the pleading for all purposes."[63] In some situations, the Court stated, "this sort of evidence alone will allow a defendant to support its claims regarding the amount in controversy."[64]

Furthermore, a plaintiff's proposed settlement amount "is relevant evidence of the amount in controversy if it appears to reflect a reasonable estimate of the plaintiff's claim."[65] While the amount in controversy is not proof of the amount the plaintiff will recover, it is an estimate of the amount that will be put at issue in the course of the litigation.[66] To this end, the Tenth Circuit holds, "documents that demonstrate plaintiff's own estimation of its claim are a proper means of supporting the allegations in the notice of removal, even though they cannot be used to support the ultimate amount of liability."[67]

3. Amount in Controversy Where Equitable Relief is Sought

When the plaintiff seeks declaratory or injunctive relief, "it is well established that the amount in controversy is measured by the value of the object of the litigation."[68] That "value" consists of the "pecuniary effect an adverse declaration will have on either party to the lawsuit."[69] The vast majority of courts measure the amount in controversy in declaratory and/or injunctive relief cases by looking at either the cost to the defendant or the value to the plaintiff.[70] Consequently, a defendant may establish the amount in controversy by showing its costs of complying with a potential injunction.[71]

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[63] *Id.*
[64] *Id.*
[65] *McPhail*, 2008 WL 2514157, at *8.
[66] *Id.*
[67] *Id.*
[68] Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 33, 347 (1977); Mid-America AG Network, Inc. v. Monkey Island Dev. Auth., 2004 WL 1529284, at *2 (10th Cir. July 8, 2004).
[69] City of Moore v. Atchison, Topeka, & Santa Fe Ry. Co., 699 F.2d 507, 509 (10th Cir. 1983).
[70] *Id.* (citing FEDERAL PRACTICE AND PROCEDURE § 3725, at 431-32).
[71] Justice v. Atchison, Topeka & Santa Fe Ry. Co., 927 F.2d 503, 505 (10th Cir. 1991).

4. Defeating Removal by Amending Relief Sought

Once a federal court exercises diversity jurisdiction, a plaintiff cannot amend her claimed damages to defeat federal jurisdiction.[72] Likewise, the plaintiff may not increase her damages to create federal jurisdiction.[73]

C. Time of Existence of Grounds for Removal

Time limits are procedural requirements, not jurisdictional requirements; however, courts do not hesitate to remand a case for untimely removal.[74] The parties may not extend the time for removal by consent, and the court may not order an extension of time.[75] Neither does an extension of time to answer in state court extend the time to remove to federal court.[76]

1. Event Triggering Thirty-Day Period for Actions Initially Removable

The clock starts ticking when the removability of a case first becomes ascertainable, whether that happens when the case is filed or after the case has been pending for a period of time. In either case, 28 U.S.C. § 1446(b) sets forth the general rule: the defendant must remove the case within thirty-days of the date she receives notice that the case contains a removable claim.[77] What constitutes "notice" differs depending on the stage of the case. Generally, the defendant may receive notice when she is served with summons and a copy of the petition.[78] Alternatively, she may receive notice by an "other paper" filed in the proceeding.[79]

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[72] St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 294, 58 S. Ct. 586, 82 L. Ed. 845 (1938); Harris v. Archer Daniels Midland Co., No. 06-2059-KHV, 2006 WL 963551, at *2-*3 (D. Kan. Apr. 13, 2006) (collecting cases).
[73] Michaelis v. Deluxe Fin. Servs. Inc., No. 06-2302-KHV, 2006 WL 2802344, at *1 (D. Kan. Sept. 28, 2006).
[74] *See* Henderson v. Holmes, 920 F. Supp. 1184, 1187 (D. Kan. 1996) (noting that courts strictly enforce the removal statutes). *But see* Farm & City Ins. Co. v. Johnson, 190 F. Supp. 2d 1232, 1236-37 (D. Kan. 2002) (retaining an untimely removed case).
[75] First Nat'l Bank & Trust Co. v. Nicholas, 768 F. Supp. 788, 790 (D. Kan. 1991).
[76] *See* Oldland v. Gray, 179 F.2d 408, 411 (10th Cir. 1950); Berkel & Co. Contractors Inc. v. AMEC Const. Mgmt. Inc., No. 03-2201-GTV, 2003 WL 21448873, at *3 (D. Kan. June 18, 2003).
[77] *See generally* 28 U.S.C. § 1446(b).
[78] *See* Murphy Bros. Inc. v. Michetti Pipe Stringing Inc., 526 U.S. 344, 347-48 (1999); Liebau v. Columbia Cas. Co., 176 F. Supp. 2d 1236, 1239-40 (D. Kan. 2001).
[79] *See* 28 U.S.C. § 1446(b).

Where the original state court petition includes a federal question, diverse parties with an amount in controversy exceeding $75,000, or another basis for federal jurisdiction, a defendant must remove the case within thirty-days of being served with summons and a copy of the petition.[80] However, mere receipt of the summons without service, i.e., by courtesy fax, does not start the time clock.[81] In a multiple defendant case, the thirty-day time limit begins running at the time the ***first*** defendant is served.[82]

2. Event Triggering Thirty-Day Period for Actions Not Initially Removable

When a case becomes removable after filing, the notice of the case's removability must be clear and unequivocal.[83] A defendant has no duty to investigate whether facts would support removal if the removability is not clear.[84] If a defendant learns from an "other paper" – which includes interrogatories, requests for information, and depositions,[85] as well as other documents – that a case qualifies for removal, the time to remove begins when the defendant learned of the fact(s) authorizing removal. Service of the "other paper" is unnecessary.[86]

In the past, significant confusion existed among the courts as to the interpretation of the statutory phrase "through service or otherwise." Many courts held that receipt of the complaint was sufficient to begin the running of the thirty-day period. However, the Supreme Court adopted a differing interpretation of the statutory language in *Murphy Brothers, Inc. v. Michetti*

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[80] *Murphy Bros.*, 526 U.S. at 348.
[81] *Id.* at 347-48.
[82] McShares Inc. v. Barry, 979 F. Supp. 1338, 1343 (D. Kan. 1997); Wakefield v. Olcott, 983 F. Supp. 1018, 1020 (D. Kan. 1997) (emphasis added).
[83] Farmland Nat'l Beef Packing Co. L.P. v. Stone Container Corp., 98 F. App'x 752, 755 (10th Cir. 2004); Huffman v. Saul Holdings Ltd. P'ship, 194 F.3d 1072, 1077-78 (10th Cir. 1999); Akin v. Ashland Chem. Co., 156 F.3d 1030, 1035 (10th Cir. 1998).
[84] Little Apple 1, L.P. v. Panek Exteriors Inc., No. 05-4054-SAC, 2005 WL 1863147, at *2-*4 (D. Kan. July 29, 2005).
[85] *Huffman*, 194 F.3d at 1077-78 (holding that the giving of testimony in a deposition, not receipt of the written transcript, starts the 30-day clock).
[86] Deborah Pearce Reggio, *Removal and Remand: A Guide to Navigating Between the State and Federal Courts*, 23 MISS. C. L. REV. 97, 119 (2004).

Pipe Stringing, Inc.,[87] holding that, "the defendant's period for removal will be no less than 30 days from service … depending on when the complaint is received."[88] Further, the Court observed, "the various state provisions for service of the summons and the filing or service of the complaint fit into one or another of four main categories."[89] In each of the four categories, the defendant's period for removal will be no less than thirty-days from service, and in some categories, it will be more than thirty-days from service, depending on when the complaint is received.[90]

First, if the summons and complaint are served together, the 30-day period for removal runs at once.[91] Second, if the defendant is served with summons but the complaint is furnished to the defendant sometime after, the period of removal runs from the defendant's receipt of the complaint.[92] Third, if the defendant is served with the summons and the complaint is filed in court, but under local rules, service of the complaint is not required, the removal period runs from the date the complaint is made available through filing.[93] Finally, if the complaint is filed in court prior to any service, the removal period runs from the service of the summons.[94]

II. FRAUDULENT JOINDER

A. Test for Fraudulent Joinder

The district courts in the Tenth Circuit define fraudulent joinder as, "joinder of a resident defendant having no real connection with the controversy."[95] It has long been held that the right of removal cannot be defeated by "a fraudulent joinder of a resident defendant having no real

[87] 526 U.S. 344 (1999).
[88] *Id.* at 354; Liebau v. Columbia Cas. Co., 176 F. Supp. 2d 1236, 1240 (D. Kan. 2001).
[89] *Murphy Bros.*, 526 U.S. at 354.
[90] *Id.*
[91] *Id.*
[92] *Id.*
[93] *Id.*
[94] *Murphy Bros.*, 526 U.S. at 354.
[95] Cooper v. Zimmer Holdings, Inc., 320 F. Supp. 2d 1154, 1157 (D. Kan. 2004).

connection with the controversy."[96] When diversity is not apparent on the face of the petition, the defendant may argue that the plaintiff fraudulently joined a non-diverse party to keep the case out of federal court.[97] Fraudulent joinder is a judicially created doctrine that provides an exception to the requirement of complete diversity.[98] Fraudulent joinder is a term of art; it does not reflect on the integrity of the plaintiff or counsel, but exists regardless of the plaintiff's motives when the circumstances do not offer any other justifiable reason for joining the defendant.[99]

The removing defendant's burden of proving fraudulent joinder is not unlike the burden of proving any claim of fraud.[100] "[U]pon specific allegations of fraudulent joinder, the court may pierce the pleadings, consider the entire record, and determine the basis of joinder by any means available."[101] The removing party must show that joinder is fraudulent and does so only if it offers proof which compels the conclusion that the joinder was without right or made in bad faith.[102]

The Tenth Circuit addressed fraudulent joinder claims in its unpublished opinion, *Montano v. Allstate Indemnity*,[103] stating: "[t]o prove their allegation of fraudulent joinder [the removing parties] must demonstrate that there is no possibility that [plaintiff] would be able to establish a cause of action against [the joined party] in state court."[104] Accordingly, in order to establish fraudulent joinder, the removing party must prove: (1) failure to state a claim upon

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[96] *Id.* at 1156-57 (quoting Wilson v. Republic Iron & Steel Co., 257 U.S. 92, 97 (1921)).
[97] *See, e.g.*, Wolf Creek Nuclear Operating Corp. v. Framatome ANP Inc., 416 F. Supp. 2d 1081, 1085-86 (D. Kan. 2006); Loeffelbein v. Milberg Weiss Bershad Hynes & Lerach LLP, No. 02-2435-CM, 2003 WL 21313957, at *4-*5 (D. Kan. May 23, 2003).
[98] *Loeffelbein*, 2003 WL 21313957, at *4.
[99] *Cooper*, 320 F. Supp. 2d at 1156-57. (citation omitted).
[100] *Wolf Creek*, 416 F. Supp. 2d at 1085.
[101] City of Neodesha, Kan. v. BP Corp. N. Am. Inc., 355 F. Supp. 2d 1182, 1185 (D. Kan. 2005) (quoting Dodd v. Fawcett Publ'ns, Inc., 329 F.2d 82, 85 (10th Cir. 1964)).
[102] *Id.*
[103] No. 99-2225, 2000 WL 525592, at *1-*2 (10th Cir. Apr. 14, 2000).
[104] *Id.*

which relief must be granted; and (2) that there is no possibility that the plaintiff would be able to establish a cause of action against the joined party in state court.[105]

In evaluating fraudulent joinder claims, the court resolves "all disputed questions of fact and all ambiguities in the controlling law in favor of the non-removing party."[106] The court subsequently determines whether that party has any possibility of recovery against the party whose joinder is questioned.[107] Finally, as the reference to "a cause of action" in the above quoted passage reflects, remand is required if any one of the claims against the non-diverse defendant … is possibly viable.[108]

B. Evidence of Fraudulent Joinder

A non-diverse defendant is fraudulently joined when no cause of action is pleaded, when the cause of action pleaded is defective as a matter of law, or when the pleaded cause of action does not exist in fact.[109] Fraudulent joinder is also present when the plaintiff has no good-faith intention to prosecute the action or to seek a joint judgment against the non-diverse defendant.[110] If there is a possibility, however, that a state court would recognize the cause of action pleaded against the non-diverse defendant, then joinder is proper and remand is required.[111]

Under the Tenth Circuit standard, to defeat a motion to remand, it is incumbent upon the removing defendant to show that there is no possibility that the plaintiff would be able to

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[105] Crow v. State Indus., No. 01-2555-GTV, 2003 WL 1053945, at *3 (D. Kan. Feb. 27, 2003) (quoting Montano v. Allstate Indemnity, No. 99-2225, 2000 WL 525592, at *1-*2 (10th Cir. Apr. 14, 2000)). Several District of Kansas courts have relied on the unpublished *Montano* decision. *See, e.g.,* City of Neodesha, Kan. v. BP Corp. N. Am. Inc., 355 F. Supp. 2d 1182, 1186-87 (D. Kan. 2005); Wolf Creek Nuclear Operating Corp. v. Framatome ANP, Inc., 416 F. Supp. 2d 1081, 1084 (D. Kan. 2006).
[106] *City of Neodesha*, 355 F. Supp. 2d at 1186.
[107] *Id.* This standard is more exacting than that for dismissing a claim under FED.R.CIV.P. 12(b)(6); indeed, the latter entails the kind of merits determination that, absent fraudulent joinder, should be left to the state court where the action was commenced. *Id.*
[108] *Id.*
[109] *Loeffelbein*, 2003 WL 21313957, at *4.
[110] *Id.*
[111] *Id.*

establish a cause of action against the defendant in state court.[112] In making this determination, the court looks to the facts pled in the Petition and the law of the state of Kansas.[113] Any ambiguities in the controlling state law are resolved in favor of the plaintiff.[114] On a motion to remand, the court is primarily concerned with the allegations made in the Petition, rather than the evidence needed to sustain those allegations.[115] However, "personal deductions from plaintiff's litigation strategy are generally insufficient to meet the heavy burden to show fraudulent joinder."[116]

III. VOLUNTARY / INVOLUNTARY RULE

A. "Voluntary" Dismissal

A right to remove may also develop when a plaintiff amends the petition and (1) voluntarily changes the parties in the case,[117] (2) amends the places of citizenship, (3) increases the amount in controversy, and /or (4) adds a federal claim. In the first instance, where a plaintiff voluntarily changes the parties, the key is whether the change is voluntary or involuntary. In order to restart the time to remove, the plaintiff must voluntarily change the parties. Dismissal of a non-diverse party by the court or manipulation of the litigation by the defendant will not restart the time to remove.[118]

Furthermore, the Supreme Court has held that cases with non-diverse parties are not removable simply because a non-diverse defendant is dismissed from the case.[119] Such suits are

[112] *Cooper*, 320 F. Supp. 2d at 1157.
[113] *See Wolf Creek*, 416 F. Supp. 2d at 1086-87; *see also City of Neodesha*, 355 F. Supp. 2d at 1187.
[114] *Wolf Creek*, 416 F. Supp. 2d at 1087.
[115] *Id.* at 1089.
[116] *City of Neodesha*, 355 F. Supp. 2d at 1189.
[117] *See* DeBry v. Transamerica Corp., 601 F.2d 480, 488 (10th Cir. 1979).
[118] *Id.*
[119] Whitcomb v. Smithson, 175 U.S. 635, 638, 20 S.Ct. 248, 250 (1900); American Car & Foundry Co. v. Kettelhake, 236 U.S. 311, 316, 35 S.Ct. 355, 356 (1915).

removable only if the plaintiff voluntarily dismisses the non-diverse defendant.[120] If the dismissal is involuntary, such as a "result of either the defendant's or the court's acting against the wish of the plaintiff," the case is not removable.[121] One purpose of the voluntary / involuntary rule is to promote judicial economy.[122] Secondly, it provides deference to the plaintiff's choice of forum.[123] "It is only where plaintiff by his voluntary act definitely and clearly indicates his intention to abandon or discontinue the action as to the non-diverse defendants – where he has clearly indicated that he no longer desires to dictate the forum – that the case becomes removable."[124]

IV. WAIVER OF RIGHT TO REMOVE

A defendant's statutory right to removal is not absolute. A defendant who fails to file a timely notice of removal waives her right to remove to federal court.[125]

A. Waiver by Defending

In addition, waiver may arise from a defendant's affirmative actions in state court. The case of *Liebau v. Columbia Casualty Co.*[126] is the only District of Kansas decision providing a framework for this type of waiver. Essentially, a court focuses on the defendant's intent in filing a particular motion or pleading.[127] Affirmative actions that target the underlying merits of a plaintiff's claims or demonstrate a willingness to litigate in state court will likely operate as a waiver.[128] On the other hand, affirmative actions that (1) are dictated by Kansas state court rules, (2) seek dismissal on a ground other than on the merits of a plaintiff's claims, or (3)

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[120] *Kettelhake*, 236 U.S. at 316; *DeBry*, 601 F.2d at 487-88.
[121] Engler v. Rapid-American Corp., No. 96-2349-KHV, 1996 WL 772526, at *2 (D. Kan. Nov. 26, 1996).
[122] *Id.*
[123] *Id.* at *3.
[124] *Id.* (citing Powers v. Chesapeake & O. Ry. Co., 169 U.S. 92 (1898)).
[125] *See, e.g.*, *Samuels*, 2006 WL 449257, at *2-*4.
[126] 176 F. Supp. 2d 1236 (D. Kan. 2001).
[127] *Id.* at 1244.
[128] *Id.* at 1243-45.

attempt to preserve the status quo or the defendant's right to contest the merits of plaintiff's claims, are less likely to result in waiver.[129]

The court in *Liebau* adopted the following analysis for determining whether a waiver occurs:

> The critical factor in determining whether a particular defensive action in the state court should operate as a waiver of the right to remove is the defendants' intent in making the motion. If the motion is made only to preserve the status quo ante and not to dispose of the matter on its merits, it is clear that no waiver has occurred. On the other hand, if a motion seeks a disposition, in whole or in part, of the action on its merits, the defendant may not attempt to invoke the right to remove after losing on the motion.[130]

Applying this rationale, the court held that the following litigation-based conduct did not amount to a waiver of removal: filing an answer in state court that raised various affirmative defenses, filing a motion to dismiss for improper service of process, and attempting to overturn a prior default judgment.[131] By seeking to set aside the default judgment, the defendant was simply seeking to preserve its right to contest the merits of the plaintiff's claims and was not seeking a ruling on the merits of those claims; the defendant "had no choice but to move to set aside the default."[132]

In light of the lack of controlling authority in this area, the safest option for the Kansas practitioner is to file the notice of removal as soon as it becomes apparent that the plaintiff's case is removable.[133] At the very least, a defendant confronting a waiver issue should emphasize the "clear and unequivocal" standard for waiver,[134] as well as the *Liebau* holding.

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[129] *Id.*
[130] *Id.* at 1244 (quoting Bolivar Sand Co., Inc. v. Allied Equip., Inc., 631 F.Supp. 171 (W.D. Tenn. 1986)).
[131] *Liebau*, 176 F. Supp. 2d at 1244.
[132] *Id.*
[133] *See* Akin v. Ashland Chem. Co., 156 F.3d 1030, 1036 (10th Cir. 1998) (holding that, absent sufficient notice of the right to remove, a defendant who actively participates in state court does not waive the right to remove).
[134] *See* discussion *infra* Part IV.C.

B. Waiver by Consent

If a party merely consents to jurisdiction in a forum, the consent does not operate to waive the right to remove.[135] Under Kansas law, "permissive venue agreements, which provide[d] only that venue is 'proper' or 'may be maintained' in a given venue are not true 'forum selection clauses,' and need not be given exclusive effect."[136] Under the Tenth Circuit's standard, "the controlling factor in governing enforcement of a venue provision in any agreement by confining venue to a specific court is whether the parties intended to commit the actions to that court to the exclusion of all others."[137]

C. Waiver by Contract

Nonetheless, a defendant can contractually waive her right to remove through a forum selection clause.[138] A defendant's waiver on this basis, however, must be "clear and unequivocal."[139] Consistent with this standard, the Tenth Circuit focuses on the specific language of the forum selection clause and construes any ambiguity against the drafter.[140] Unambiguous clauses are "prima facie valid" absent proof that enforcement would be unreasonable or unfair under the particular circumstances.[141]

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[135] SBKC Serv. Corp. v. 1111 Prospect Partners, L.P., 105 F.3d 578, 581-82 (10th Cir. 1997) (no waiver where clause did not confine commencement of litigation exclusively to state court).
[136] Double A Home Care, Inc. v. Epsilon Systems, Inc., 15 F. Supp. 2d 1114, 1115 (D. Kan. 1998).
[137] *SBKC Serv. Corp.*, 105 F.3d at 582.
[138] *See, e.g.*, Am. Soda LLP v. U.S. Filter Wastewater Group Inc., 428 F.3d 921, 926 (10th Cir. 2005) (holding that a forum selection clause requiring disputes to be brought in "'Courts of the State of Colorado" excluded federal courts in Colorado and therefore remand was appropriate); Milk 'N' More Inc. v. Beavert, 963 F.2d 1342, 1345-46 (10th Cir. 1992) (enforcing a forum selection clause that provided that Johnson County, Kan., was the sole forum the parties could resolve disputes arising under their agreement).
[139] *Beavert*, 963 F.2d at 1346 (citation and internal quotation marks omitted); ORI Inc. v. Lanewala, No. 99-2402-JWL, 1999 WL 1423068, at *3 (D. Kan. Nov. 30, 1999) (holding that "the forum selection clause drafted by plaintiff did not clearly and unequivocally waive defendant's statutory right to remove th[e] action to federal court").
[140] *Beavert*, 963 F.2d at 1346.
[141] *Id.*

V. PRACTICE POINTERS

It has long been recognized that "there is no other phase of American jurisprudence with so many refinements and subtleties" as removal and remand.[142] Consequently, Kansas practitioners must navigate between state and federal courts with caution. Familiarity with the timing, grounds, and procedural steps of removal is essential, as a party's failure to follow the appropriate procedures may have lasting effects.

If the substantive requirements for removal are not satisfied, or the procedural rules are not met, a party can readily find its case being tried in a different forum and before a different judge than originally anticipated. Statistical evidence indicates that a litigant's choice of forum is a right worth protecting, thus, practitioners should double-check their actions when seeking removal. "Choice of forum can mean joyous victory or depressing defeat. A wrong selection and it [is] enemy territory … A correct choice and … your enemy will fear you."[143]

[142] Hagerla v. Miss. River Power Co., 202 F. 771, 773 (S.D. Iowa 1912).
[143] Gita F. Rothschild, *Forum Shopping*, 24 LITIGATION 40 (ABA Section of Litigation, Spring 1998).

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I. POWER AND RIGHT TO REMOVE

A. The Parties

1. Defining "Parties in Interest"

A "party in interest" in New Mexico is a party with a real and substantial interest in the controversy.[1]

2. Presence of "Doe" Defendants

In New Mexico, the presence of fictitious "Doe" defendants is disregarded in determining the existence of diversity of citizenship.[2] Therefore, the presence of "Doe" defendants does not destroy diversity and does not preclude removal.

3. Diversity for Putative Class Actions

New Mexico follows the rule that, for class actions filed after 2005, federal law extends the subject matter jurisdiction of the federal courts to encompass putative class actions in which at least one plaintiff class member is diverse from one defendant and where the amount in controversy exceeds $5 million.[3] For suits brought under the Class Action Fairness Act, class members' claims are now aggregated to determine whether there is the requisite amount in controversy in excess of $5,000,000. However, the Class Action Fairness Act, effective on

[1] Becker v. Angle, 165 F.2d 140, 142 (10th Cir. 1947).
[2] 28 U.S.C. § 1441(a).

February 18, 2005, is not retroactive to cases filed before the effective date. For actions prior to the effective date, class members' claims may be aggregated to meet the amount in controversy requirement only when they "unite to enforce a single title or right in which they have a common and undivided interest." When plaintiffs' claims arise from individual contracts with a defendant, the plaintiffs are not suing to enforce a common title or right to which they have a common and undivided interest.[4]

B. The Amount in Controversy

1. Establishing the Amount in Controversy

The amount in controversy is the amount, established on the face of the complaint or by a preponderance of other evidence, which is arguably at issue in the litigation. The evidence need not demonstrate that a plaintiff is likely to actually recover the amount claimed, but, instead, need only show clearly that the plaintiff is seeking to recover an amount in excess of $75,000 exclusive of interest and costs.[5]

2. Application When a Specific Dollar Amount is Not Pled

Under New Mexico state rules of procedure, a complaint may not plead a specific dollar amount of damages except in certain types of liquidated damages actions. Where no dollar amount is pled, then the amount in controversy must be established by other factual proof or case cannot be removed.[6] Possible sources of other proof can include: a demand letter from plaintiff's counsel, telephone conversation with plaintiff's counsel, and analysis of damages claimed and jury verdict research for similar cases.

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[3] 28 U.S.C. § 1332(d).
[4] Pritchett v. Office Depot, Inc., 420 F.3d 1090, 1092 (10th Cir. 2005).
[5] Laughlin v. Kmart Corporation, 50 F.3d 871 (10th Cir. 1995).
[6] *See*, Laughlin v. Kmart Corporation, 50 F.3d 871 (10th Cir. 1995).

3. Amount in Controversy Where Equitable Relief is Sought

In cases seeking equitable relief, such as declaratory and injunctive relief, the amount in controversy is measured by the value of the object of the litigation. The Tenth Circuit has followed what has commonly been referred to as the "either viewpoint rule" which considers either the value to the plaintiff or the cost to defendant of injunctive and declaratory relief as the measure of the amount in controversy for purposes of meeting the jurisdictional minimum. The amount in controversy may be established by looking at the defendant's cost of complying with the injunction or the value to the plaintiff.[7]

4. Defeating Removal by Amending Relief Sought

New Mexico follows the rule that a motion to amend cannot be used to defeat or create diversity jurisdiction after removal. The rule is based on the requirement that removal jurisdiction is assessed based on the record that existed at the time of removal.[8]

C. Time of Existence of Grounds for Removal

1. Event Triggering Thirty-Day Period for Actions Initially Removable

In *Akin v. Ashland Chem. Co.,*[9] the Tenth Circuit dealt with the issue of when the statute begins to run. The Court held that, if the statute is going to run, the notice of removability ought to be unequivocal. It should not be one which may have a double design. The Court further ruled that "ascertained" as used in § 1446(b) means a statement that "should not be ambiguous" or one which "requires an extensive investigation to determine the truth." The key to determining the date from which the clock begins to run is when the defendant is able to "*intelligently ascertain removability.*" The Tenth Circuit disagreed with cases from other jurisdictions, which impose a duty to investigate and determine removability where the initial

[7] Justice v. Atchison, Topeka and Santa Fe Ry. Co., 927 F.2d 503, 505 (10th Cir. 1991).
[8] Laughlin v. Kmart Corp., 50 F.3d 871, 873 (10th Cir. 1995).

pleading indicates that the right to remove *may* exist. Rather, this court requires clear and unequivocal notice from the pleading itself, or a subsequent "other paper" such as an answer to interrogatory.

2. Event Triggering Thirty-Day Period for Actions Not Initially Removable

If the case not removable on the initial pleading, §1441 provides that, "a notice of removal may be filed within thirty days of receipt by defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may be first ascertained that case is one which is, or has become removable…"

In New Mexico, initial removability will only run from service of the complaint, as defined by the New Mexico Rules of Civil Procedure, Rule 1-004. If the case is being removed at a later time, then "service or otherwise" may mean either service of a filing in the case as contemplated by Rule 1-006 of the New Mexico Rules of Civil Procedure, or may mean receipt by the defendant of a communication from opposing counsel, such as a letter or facsimile or e-mail transmission.

An "other paper" is generally a paper filed in the litigation, which discloses sufficient information to give clear and unequivocal notice that the requirements for removal are met. An "other paper" will generally be an answer to interrogatory. However, certain communications, such as a demand letter from plaintiff's counsel, which serves to demonstrate that the amount in controversy is met, may constitute an "other paper" for removal purposes.[10]

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[9] 156 F.3d 1030 (10th Cir. 1998).
[10] *See*, Akin v. Ashland Chem. Co., 156 F.3d 1030 (10th Cir. 1998).

II. FRAUDULENT JOINDER

A. Test for Fraudulent Joinder

If the plaintiff fails to state a cause of action against a resident defendant who defeats diversity, and the failure is obvious according to the settled rules of the state, the joinder of the resident defendant is fraudulent.[11] "Fraudulent joinder" is a term of art. It does not reflect on the integrity of plaintiff or counsel but is merely the rubric applied when a court finds either that no cause of action is stated against the nondiverse defendant or, in fact, no cause of action exists.[12] Whether the joinder is fraudulent or not is said to depend on whether the plaintiff really intends to obtain a judgment against the defendant. Where there is no possibility that the plaintiff has stated a cause of action, the joinder is fraudulent, and the cause should not be remanded.[13]

B. Evidence of Fraudulent Joinder

The burden of proving fraudulent joinder rests with the defendant and, in New Mexico, that burden is a heavy one to meet. Fraudulent joinder exists-regardless of a plaintiff's motives-only when there is no possibility that the plaintiff would be able to establish a cause of action against the joined party in state court. In evaluating fraudulent joinder claims, the Court must initially resolve all disputed questions of fact and all ambiguities in the controlling law in favor of the non-removing party. Then, the court must determine whether that party has any possibility of recovery against the party whose joinder is questioned. The issue of fraudulent joinder, then, is resolved based on evidence tending to show, or disprove, a right of recovery by the plaintiff against the removing party under state law.

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[11] Roe v. General Am. Life Ins. Co., 712 F.2d 450, 452 n. * (10th Cir. 1983); Dodd v. Fawcett Publications, Inc., 329 F.2d 82, 85 (10th Cir. 1964).
[12] Lewis v. Time Inc., 83 F.R.D. 455, 460 (E.D. Cal. 1979) , *aff'd*, 710 F.2d 549 (9th Cir. 1983).
[13] *See*, Dailey v. Elicker, 447 F.Supp. 436, 439 (D.Colo. 1978); Todd Holding Co., Inc. v. Super Valu Stores, Inc., 744 F.Supp. 1025, 1028 (D.Colo. 1990).

III. VOLUNTARY / INVOLUNTARY RULE

A. "Voluntary" Dismissal

In New Mexico, removal is possible whenever this event occurs, so long as the change of parties was voluntary as to the plaintiff, and not the involuntary result of a court ruling. Settlement with a diversity- destroying defendant on the eve of trial, for example, may permit the remaining defendants to remove.[14]

B. Exceptions

Exceptions to this rule exist, especially, in the context of fraudulent joinder and innocent sellers. Fraudulent joinder is an exception to the voluntary dismissal rule. Where the court determines that a particular party has been fraudulently joined for purposes of defeating removal jurisdiction, the case may be removed, despite the involuntary nature of the court's dismissal determination. There is no exception for innocent sellers, however. Under New Mexico law, innocent sellers in the chain of product distribution are jointly and severally liable. Therefore, the involuntary dismissal of an innocent seller will not give rise to removability. The dismissal of the innocent seller must be a voluntary one in order to trigger a right to remove.

IV. WAIVER OF RIGHT TO REMOVE

A. Waiver by Defending

A defendant does not waive its right to remove the case by defending an action or otherwise invoking the processes of the state court. To the contrary, in New Mexico, certain defensive and procedural steps should be taken prior to removal to protect the defendant's rights in the event of a remand. Therefore, for example, any peremptory excusal of the state court

[14] DeBry v. Transamerica Corp., 601 F.2d 480 (10th Cir. 1979).

judge should be exercised prior to removal so that the defendant will not be deemed to have waived excusal of the judge if the case is remanded back to state court.

B. Waiver by Consent

New Mexico has not ruled on the question of consent as a waiver of the right to remove. However, because removal is strongly disfavored in the jurisdiction, it is likely that a federal judge in New Mexico, asked to determine the question, would rule that a defendant's consent to plaintiff's filing of suit in state court waives the defendant's right to remove the case.

C. Waiver by Contract

In the New Mexico federal courts, contractual waivers of removal are treated as forum selection clauses. When venue is specified, such as when the parties designate a particular county or tribunal, and the designation is accompanied by mandatory or obligatory language, the clause will be enforced as mandatory. By consenting to state court jurisdiction and selecting the state courts as the "exclusive forum," the parties indicated their intent to make venue exclusive in state court with respect to any disputes. Where the forum selection clause at issue is mandatory, the defending party is deemed to have unequivocally waived its right to remove the lawsuit to federal court. Absent evidence that enforcement would be unreasonable and unjust, or that the clause is invalid for such reasons as fraud or overreaching, a contractual waiver of removal is binding and will be enforced.[15]

[15] *See* Milk 'N' More Inc. v. Beavert, 963 F.2d 1342, 1346 (10th Cir. 1992) (holding that a waiver of one's statutory right to remove a case from a state to a federal court must be clear and unequivocal).

V. PRACTICE POINTERS

In New Mexico, Removal is disfavored in the federal courts, removal jurisdiction is to be narrowly construed, and all doubts are resolved in favor of remand.[16] The burden is on the removing defendant to establish the existence of removal jurisdiction by a preponderance of the evidence.[17] Therefore, in order to successfully remove a case and avoid remand, it is important to allege sufficient facts in your notice of removal to establish the existence of removal jurisdiction. If jurisdiction is challenged, you must be prepared to prove up those allegations by a preponderance of the evidence.

New Mexico also requires certain procedural steps to ensure that the removal process is completed. You must attach a copy of the summons and complaint served on the defendant to the notice of removal.[18] You will also need to prepare a federal court civil cover sheet to accompany the notice of removal and a Fed.R.Civ.P.7.1 corporate disclosure statement if the removing defendant is a corporation. Immediately upon filing the notice of removal in federal court, you must file a notice of filing of notice of removal in the state court action.[19] If you did not file an answer to the complaint prior to removal, you have either the remainder of the 20-day answer period or 5 days to file your answer in federal court, whichever is longer.[20] If you did not file a jury demand in state court prior to removal and you want a jury, you must file a demand in federal court within the times provided under Rule 38 of the Federal Rules of Civil Procedure. The party removing the case to federal court is responsible for filing the ***entire*** state court record with the federal court within 30 days after removal.[21] The removing defendant is

[16] Laughlin v. Kmart Corp., 50 F.3d 871, 873 (10th Cir. 1995).
[17] United States *ex rel.* Hafter v. Spectrum Emergency Care, Inc., 190 F.3d 1156, 1160 (10th Cir. 1999); Karnes v. Boeing Co., 335 F.3d 1189, 1193 (10th Cir. 2003).
[18] 28 U.S.C. § 1446(a).
[19] 28 U.S.C. § 1446(d).
[20] FED.R.CIV.P. 81(c).
[21] 28 U.S.C. § 1447(b); D.N.M. LR-Civ. 81.1.

generally responsible for initiating the Fed.R.Civ.P. 26(f) "meet and confer," for putting together the Initial Pretrial Report, and for initiating the Pretrial Order.

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Oklahoma contains three federal district courts, for the Eastern, Western, and Northern districts, which are within the Tenth Circuit. Many of the issues addressed in this section are governed by Tenth Circuit precedent. However, Oklahoma district courts have weighed in on several issues for which there is no Tenth Circuit precedent. This section discusses Tenth Circuit case law when it is controlling, but focuses on the nuances of the Oklahoma district court cases where there is no circuit-court precedent.

I. POWER AND RIGHT TO REMOVE

A. The parties

1. Defining "Parties in Interest"

Neither the Tenth Circuit nor the Oklahoma district courts use a specific definition of "parties in interest" unique to the context of the removal statute stating that diversity actions are removable only if "none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought."[1] However, in determining whether removal is proper, "the joinder of a resident defendant against whom no cause of action is pled, or against

[1] 28 U.S.C. § 1441(b) (2007).

whom there is in fact no cause of action, will not defeat removal."[2] In evaluating diversity, courts will also disregard the presence of a nominal or formal party.[3]

2. Presence of "Doe" Defendants

For removal purposes, courts will disregard the citizenship of defendants sued under fictitious names.[4]

3. Diversity for Putative Class Actions

With respect to class actions, only named class representatives will be considered in determining diversity of citizenship with defendants.[5]

B. The Amount in Controversy

The Oklahoma Pleading Code states that, in actions not sounding in contract, every pleading demanding relief for money damages in excess of $10,000 shall, set forth only that the amount sought exceeds $10,000, without demanding any specific amount of money.[6] Thus, determining whether the amount in controversy is satisfied can be complicated.

1. Establishing the Amount in Controversy

The Tenth Circuit and the Oklahoma district courts hold that, "[t]he amount in controversy ordinarily is determined by the allegations of the complaint, or where they are not dispositive, by the allegations in the notice of removal."[7] The burden is on the removing party to set forth the underlying facts supporting the assertion that the amount in controversy is met in the notice of removal.[8] Where the state-court petition does not affirmatively establish that the

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[2] Roe v. Gen. Am. Life Ins. Co., 712 F.2d 450, 452 (10th Cir. 1983).
[3] Hann v. City of Clinton, 131 F.2d 978, 981 (10th Cir. 1942); Becker v. Angle, 165 F.2d 140, 141 (10th Cir. 1948).
[4] Slover v. Equitable Variable Life Ins. Co., 443 F. Supp. 2d 1272, 1276 (N.D. Okla. 2006).
[5] Flowers v. EZPawn, Oklahoma, Inc., 307 F. Supp. 2d 1191 (N.D. Okla. 2004); Rocket Oil & Gas Co. v. Arkla Exploration Co., 435 F. Supp. 1303 (10th Cir. 1977).
[6] OKLA. STAT. tit. 12, § 2008(A)(2).
[7] Laughlin v. Kmart Corp., 50 F.3d 871, 873 (10th Cir. 1995).
[8] *See id.*; *see also* Archer v. Kelly, 271 F. Supp. 2d 1320, 1321 (N.D. Okla. 2003); Johnson v. Wal-Mart Stores, Inc., 953 F. Supp. 351 (N.D. Okla. 1995).

amount in controversy exceeds $75,000, the removing party should perform an economic analysis of the alleged damages supported by underlying facts.[9]

2. Application When a Specific Dollar Amount is Not Pled

The Local Civil Rules for the Northern District of Oklahoma specifically provide that, when an action is removed based on diversity and the state-court petition does not contain a specific damages claim exceeding $75,000, the notice of removal must include a "particularized statement of facts upon which the jurisdictional amount is based."[10] Alternatively, a response by the plaintiff to an interrogatory as to the amount in controversy or an admission by the plaintiff that the amount of damages sought exceeds $75,000.[11] The receipt by the defendant of such a response to an interrogatory or request for admission "constitute[s] the receipt of a 'paper for which it may first be ascertained that the case is one which is or has become removable' within the meaning of 28 U.S.C. § 1446(b)."[12] Failure to comply with the rule subjects the action to remand.[13] The Northern District has also admitted into evidence a pre-litigation demand letter to demonstrate that the amount in controversy is satisfied.[14]

3. Amount in Controversy Where Equitable Relief is Sought

When declaratory or injunctive relief is sought, the amount in controversy is measured by the value of the object of the litigation. This "either viewpoint rule" considers either the value to the plaintiff or the cost to the defendant of injunctive and declaratory relief as the measure of the amount in controversy.[15]

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[9] *See id.*
[10] LCvR 81.3(a)(1-2).
[11] LCvR 81.3(a)(1-2).
[12] LCvR 81.3(b).
[13] LCvR 81.3(b).
[14] *Archer*, 271 F. Supp. 2d at 1324.
[15] Lovell v. State Farm Mut. Auto. Ins. Co., 466 F.3d 893, 897 (10th Cir. 2006); City of Moore v. Atchison, Topeka & Santa Fe Ry., 699 F.2d 507, 509 (10th Cir. 1983); Perrin v. Tenneco Oil Co., 505 F. Supp. 23 (W.D. Okla. 1980).

C. Time of Existence of Grounds for Removal

The Northern District of Oklahoma has rejected the "equitable exception" to the one-year limitation on removal set forth in *Tedford v. Warner-Lambert*.[16] In *Caudill v. Ford Motor Co.*,[17] the court found "the one year limitation should be strictly interpreted and enforced."[18] In that case, plaintiffs sued in state court, joining a non-diverse defendant.[19] One year and six days after filing suit, plaintiffs dismissed the non-diverse defendant without prejudice.[20] Ford Motor Company removed the action, arguing plaintiffs fraudulently joined the non-diverse defendant in order to defeat diversity.[21] The Court granted the plaintiffs' motion to remand.[22]

In rejecting an equitable exception to the one-year limitation on removal, the court stated that Congress knew when adopting the one-year bar on removal that "some plaintiffs would attempt to defeat diversity by fraudulently (and temporarily) joining a non-diverse party."[23] Accordingly, under 28 U.S.C. § 1446(b), if after one year a plaintiff dismisses the non-diverse defendant, the defendant cannot remove, and "a plaintiff could defeat jurisdiction by joining a non-diverse party and dismissing him after the deadline."[24] Thus, "Congress has recognized and accepted that, in some circumstances, plaintiffs can and will intentionally avoid federal jurisdiction."[25] Further, the court noted that federal removal jurisdiction is statutory and to be strictly construed, and that there is a presumption against removal.[26] In remanding the case, the court stated that Ford had options other than waiting for the plaintiffs to dismiss the non-diverse

[16] 327 F.3d 423 (5th Cir. 2003); Caudill v. Ford Motor Co., 271 F. Supp. 2d 1324 (N.D. Okla. 2003); 28 U.S.C. § 1446(b).
[17] 271 F. Supp. 2d 1324 (N.D. Okla. 2003).
[18] *Id.* at 1327.
[19] *Id.* at 1326.
[20] *Id.*
[21] *Id.*
[22] *Id.* at 1328.
[23] *Caudill*, 271 F. Supp. 2d at 1328.
[24] *Id.*
[25] *Id.*
[26] *Id.*

defendants, such as moving for dismissal of the party in state court or removing within a year and making its fraudulent joinder argument to the court.[27]

In *Anderson v. Ford Motor Company*,[28] the Western District of Oklahoma denied the plaintiff's motion to remand when plaintiff sued in state court and waited a year and a half to serve the petition on the defendants. The plaintiffs argued the provision of 28 U.S.C § 1446(b), stating "except that a case may not be removed on the basis of [diversity jurisdiction] more than 1 year after commencement of the action" made defendants' removal improper.[29] However, the *Anderson* court held "a plain reading of § 1446(b), the 'except' clause applies only to diversity cases not originally removable."[30] A contrary conclusion "would lead to the absurd result of requiring a defendant to attempt to remove a case before being served … or forfeit its right to do so later."[31]

In reaching its conclusion, the court considered the statute's plain language, purpose, and legislative intent. The purpose of the statute, the court held, was to prevent disruption that occurs in state courts when cases are removed after substantial progress has been made.[32] Comity between state and federal courts is not disturbed when no progress has been made in the case, nor does the state have any special interest in the case.[33] Further, removal caused no delay because the defendants removed promptly after being served, and any delay was attributable to the plaintiff.[34] It should be noted that under Oklahoma's Code of Civil Procedure, the state court

[27] *Id.*
[28] 303 F. Supp. 2d 1253 (W.D. Okla. 2004).
[29] *Id.*
[30] *Id.* at 1258-59.
[31] *Id.* at 1258.
[32] *Id.* at 1257.
[33] *Id.*
[34] *Anderson*, 303 F. Supp. 2d at 1257.

could have dismissed the case *sua sponte* due to the plaintiff's failure to effect service within 180 days of filing.[35]

II. FRAUDULENT JOINDER

A. Test for Fraudulent Joinder

The Tenth Circuit Court of Appeals holds, "the joinder of a resident defendant against whom no cause of action is pled, or against whom there is in fact no cause of action, will not defeat removal."[36] The party invoking the district court's jurisdiction bears the burden of establishing fraudulent joinder.[37] A removing defendant must show the plaintiffs "either (1) committed outright fraud in pleading the jurisdictional facts, or (2) have no possibility of recovery against the non-diverse defendants."[38] When fraudulent joinder is alleged, the court may pierce the pleadings and consider underlying facts.[39] However, the standard is stringent and ambiguities must be resolved in favor of the plaintiff.[40] The second inquiry is "akin to that of whether the plaintiff has properly stated a claim upon which relief may be granted under FED.R.CIV.P. 12(b)(6)."[41]

Despite the high burden to establish fraudulent joinder, one Oklahoma district court held that, "federal courts must vigilantly protect a defendant's right to proceed in federal court against abuses and manipulations by the plaintiff."[42] Thus, federal courts "may and should" take action to defeat wrongful attempts to deprive parties of the protection of their rights in federal court.[43]

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[35] OKLA. STAT. tit. 12, § 2004.
[36] *Roe*, 712 F.2d at 452, n.* (10th Cir. 1983).
[37] *Slover*, 443 F. Supp. 2d at 1276.
[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] *Id.* at 1278.
[42] *Anderson*, 303 F. Supp. 2d at 1258.
[43] *Id.*

III. VOLUNTARY / INVOLUNTARY RULE

A. "Voluntary" Dismissal

There is no recent authority from Oklahoma district courts regarding voluntary versus involuntary dismissal of parties. A somewhat dated case addressing the issue states that when defendants had been removed or eliminated from the case not by the voluntary act of the plaintiff, but by action of the court, the defendants' elimination "will not support removal to federal court under the better considered cases construing 28 U.S.C. § 1446(b)."[44]

However, Oklahoma's most recent case law addressing fraudulent joinder, suggests that this rationale may not apply when the plaintiff has fraudulently joined or failed to state a claim against a defendant.[45]

IV. WAIVER OF RIGHT TO REMOVE

A. Waiver by Defending

The Tenth Circuit holds that "a defendant who actively invokes the jurisdiction of the state court and interposes a defense in that forum is not barred from the right to removal in the absence of adequate notice of the right to remove."[46]

B. Waiver by Contract

A party may however, waive its right to remove. For example, a party may waive its right to remove by selecting a state court as the exclusive forum to resolve disputes.[47]

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[44] Oklahoma State Union of Farmers' Educ. and Coop. Union of Am. v. Hartford Fire Ins. Co., 307 F. Supp. 415, 416 (W.D. Okla. 1970).
[45] *Anderson*, 303 F. Supp. 2d at n.9; *Slover*, 443 F. Supp. 2d at 1276.
[46] Akin v. Ashland Chem. Co., 156 F.3d 1030, 1036 (10th Cir. 1998).
[47] *See, e.g.*, Am. Soda, LLP v. U.S. Filter Wastewater Group, Inc., 428 F.3d 921 (10th Cir. 2005).

V. PRACTICE POINTERS

Perhaps the most important strategy for avoiding remand is including sufficient underlying facts in the notice of removal to establish federal court jurisdiction. Because Oklahoma's pleading code requires that a petition seeking relief for a claim not sounding in contract state only that the pleader seeks in excess of $10,000, it is often difficult to tell from the face of the state-court petition whether the amount in controversy is satisfied. Several strategies may be effective in establishing the amount in controversy. First, a pre-litigation demand letter may be used to establish the plaintiff seeks in excess of $75,000. Requests for admission asking the plaintiff to admit he does not seek and will not accept in excess of $75,000 can also be helpful, but may not be dispositive in all of Oklahoma's district courts. Similarly, interrogatories regarding the damages sought may establish the amount in controversy.

If a case is removed on grounds of diversity and relies on a fraudulent joinder argument, it is equally important that the notice of removal set forth sufficient underlying facts to demonstrate that a defendant has been fraudulently joined for the purpose of defeating diversity or that the plaintiff cannot maintain a claim against the defendant.

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I. POWER AND RIGHT TO REMOVE

A. The parties

1. Defining "Parties in Interest"

To determine diversity, courts consider the citizenship of all properly joined and served defendants.[1] The Supreme Court held that an entity that has not been named or joined as a defendant to the action cannot be considered a real party in interest for purposes of destroying diversity.[2]

In addition, courts can disregard the citizenship of a named party if that party is not the real party in interest.[3] For example, improperly or collusively named parties under 28 U.S.C. § 1359, state agencies named when the suit is really against the state itself, parties named to satisfy state pleading rules, and parties with no stake in the controversy can all be disregarded for determining diversity because they are not real parties to the controversy.[4]

[1] *See* Lincoln Property Co. v. Roche, 546 U.S. 81, 90, 93-94 (2005).
[2] *Id.* at 93-94.
[3] *Id.* at 91-93.
[4] *Id.*

2. Presence of "Doe" Defendants

In *Australian Gold, Inc. v. Hatfield*,[5] the Tenth Circuit held that the citizenship of Doe defendants should be disregarded when determining removal jurisdiction.[6]

3. Diversity for Putative Class Actions

The Class Action Fairness Act of 2005 ("CAFA"),[7] confers federal jurisdiction upon class action lawsuits that contain 100 or more proposed plaintiffs, where the amount in controversy exceeds the sum or value of $5,000,000, and minimal diversity requirements are met.[8] Minimal diversity requirements are satisfied if any class member is a citizen of a state different from any defendant.[9]

B. The Amount in Controversy

1. Establishing the Amount in Controversy

To determine the amount in controversy, the court looks first to the face of the complaint.[10] Attorneys' fees may be considered as part of the amount in controversy, but the defendant must supply the court with "underlying facts, affidavits, or any other information to support" his allegations of the amount of attorneys' fees at issue.[11]

2. Application When a Specific Dollar Amount is Not Pled

The removing defendant bears the burden of establishing by a preponderance of the evidence that the amount in controversy exceeds the jurisdictional requirement.[12] "Jurisdiction is determined at the time of the notice of removal;" therefore, defendants must meet their burden

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[5] 436 F.3d 1228 (10th Cir. 2006).
[6] *Id.* at 1235.
[7] 28 U.S.C. § 1332(d).
[8] Prime Care of Northeast Kansas, L.L.C. v. Humana Ins. Co., 447 F.3d 1284, 1285 (10th Cir. 2006).
[9] *Id.*
[10] Baldwin v. Fresenius Medical-Care – North America, 2007 U.S. Dist. LEXIS 46018, at *3 (2007).
[11] Joly v. National R.V., Inc., 2007 U.S. Dist. LEXIS 90770, at *7-8 (D. Utah 2007).
[12] Baldwin v. Fresenius Medical-Care – North America, 2007 U.S. Dist. LEXIS 46018 *5 (2007); *see also* Joly v. National R.V., Inc., 2007 U.S. Dist. LEXIS 90770, at *3 (2007); Litchfield v. International Survivors Action Committee, 2005 U.S. Dist. LEXIS 45301, at *2 (D. Utah 2005).

of affirmatively establishing the amount in controversy in "the notice of removal, not in some later pleading."[13] However, the courts will consider evidence attached to the notice of removal.[14]

3. Amount in Controversy Where Equitable Relief is Sought

The Tenth Circuit follows the "either viewpoint rule."[15] In order to determine the amount in controversy for jurisdictional purposes, this "rule considers either the value to the plaintiff or the cost to the defendant of injunctive and declaratory relief."[16] However, if the case involves multiple plaintiffs, such as a class action, this rule "does not override the well established principle that each plaintiff or member of the class must individually satisfy the amount in controversy requirement."[17]

4. Defeating Removal by Amending Relief Sought

A party may not "force remand of an action after its removal from state court by amending the complaint to destroy the federal court's jurisdiction over the action."[18]

C. Time of Existence of Grounds for Removal

1. Event Triggering Thirty-Day Period for Actions Initially Removable

"A named defendant's time to remove is triggered by simultaneous service of the summons and complaint, or receipt of the complaint, 'through service or otherwise,' after and apart from service of the summons, but not by mere receipt of the complaint unattended by any

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[13] Litchfield v. International Survivors Action Committee, 2005 U.S. Dist. LEXIS 45301, at *3 (D. Utah 2005) (holding that in determining removability, the court relies on the complaint and notice of removal and "does not consider material submitted by defendants post-removal").

[14] Joly v. National R.V., Inc., 2007 U.S. Dist. LEXIS 90770, at *6-7 (D. Utah 2007) (stating that while the defendant's notice of removal only contained conclusory allegations about the amount in controversy, he could have attached affidavits regarding the cost of replacing the RV, the likely cost of attorneys' fees, or other costs the lawsuit would impose on them).

[15] Lovell v. State Farm Mutual Automobile Insurance Co., 466 F.3d 893, 897 (10th Cir. 2006).

[16] *Id.*

[17] *Id.* at 897-98 (holding that the court may consider defendants costs of compliance but "the cost running to each plaintiff must meet the amount in controversy requirement unless the plaintiffs' claims may be aggregated").

[18] Pfeiffer v. Hartford Fire Ins. Co., 929 F.2d 1484, 1488 (10th Cir. 1991).

formal service."[19] In addition, the defendant must be able to "intelligently ascertain removability" from the pleading.[20]

2. Event Triggering Thirty-Day Period for Actions Not Initially Removable

Under this provision, it seems that in the Tenth Circuit "service or otherwise" requires that the removing defendant receive information from which it is first ascertainable that the case is removable.[21]

The Tenth Circuit does not require the "receipt of an actual written document" to satisfy the "other paper" requirement.[22] In *Huffman*, the court held that deposition testimony, which provides sufficient notice that the case is removable, constitutes "other paper" under § 1446(b).[23] The court went on to state that the removal period begins "with the giving of the testimony, not the receipt of the transcript."[24]

II. FRAUDULENT JOINDER

A. Test for Fraudulent Joinder

In evaluating allegations of fraudulent joinder, courts must decide whether there is a "reasonable basis in fact or colorable ground supporting" a cause of action against the non-diverse defendant.[25]

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[19] Big Sky Network Canada v. Sichuan Provincial Government, 2006 U.S. Dist. LEXIS 56275, at *9-10 (D. Utah 2006) (quoting Murphy Bros., Inc. v. Michetti Pipe Stringing Inc., 526 U.S. 344, 348, 119 S. Ct. 1322, 143 L. Ed. 2d 448 (1999)).
[20] ASC Utah v. Wolf Mountain Resorts, L.C., 2008 U.S. Dist. LEXIS 7441, at *4-5 (D. Utah 2008) (quoting Ardison v. Villa, 248 F.2d 226, 227 (10th Cir. 1957)).
[21] *See* Huffman v. Saul Holdings Ltd. Partnership, 194 F.3d 1072, 1078 (10th Cir. 1999) (holding that receipt of an actual written document is not required).
[22] *Huffman*, 194 F.3d at1078 (10th Cir. 1999).
[23] *Id.* (stating that for purposes of removal, "deposition testimony stands on equal footing with written forms of discovery, such as interrogatories and requests for information").
[24] *Id.*
[25] Jackson v. Philip Morris, Inc., 46 F. Supp. 2d 1217, 1221 (D. Utah 1998) (quoting Boyer v. Snap-On Tools Corp., 913 F.2d 108, 111 (3rd Cir. 1990)).

B. Evidence of Fraudulent Joinder

To determine whether a defendant was fraudulently joined, "courts may pierce the pleadings, consider the entire record, and determine the basis of joinder by any means available."[26] In *Jackson*, the court looked at the entire record, including oral argument transcripts and all other documents submitted by the parties, and the court could not find any reasonable basis for the plaintiffs' claims against the non-diverse defendants.[27] The holding was based, in part, on the following evidence: plaintiffs' complaint did not contain any allegation against only the non-diverse defendants and the overall nature of the suit was directed at "Big Tobacco," plaintiffs admitted during oral argument that they did not "have any specific information about what these distributors" had done, and plaintiffs failed to sufficiently connect the non-diverse defendants to the named plaintiffs.[28]

III. VOLUNTARY / INVOLUNTARY RULE

A. "Voluntary" Dismissal

A dismissal is considered voluntary only if it is the plaintiff's own voluntary act which "set[s] in motion the condition which causes the case to become removable."[29] A ruling on the merits, which was not initiated or approved by the plaintiff, is not voluntary within the meaning of the rule.[30] In addition, the case cannot be "removed as a result of evidence from the defendant or the result of a court order rendered on the merits of the case."[31] It must be plaintiffs own act which creates the condition that gives rise to the removal.[32]

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[26] *Jackson*, 46 F. Supp. 2d at 1221 (quoting Dodd v. Fawcett Publications, Inc., 329 F.2d 82 (10th Cir. 1964)).
[27] *Id.* at 1229.
[28] *Id.* at 1224-29.
[29] Debry v. Transamerica Corp., 601 F.2d 480, 487-88 (10th Cir. 1979).
[30] *Id.* at 487.
[31] *Id.* at 488.
[32] *Id.* (holding that the case was removable because it was the plaintiff's voluntary act of revealing in the second amended complaint that the residence of one of the plaintiffs had changed).

IV. WAIVER OF RIGHT TO REMOVE

A. Waiver by Defending

To waive the right to removal, a defendant's actions must "demonstrate a clear and unequivocal intent to proceed on the merits in the state court action."[33] Action in the state court that merely maintains the status quo does not waive the right to removal.[34] In *ASC Utah*, the court held that the defendant "chose to proceed in state court rather than file its removal" by filing a renewed motion to dismiss in the state court; participating in hearings related to discovery, scheduling, and affirmative relief; noticing the depositions of four witnesses; serving subpoenas and providing witness lists to the state court; and serving an objection to a proposed order regarding one of the hearings.[35] The court held that such actions clearly and unequivocally demonstrated the defendant's intent to proceed in state court on the merits.[36]

V. PRACTICE POINTERS

A. Successful Strategies for Removal and Avoiding Remand

As mentioned above, the Tenth Circuit will not review any evidence submitted after the petition for removal is filed. Therefore, it is imperative that if the amount in controversy is not facially apparent from the face of the complaint, the removing defendant must attach sufficient factual evidence to the removal petition to establish by a preponderance of the evidence that the jurisdictional amount is satisfied. Conclusory statements about the amount in controversy are not enough to meet this burden.

[33] ASC Utah, 2008 U.S. Dist. LEXIS 7441, at *9.
[34] *Id.* at *7.
[35] *Id.* at *8.
[36] *Id.* at *9.

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I. POWER AND RIGHT TO REMOVE

A. The Parties

1. Defining "Parties in Interest"

For purposes of diversity jurisdiction (whether in a removed case or one originally filed in federal court), Wyoming courts will only consider citizenship of the "real parties in interest."[1] "A 'real party in interest' is one who has an actual and substantial interest in the subject matter, as distinguished from one who has only a nominal interest, having reference not merely to the name in which the action was brought, but to the facts as they appear of record."[2]

2. Presence of "Doe" Defendants

Although no Wyoming decision addresses the issue directly, other courts in the Tenth Circuit have found that the presence of "Doe" defendants does not destroy diversity.[3]

3. Diversity for Putative Class Actions

The Class Action Fairness Act ("CAFA")[4] now controls questions of diversity in putative class actions exceeding $5 million in controversy.[5] The CAFA departs from the complete

[1] Cunningham v. BHP Petroleum Great Britain, PLC, 427 F.3d 1238, 1244 (10th Cir. 2005).
[2] McNeiley v. Ayres Jewelry Co., 886 P.2d 595, 600 (Wyo. 1994) (quoting Weber v. City of Cheyenne, 97 P.2d 667, 669 (Wyo. 1940)).
[3] *See, e.g.,* Smith v. Currency Trading Int'l, Inc., 10 F. Supp. 2d 1189 (D. Colo. 1998) ("John Doe" defendant did not prevent removal on basis of diversity jurisdiction).
[4] Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified in scattered sections of 28 U.S.C.).
[5] *See, e.g.,* 28 U.S.C. §§ 1332(d), 1453.

diversity requirement, and requires only minimal diversity if the amount in controversy exceeds $5 million.[6] However, in multi-plaintiff cases not subject to the CAFA (for example other multi-plaintiff actions), traditional rules of diversity still apply and require complete diversity. Only the named parties will be considered in determining whether diversity of citizenship exists.[7]

B. The Amount in Controversy

1. Establishing the Amount in Controversy

As with all questions of removal, the removing party bears the burden to show that the case meets the statutory minimum amount in controversy.[8] "The amount in controversy is ordinarily determined by the allegations of the complaint, or, where they are not dispositive, by the allegations in the notice of removal."[9] According to 28 U.S.C. § 1332, the amount in controversy cannot include "interest and costs."[10] The Tenth Circuit has also declined to aggregate attorneys fees when measuring the amount in controversy in class actions.[11] The removing party must show that the jurisdictional threshold is met by a preponderance of the evidence.[12]

2. Application When a Specific Dollar Amount is Not Pled

If the complaint lacks allegations sufficient to satisfy the jurisdictional threshold, a removing party should provide independent facts demonstrating that the amount in controversy is

[6] 28 U.S.C. § 1332(d)(2)(A) ("The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000 . . . and is a class action in which . . . any member of a class of plaintiffs is a citizen of a State different from any defendant.").
[7] *See* Nicodemus v. Union Pac. Corp., 204 F.R.D. 479, 490 (D. Wyo. 2001), *rev'd on other grounds*, 440 F.3d 1227 (10th Cir. 2006).
[8] Martin v. Franklin Capital Corp., 251 F.3d 1284, 1289 (10th Cir. 2001).
[9] Laughlin v. Kmart Corp., 50 F.3d 871, 873 (10th Cir. 1995).
[10] 28 U.S.C. § 1332.
[11] *Martin*, 251 F.3d at 1293.
[12] *Id*. at 1290.

greater than $75,000. Cursory conclusions contained in the petition for removal (even if based on the complaint) are generally insufficient.[13]

3. Amount in Controversy Where Equitable Relief is Sought

In cases seeking declaratory and injunctive relief, "the amount in controversy is measured by the value of the object of the litigation." The Tenth Circuit has followed what has commonly been referred to as the "either viewpoint rule" which considers either the value to the plaintiff or the cost to the defendant of injunctive and declaratory relief as the measure of the amount in controversy for purposes of meeting the jurisdictional minimum.[14] When determining the amount in controversy, a Wyoming federal court will look to the "the pecuniary effect an adverse declaration will have on either party to the lawsuit."[15]

The CAFA alters the amount in controversy requirements for large class action claims involving more than $5 million in the aggregate.[16] However, in CAFA "mass action" cases, each plaintiff still must meet the $75,000 amount individually.[17] Only unusual circumstances, like when the plaintiffs share an interest in the same piece of real estate or insurance policy, permit aggregation among plaintiffs.[18]

C. Time of Existence of Grounds for Removal

1. Event Triggering Thirty-Day Period for Actions Initially Removable

Under 28 U.S.C. § 1446(b), "the removal period does not begin until the defendant is able 'to intelligently ascertain removability so that in his petition for removal he can make a

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[13] *Id.* at 1291-92.
[14] Lovell v. State Farm Mut. Auto. Ins. Co., 466 F.3d 893, 897 (10th Cir. 2006); *see also* California Cas. & Fire Ins. Co. v. Brinkman, 50 F. Supp. 2d 1157, 1162-63 (D. Wyo. 1999).
[15] *Brinkman*, 50 F. Supp. 2d at 1163.
[16] *See* 28 U.S.C. §§ 1332(d), 1453 (allowing removal when aggregation of class claims meets $5 million minimum).
[17] 28 U.S.C. § 1332(d)(11)(B)(i).
[18] *Lovell*, 466 F.3d at 897-98; *see also* Elliott Indus. Ltd. P'ship. v. BP Am. Prod. Co., 407 F.3d 1091, 1105 (10th Cir. 2005) ("The paradigm cases for permitting the aggregation of claims 'are those which involve a single indivisible res, such as an estate, a piece of property (the classic example), or an insurance policy. These are matters that cannot be adjudicated without implicating the rights of everyone involved with the res.'") (citation omitted).

simple and short statement of the facts.'"[19] Once removal is apparent, the removing party has thirty days in which to remove.

2. Event Triggering Thirty-Day Period for Actions Not Initially Removable

The removing party need not investigate claims in the complaint to determine removability.[20] However, the removing party must stay abreast of all facts relating to removal. The Tenth Circuit has followed the majority of courts by holding that the term, "other paper," found in § 1441 includes pleadings, written documents, and depositions. Thus, information derived in discovery may put a defendant on notice of removability and trigger the thirty-day deadline.[21]

Much like a defendant may miss the deadline for removal; a plaintiff may waive its right to remand if it fails to object to the timeliness of removal.[22] However, subject matter jurisdiction must be otherwise appropriate in the federal court (*i.e.*, a plaintiff cannot waive its right to challenge diversity of citizenship or the amount in controversy) and the timing flaw must be merely a procedural defect.[23]

II. FRAUDULENT JOINDER

A. Test for Fraudulent Joinder

Fraudulent joinder refers to those circumstances where the plaintiff has joined a non-diverse defendant solely for the purpose of defeating diversity jurisdiction in federal court. In such cases, removal is proper despite a plaintiff's purported inclusion of non-diverse defendants.

[19] Huffman v. Saul Holdings Ltd. P'ship, 194 F.3d 1072, 1078-79 (10th Cir. 1999) (citation omitted).
[20] Akin v. Ashland Chem. Co., 156 F.3d 1030, 1036 (10th Cir. 1998).
[21] *Huffman*, 194 F.3d at 1078.
[22] *See, e.g.*, Hasvold v. First USA Bank, N.A., 194 F. Supp. 2d 1224, 1239 (D. Wyo. 2002).
[23] *Huffman*, 194 F.3d at 1076-77.

To establish fraudulent joinder in Wyoming, the removing party "must prove the non-liability of the [fraudulently joined] defendant as a matter of fact or law."[24] Moreover, the fraudulent joinder must be plead with particularity.[25] However, in cases involving the First Amendment of the U.S. Constitution, Wyoming federal courts appear to apply a somewhat lessened burden.[26]

B. Evidence of Fraudulent Joinder

Since fraudulent joinder is a jurisdictional issue, the parties litigating over removal and/or remand may rely on evidence outside of the pleadings.[27] Thus, removal (and opposition thereto) may be supported by affidavits and discovery in a manner similar to a motion for summary judgment.[28]

III. THE VOLUNTARY/INVOLUNTARY RULE

A. "Voluntary" Dismissal

The "voluntary/involuntary rule" ("the Rule"), which often is related to the issue of joinder, still exists and is enforced by courts in the Tenth Circuit.[29] "What it requires is a voluntary act of the plaintiff which effects a change rendering a case subject to removal (by defendant) which had not been removable before the change."[30]

No published Wyoming federal opinion has directly addressed the Rule, but at least one decision has recognized the existence of the Rule,[31] and it is likely that Wyoming would follow its sister courts in the Tenth Circuit.

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[24] Spence v. Flynt, 647 F. Supp. 1266, 1271 (D. Wyo. 1986).
[25] *Id.*
[26] *See, e.g., id.*
[27] *See id.* ("In deciding whether removal is proper, the Court must not pre-try the issues, but may pierce the pleadings and determine the basis of joinder 'by any means available.'") (citation omitted).
[28] *Id.*
[29] *See* DeBry v. Transamerica Corp., 601 F.2d 480, 487-88 (10th Cir. 1979).
[30] *Id.*
[31] *See Spence*, 647 F. Supp. at 1271.

IV. WAIVER OF RIGHT TO REMOVE

A. Waiver by Defending

"[A] waiver of one's statutory right to remove a case from a state to a federal court must be 'clear and unequivocal.'"[32] Thus, preliminary participation in the state court proceedings – filing an answer, for example – will not waive a party's right to remove. Even the filing of a motion for summary judgment will not effect a waiver if the motion was filed before it was "unequivocally apparent" that the case was removable.[33]

B. Waiver by Consent

If a party merely consents to jurisdiction in a forum, the consent does not operate to waive the right to remove.[34]

C. Waiver by Contract

Contractual clauses that mandate litigation in a particular forum can waive a party's right to remove.[35] In these cases, interpretation of the contractual provision, whether the forum-selection clause is mandatory or permissive, becomes pivotal to the issue of removal.

V. PRACTICE POINTERS

Wyoming federal courts have produced very little specific case law on removal issues. However, those courts have dismissed cases *sua sponte* for lack of subject matter jurisdiction,[36] and they strictly construe the jurisdictional statutes.[37] Thus, a party seeking removal should pay particular attention to the statutes and to Tenth Circuit law in the absence of Wyoming

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[32] Milk 'n' More, Inc. v. Beavert, 963 F.2d 1342, 1346 (10th Cir. 1992) (citation omitted).
[33] *Akin*, 156 F.3d at 1036 ("a defendant who actively invokes the jurisdiction of the state court and interposes a defense in that forum is not barred from the right to removal in the absence of adequate notice of the right to remove").
[34] SBKC Serv. Corp. v. 1111 Prospect Partners, L.P., 105 F.3d 578, 581-82 (10th Cir. 1997) (no waiver where clause did not confine commencement of litigation exclusively to state court).
[35] *See, e.g.*, Excell, Inc. v. Sterling Boiler & Mech., Inc., 106 F.3d 318, 320-21 (10th Cir. 1997); American Soda, LLP v. U.S. Filter Wastewater Group, Inc., 428 F.3d 921, 927 (10th Cir. 2005).
[36] *See, e.g.*, *Nicodemus*, 204 F.R.D. 479, 490.
[37] *See, e.g.*, Drake v. Cheyenne Newspapers, Inc., 842 F. Supp. 1403 (D. Wyo. 1994).

jurisprudence on point. Lastly, the Local Rules for the U.S. District Court for Wyoming require a removing party to submit the entire state court record to the federal court within ten days of receipt of the federal court's "Removal Order."[38]

[38] U.S.D.C.L.R. 81.1.

11TH CIRCUIT

ALABAMA

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I. POWER AND RIGHT TO REMOVE

A. The Parties

1. Defining "Parties in Interest"

Alabama's federal district courts have generally followed the Eleventh Circuit's opinion in *Broyles v. Bayless*[1] when confronted with the question of whether a defendant should be considered a "party in interest" for purposes of diversity jurisdiction.[2]

In *Broyles*, the Eleventh Circuit defined "real party in interest" as a "party that has a real and substantial stake in the litigation and who exercises *substantial control* over the litigation."[3] The court held that, as a matter of federal law, diversity jurisdiction must be grounded upon "'citizens' who are real and substantial parties to the controversy."[4] Determining who is a "real and substantial party," however, must be based on state law:

[1] 878 F.2d 1400 (11th Cir. 1989).
[2] *See* Toole v. Chupp, 456 F. Supp. 2d 1218 (M.D. Ala. 2006); Wynn *ex rel.* Ala. v. Philip Morris, Inc., 51 F. Supp. 2d 1232 (N.D. Ala. 1999).
[3] *Broyles*, 878 F.2d at 1403 (emphasis in original).
[4] *Id*. at 1402 (citing Navarro Sav. Assoc. v. Lee, 446 U.S. 458 (1980)).

> Federal courts look to the substantive law of the state, however, to determine whether an individual, although a party to the lawsuit, is a real and substantial party to the litigation. This hurdle prevents a party with an insufficient interest in the litigation from using his or her citizenship to transfer a local controversy into one within federal diversity jurisdiction and vice-versa. Thus, Federal courts do not consider the controlling state's procedural law as to who must be a party to any given action, but rather look to determine upon whom the state confers substantive rights.[5]

Unfortunately, Alabama has not established a general definition of "parties in interest" that federal courts can use to determine whether diversity jurisdiction exists. The determination must be made on a case-by-case basis.[6]

2. Presence of "Doe" Defendants

Federal district courts in Alabama follow 28 U.S.C. § 1441(a), which states: "For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded."[7]

Prior to the amendment of § 1441(a), the Eleventh Circuit held in *Coker v. Amoco Oil Co.*[8] that, "[u]nserved resident fictitious defendants may not be ignored on removal . . . ."[9] Reacting to *Coker* and cases from other circuits that kept otherwise removable cases in state court as long as fictitious defendants were not expressly dismissed, Congress amended § 1441(a) so that the citizenship of defendants sued under fictitious names would be disregarded for purposes of removal.[10] Subsequent to the amendment of § 1441(a), Alabama's federal district

[5] *Id*. (internal citations omitted).
[6] *See, e.g., Toole*, 456 F. Supp. 2d 1218 (analyzing question of whether citizenship of uninsured motorist carrier who has "opted out" of lawsuit should be considered in determining whether the court has removal jurisdiction); *Wynn*, 51 F. Supp. 2d 1232 (determining whether State of Alabama was real party in interest or nominal party).
[7] 28 U.S.C. § 1441(a) (2002).
[8] 709 F.2d 1433 (11th Cir. 1983).
[9] *Id.* at 1440.
[10] *See* Wilson v. Gen. Motors Corp., 888 F.2d 779, 782 n.3 (11th Cir. 1989).

courts have not deviated from that section's instruction to ignore the citizenship of fictitious defendants.[11]

3. Diversity for Putative Class Actions

Federal district courts in Alabama evaluate diversity jurisdiction in accordance with the Class Action Fairness Act ("CAFA"),[12] so that only "minimal diversity" is required.[13] That is, diversity jurisdiction exists if any member of the plaintiff class, whether named or unnamed, is diverse from any defendant.[14]

B. The Amount in Controversy

1. Establishing the Amount in Controversy

To remove a case to federal court based on diversity jurisdiction, the amount in controversy must exceed $75,000.[15] The amount in controversy includes both compensatory and punitive damages,[16] but excludes interest and costs.[17] In some limited circumstances, attorneys' fees can also be included in the amount in controversy.[18]

If the plaintiff's complaint includes an ad damnum clause in which the plaintiff seeks more than $75,000, the complaint itself is generally determinative of the amount in

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[11] *See, e.g.*, Baums v. Gen. Ins. Co. of Am., No. 3:06-cv-558-MEF, 2006 U.S. Dist. LEXIS 77820, at *2 n.1 (M.D. Ala. Oct. 23, 2006); Edge v. Blockbuster Video, Inc., 10 F. Supp. 2d 1248, 1249 n.1 (N.D. Ala. 1997); Kelly v. Shel-Ter Co., No. 96-0468-CB-C, 1997 U.S. Dist. LEXIS 6551, at *2 (S.D. Ala. Apr. 28, 1997).

[12] *See* Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.).

[13] *See* Lowery v. Ala. Power Co., 483 F.3d 1184, 1189 n.9 (11th Cir. 2007); Cleveland v. Ark-La-Tex Fin. Serv., LLC, No. 07-0444-CG-M, 2007 U.S. Dist. LEXIS 63145, at *5 (S.D. Ala. Aug. 24, 2007); Eufala Drugs, Inc. v. Tmesys, Inc., 432 F. Supp. 2d 1240, 1242 (M.D. Ala. 2006).

[14] 28 U.S.C. § 1332(d)(2).

[15] 28 U.S.C. §§ 1332(a), 1441(a).

[16] *See, e.g.*, Henry v. Nationwide Ins. Co., No. 06-0612-CG-M, 2007 U.S. Dist. LEXIS 62428, at *6-7 (S.D. Ala. Aug. 22, 2007).

[17] 28 U.S.C. § 1332(a).

[18] *See, e.g.*, Wilson Oil Co. v. Crown Central Petroleum Co., No. 02-F-358-F, 2005 U.S. Dist. LEXIS 34735, at * 10 (M.D. Ala. Dec. 6, 2005) (stating, in case involving Alabama Motor Fuel Marketing Act, that "[a]ttorneys' fees are an allowable component of the amount in controversy where such fees are made recoverable by statute").

controversy.[19] If the plaintiff has specifically pled less than the jurisdictional amount, a defendant can successfully remove the case to federal court only by proving to a "legal certainty" that the amount in controversy exceeds $75,000.[20]

2. Application When a Specific Dollar Amount is Not Pled

The Eleventh Circuit has stated that courts have an obligation to assure themselves that the amount in controversy is met.[21] When there is no ad damnum clause in the complaint, a defendant wishing to remove the case must prove by a preponderance of the evidence that the amount in controversy requirement is met.[22]

In Alabama, plaintiffs are not required to include ad damnum clauses in their complaints. Accordingly, "[t]he absence of an ad damnum is routine in Alabama, especially in cases where complete diversity of citizenship invites removal to federal court under 28 U.S.C. §§ 1441 and 1332(a)."[23]

The U.S. District Court for the Northern District of Alabama recently summarized the common practice in cases in which an ad damnum is absent from the complaint:

> Prior to April 11, 2007, Alabama personal injury cases and wrongful death cases with no ad damnum, but in which diversity of citizenship existed, were regularly removed to federal court upon defendant's filing of a notice of removal that simply asserted the existence of the more than $ 75,000 in controversy required by 28 U.S.C. § 1332(a), and proved that amount by citing jury awards in excess of $75,000 in similar Alabama tort cases. District courts, including this court, have, without hesitation, allowed such removals unless the plaintiff resolved the ambiguity that she herself deliberately created by conceding that she will forever forego any claim above $75,000, in which event her case, pre-Lowery, was remanded.[24]

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[19] Burns v. Windsor Ins. Co., 31 F.3d 1092, 1095 (11th Cir. 1994).
[20] *Id.*; *see also* Foster v. River Birch Homes, Inc., No. 07-0117-BH-C, 2007 U.S. Dist. LEXIS 20196, at *4-5 (S.D. Ala. Mar. 19, 2007).
[21] Morrison v. Allstate Indem. Co., 228 F.3d 1255, 1261 (11th Cir. 2000).
[22] Lowery v. Ala. Power Co., 482 F.3d 1184, 1208 (11th Cir. 2007).
[23] Constant v. Int'l House of Pancakes, Inc., 487 F. Supp. 2d 1308, 1309 (N.D. Ala. 2007).
[24] *Id.* at 1309.

The judge in *Constant* interpreted *Lowery v. Alabama Power Co.*[25] as ending the former practice, stating that, "the day of the knee-jerk removal of diversity tort cases from state to federal court within the three states comprising the Eleventh Circuit came to an end on April 11, 2007, when [*Lowery*] was decided."[26]

That judge interpreted *Lowery* as "expressly limit[ing] the jurisdictional examination to what appears in the state-court complaint and in any other materials furnished by plaintiff after that complaint was filed."[27] The judge explained that he could not "indulge in speculation," but that he could rely on deduction, noting, however, that it is "not always easy to draw the line between deduction and speculation."[28] At least one judge in the Middle District of Alabama has followed the reasoning in *Constant*.[29]

Although judges in the Northern and Middle Districts have seemed to focus on the Eleventh Circuit's instruction not to rely on speculation, a judge in the Southern District of Alabama has noted that deduction is acceptable and that, in certain cases, the court can easily deduce from the face of the complaint that the amount in controversy exceeds $75,000.[30]

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[25] 483 F.3d 1184 (11th Cir. 2007).
[26] *Constant*, 487 F. Supp. 2d at 1308.
[27] *Id*. at 1312.
[28] *Id*.
[29] Carswell v. Sears, Roebuck and Co., No. 2:06-cv-1098-WKW, 2007 U.S. Dist. LEXIS 42693 (M.D. Ala. Jun. 12, 2007).
[30] For example, the court in *Sanderson v. Daimler Chrysler Motor Corp.*, No. 07-0559-WS-B, 2007 U.S. Dist. LEXIS 75431, at * 3-5 (S.D. Ala. Oct. 9, 2007), stated:

> Certain injuries are by their nature so substantial as to make it readily apparent that the amount in controversy requirement is satisfied. For example, an allegation in a complaint that the plaintiff was rendered a paraplegic would render the case removable, even if the complaint did not expressly demand over $75,000, and even if it was silent as to medical expenses, pain and suffering, mental anguish and lost income. In such cases, the description of the injury itself demonstrates that the amount in controversy "more likely than not exceeds the . . . jurisdictional amount."

Sanderson, 2007 U.S. Dist. LEXIS 75431, at * 3-5.

It should be noted that the *Lowery* decision was issued less than a year ago, and that a motion for rehearing is currently pending in the Eleventh Circuit. Accordingly, the law in this area is still in flux.

3. Amount in Controversy Where Equitable Relief is Sought

When a plaintiff seeks injunctive or declaratory relief and invokes diversity jurisdiction, the "amount in controversy" is the monetary value of the object of the litigation from the plaintiff's perspective.[31]

The plaintiff cannot defeat removal simply by characterizing the claim as one involving less than the requisite jurisdictional amount when the district court is informed that the value of the interest to be protected exceeds the amount in controversy requirement.[32] As with a request for monetary relief, the burden is on the removing defendant to establish by a preponderance of the evidence that the amount in controversy exceeds the jurisdictional threshold.[33]

4. Defeating Removal by Amending Relief Sought

Once a state court case has been removed properly, an amendment to the complaint to plead less than the jurisdictional amount will not defeat the federal court's subject matter jurisdiction.[34]

C. Time of Existence of Ground of Removal

1. Event Triggering Thirty-Day Period for Actions Initially Removable

Pursuant to 28 U.S.C. § 1446(b), a defendant wishing to remove a case to federal court must file a notice of removal within 30 days of receipt by the defendant of the initial pleading

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[31] Federated Mut. Ins. Co. v. McKinnon Motors, LLC, 329 F.3d 805, 807 (11th Cir. 2003); Leonard v. Enter. Rent-A-Car, 279 F.3d 967, 973 (11th Cir. 2002); Stonebridge Life Ins. Co. v. Verneuille, No. 06-0655-WS-M, 2007 U.S. Dist. LEXIS 326, at *5-6 (S.D. Ala. Jan. 3, 2007).
[32] Peebles v. Merrill Lynch, Pierce, Fennder, & Smith, Inc., 431 F.3d 1320, 1325-26 (11th Cir. 2005).
[33] *Leonard*, 279 F.3d at 972.
[34] Hill v. MONY Life Ins. Co., 75 F. Supp. 2d 1328, 1330 (M.D. Ala. 1999) (citing St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283, 293-94 (1938)); Fuller v. Exxon Corp., 78 F. Supp. 2d 1289, 1295 (S.D. Ala. 1999).

through "service or otherwise." The United States Supreme Court, in *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*,[35] addressed the "service or otherwise" language of that section and determined that the time for removal cannot be triggered before the defendant has been served with a summons.[36] The Eleventh Circuit and Alabama's federal district courts have not deviated from this decision.

In suits against multiple defendants, there is a split among the circuits as to whether the 30-day period begins from service on the first-served defendant or the last-served defendant. The Eleventh Circuit has not yet addressed the issue.

The Northern District of Alabama generally uses the first-served defendant rule.[37] In cases in which a new defendant is named in an amended complaint, however, the Northern District of Alabama uses the last-served defendant rule so that the new defendant has 30 days from service of the amended complaint.[38] It should be noted, however, that the Northern District specifically limited the application of *Fitzgerald* to the facts of that case.[39] In addition, the switch to the last-served defendant rule does not eliminate the requirement that all defendants consent to removal.[40]

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[35] 526 U.S. 344 (1999).
[36] *Id*. at 356.
[37] *See, e.g.*, East v. Long, 785 F. Supp. 941, 945 (N.D. Ala. 1992) ("The only real jurisdictional factual issue is whether all defendants joined in the removal within thirty (30) days after it became removable by service on the *first served defendant . . . .*") (emphasis added).
[38] Fitzgerald v. Bestway Serv., Inc., 284 F. Supp. 2d 1311, 1317 (N.D. Ala. 2003) (reasoning that the new defendant's "right to remove should not be destroyed by the original defendants' delay").
[39] *Id*.
[40] *Id*.

The Middle District of Alabama has adopted the first-served defendant rule, and has applied it even where additional defendants are joined in amended pleadings.[41] In *Adams*, the court stated:

> Whatever this Court might think of the relative merits of the "first-served defendant rule" and the "last-served defendant rule," in the absence of direction from either the United States Supreme Court or the Eleventh Circuit Court of Appeals, this Court will not deviate from the path selected by the other judges of this district.[42]

The Southern District of Alabama has also adopted the first-served defendant rule.[43] When faced with the situation where an additional defendant was added in an amended complaint, the Southern District of Alabama applied the first-served defendant rule, but noted that the equitable reasons for allowing the new defendant additional time to remove were not as strong as in *Fitzgerald* or *Adams* because the 30-day time period for the original defendants to remove had not yet expired.[44]

2. Event Triggering Thirty-Day Period for Actions Not Initially Removable

Neither the Eleventh Circuit nor Alabama's federal district courts have directly addressed what constitutes "service or otherwise" in the context of receipt of documents other than the initial pleading. To be safe, a defendant wishing to remove a case not removable on the initial pleading should assume that the 30-day period begins to run immediately upon receipt of the paper that caused the case to become removable.

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[41] Adams v. Charter Comm. VII, LLC, 356 F. Supp. 2d 1268, 1272 (M.D. Ala. 2005) (applying first-served defendant rule where additional defendants were named in amended complaint after suit had been pending more than one year).

[42] *Id.*

[43] *See, e.g.*, Cartee v. Precise Cable Const., Inc., No. CA 05-0515-C, 2005 U.S. Dist. LEXIS 42772, at *19 (S.D. Ala. Oct. 31, 2005).

[44] Betts v. Larsen Intermodal Serv., Inc., No. 05-0600-CG-C, 2006 U.S. Dist. LEXIS 42025, at *7 (S.D. Ala. June 21, 2006) (noting that newly added defendant still had nine days to effect removal under first-served defendant rule).

The Eleventh Circuit has identified the following as constituting "other paper": (1) responses to requests for admissions, (2) settlement offers, (3) interrogatory responses, (4) deposition testimony, (5) demand letters, and (6) email estimating damages.[45]

II. FRAUDULENT JOINDER

A. Test for Fraudulent Joinder

To prove fraudulent joinder of a non-diverse defendant, the removing defendant must demonstrate that either: "(1) there is no possibility the plaintiff can establish a cause of action against the resident defendant; or (2) the plaintiff has fraudulently pled jurisdictional facts to bring the resident defendants into state court."[46] It is the removing defendant's burden to make such a showing by "clear and convincing evidence."[47]

In the typical case, the removing defendant will be attempting to show that there is no possibility the plaintiff can establish a cause of action against the resident defendant. "If there is any possibility that the state law might impose liability on a resident defendant under the circumstances alleged in the complaint, the federal court cannot find that joinder of the resident defendant was fraudulent, and remand is necessary."[48] The plaintiff does not have to have a "winning case" against the resident defendant; "he need only have a possibility of stating a valid

[45] *Lowery*, 483 F.3d at 1213 n.62. *See also* Sudduth v. Equitable Life Assurance Society, No. 07-0436-WS-C, 2007 U.S. Dist. LEXIS 63174, at *3-9 (S.D. Ala. Aug. 27, 2007) (indicating that a deposition transcript can constitute "other paper"); Moore v. Allstate Indem. Co., No. 06-0412-WS-B, 2006 U.S. Dist. LEXIS 72939, at * 7-11 (S.D. Ala. Sept. 22, 2006) (concluding that plaintiff's response to request for admission constituted "other paper"); Moses v. Allstate Indem. Co., No. 3:06-cv-154-WHA, 2006 U.S. Dist. LEXIS 32724, at *6-7 (M.D. Ala. May 17, 2006) (concluding that plaintiff's response to request for admission constituted "other paper"); Shields v. Wash. Nat'l Ins. Co., 375 F. Supp. 2d 1346, 1349 (M.D. Ala. 2005) (concluding that a deposition can constitute "other paper"); Fulford v. Market Street Mortgage Corp., No. 3:05-cv-336-W, 2005 U.S. Dist. LEXIS 35450, at *4 (M.D. Ala. Dec. 1, 2005) (treating probate court papers reflecting that co-defendant was deceased as "other paper"). *But see* Crews v. Nat'l Boat Owners Assoc., No. 2:05-cv-1057-MEF, 2006 U.S. Dist. LEXIS 17861, at *11-12 (M.D. Ala. Apr. 6, 2006) (finding that affidavits from co-defendants regarding their citizenship do not constitute "other paper").

[46] Henderson v. Wash. Nat'l Co., 454 F.3d 1278, 1281 (11th Cir. 2006) (quoting Crowe v. Coleman, 113 F.3d 1536, 1538 (11th Cir. 1997)).

[47] *Id*.

[48] Florence v. Crescent Resources, LLC, 484 F.3d 1293, 1297 (11th Cir. 2007).

cause of action in order for the joinder to be legitimate."[49] The Eleventh Circuit has stated, however, "[t]he potential for legal liability must be reasonable, not merely theoretical."[50] Indeed, "possible must mean 'more than such a possibility that a designated residence can be hit by a meteor tonight. That is possible. Surely, as in other instances, reason and common sense have some role.'"[51]

The proceeding used for determining whether fraudulent joinder exists is similar to that used for ruling on motions for summary judgment.[52] Even so, district courts "are not to weigh the merits of a plaintiff's claim beyond determining whether it is an arguable one under state law."[53] District courts must resolve all questions of fact in favor of the plaintiff.[54] "But there must be some question of fact before the district court can resolve that fact in the plaintiff's favor."[55] Accordingly, when a defendant presents affidavits that are undisputed by the plaintiffs "the court cannot then resolve the facts in the Plaintiffs' favor based solely on the unsupported allegations in the Plaintiffs' complaint."[56]

Although the burden on the defendant is "a heavy one,"[57] the Eleventh Circuit has noted that "[t]he removal process was created by Congress to protect defendants" and has stated, "Congress 'did not extend such protection with one hand, and with the other give plaintiffs a bag

[49] Triggs v. John Crump Toyota, Inc., 154 F.3d 1284, 1287 (11th Cir. 1998).
[50] Legg v. Wyeth, 428 F.3d 1317, 1325 n.5 (11th Cir. 2005) (quoting Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co., 313 F.3d 305, 312 (5th Cir. 1992)).
[51] *Legg*, 428 F.3d at 1325 n.5 (quoting Braden v. Wyeth, No.: CV-04-PT-235-E, 2005 U.S. Dist. LEXIS 25243 (N.D. Ala. June 30, 2005)).
[52] *Legg*, 428 F.3d at 1322-23 (citing *Crowe*, 113 F.3d at 1538).
[53] *Crowe*, 113 F.3d at 1538.
[54] *Legg*, 428 F.3d at 1323.
[55] *Id*.
[56] *Id*.
[57] *Crowe*, 113 F.3d at 1538.

of tricks to overcome it.'"[58] Alabama's federal district courts follow the general framework described above.[59]

The Eleventh Circuit and federal district courts in Alabama have also recognized the doctrine of "fraudulent misjoinder."[60] Misjoinder may be deemed fraudulent "where a diverse defendant is joined with a non-diverse defendant as to whom there is not joint, several or alternative liability and where the claim against the diverse defendant has no real connection to the claim against the non-diverse defendant."[61] Although the Eleventh Circuit has instructed that misjoinder must be "egregious" to rise to the level of fraudulent joinder, it has never specifically defined "egregious misjoinder."[62] Nevertheless, the Southern District of Alabama has stated that "one type of misjoinder that is always 'egregious' is misjoinder that deliberately attempts to avoid the diversity jurisdiction of the federal courts."[63]

B. Evidence of Fraudulent Joinder

The determination of whether a non-diverse defendant has been fraudulently joined "must be based upon the plaintiff's pleadings at the time of removal, supplemented by any affidavits and deposition transcripts submitted by the parties."[64]

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[58] *Legg*, 428 F.3d at 1325 (quoting McKinney v. Bd. of Trustees of Mayland Cmty. Coll., 955 F.2d 924, 928 (4th Cir. 1992)).

[59] *See, e.g.*, Bentley v. Green Tree Servicing LLC, No. 3:07-cv-651-MEF, 2007 U.S. Dist. LEXIS 89534, at *4-6 (M.D. Ala. Dec. 5, 2007); Abrams v. Olins Corp., No. 07-0622-WS-B, 2007 U.S. Dist. LEXIS 86387, at *14-18 (S.D. Ala. Nov. 21, 2007); Southern v. Pfizer, 471 F. Supp. 2d 1207, 1214 (N.D. Ala. 2006); Bloodsworth v. Smith & Nephew, Inc., No. 2:05-cv-622-D, 2005 U.S. Dist. LEXIS 38756, at *10-12 (M.D. Ala. Dec. 19, 2005).

[60] Tapscott v. MS Dealer Serv. Corp., 77 F.3d 1353, 1360 (11th Cir. 1996), *abrogated on other grounds*, 204 F.3d 1069, 1072 (11th Cir. 2000); *see also* Baums v. Gen. Ins. Co. of Am., No. 3:06-cv-558-MEF, 2006 U.S. Dist. LEXIS 77820, at *6-9 (M.D. Ala. Oct. 23, 2006); Bryan v. Lexington Ins. Co., No. CA 06-0225-C, 2006 U.S. Dist. LEXIS 53833, at *24 (S.D. Ala. July 20, 2006).

[61] *Triggs*, 154 F.3d at 1287; *cf.* Paul v. Bayer *AG*, 320 F. Supp. 2d 1216, 1220 (N.D. Ala. 2004) (stating that voluntary misjoinder of a *plaintiff* can be "the functional equivalent of fraudulent joinder of a non-diverse defendant").

[62] *Baums*, 2006 U.S. Dist. LEXIS 77820, at *6-9 (citing *Tapscott*, 77 F.3d at 1360).

[63] *Id*. at *9.

[64] *Legg*, 428 F.3d at 1322 (quoting Pacheco de Perez v. AT&T Co., 139 F.3d 1368, 1380 (11th Cir. 1998)).

Where a plaintiff's complaint fails to set forth any specific factual allegations against the resident defendants upon which the plaintiff's claims could be based, "there can be no better admission of fraudulent joinder of these defendants."[65]

Affidavits submitted by the resident defendants can also provide strong evidence of fraudulent joinder.[66] The Eleventh Circuit has stated that it is legal error and an abuse of discretion to ignore such affidavits.[67]

III. VOLUNTARY / INVOLUNTARY RULE

A. "Voluntary" Dismissal

The Eleventh Circuit and Alabama's federal district courts have stated that, according to the voluntary-involuntary rule, a case becomes removable if the resident defendant is dismissed by a "voluntary act" of the plaintiff, but not if the resident defendant was dismissed due to the defendant's or court's action.[68] Unfortunately, a more specific definition of "voluntary dismissal" has not been provided.

The Southern District of Alabama has stated that "[f]or dismissal of a nondiverse defendant to be voluntary under the voluntary-involuntary rule, 'there must be a definite or unequivocal expression of intent to discontinue the action against the [resident] party."[69] The Southern District of Alabama has also stated that for an abandonment of a claim to be considered a "voluntary dismissal," there must be "a definite or unequivocal expression of intent to

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[65] Wakeland v. Brown & Williamson Tobacco Corp., 996 F. Supp. 1213, 1221 (S.D. Ala. 1998).
[66] *See, e.g., Southern*, 471 F. Supp. 2d at 1216.
[67] *Legg*, 428 F.3d at 1323.
[68] *See, e.g.*, McKinstry v. New England Mutual Life Ins. Co., No. 97-0106-P-M, 1997 U.S. Dist. LEXIS 9735, at *5 (S.D. Ala. May 9, 1997) (citing Insinga v. LaBella, 845 F.2d 249, 252 (11th Cir. 1988), and Weems v. Louis Dreyfus Corp., 380 F.2d 545, 547 (5th Cir. 1967)).
[69] *McKinstry*, 1997 U.S. Dist. LEXIS 9735, at *8.

discontinue the action against the resident party."[70] Neither the Eleventh Circuit nor Alabama's other federal district courts have commented on this requirement.

B. Exceptions

Fraudulent joinder is a "well-established exception to the voluntary-involuntary rule."[71] In addition, the Eleventh Circuit has held that "a trial court's finding that it lacks jurisdiction over a resident defendant is akin to a finding of fraudulent joinder of that defendant in that it involves a determination by the court that the resident defendant was never properly before the court."[72] Based on that reasoning, the Eleventh Circuit in *Insinga* held that the voluntary-involuntary rule does not apply when a state court's dismissal of a party is based on sovereign immunity, because sovereign immunity is a defense that relates to the jurisdiction of the court rather than the merits of the case.[73] The Middle District of Alabama has recently interpreted the *Insinga* case to require both a dismissal based on lack of jurisdiction *and* finality (i.e., that the time for appeal has run).[74]

[70] Naef v. Masonite Corp., 923 F. Supp. 1504, 1510 (S.D. Ala. 1996).
[71] *Insinga*, 845 F.2d at 254.
[72] *Id*.
[73] *Id*.
[74] Barron v. Werner Enter., Inc., No. 3:06-cv-983-MHT, 2007 U.S. Dist. LEXIS 87296, at *6-7 (M.D. Ala. Nov. 28, 2007).

IV. WAIVER OF RIGHT TO REMOVE

A. Waiver by Defending

In judging whether a defendant has waived its right of removal by invoking processes of the state court, the Eleventh Circuit analyzes whether the defendant's action indicates a willingness to litigate in state court before the notice of removal was filed.[75] This determination is made on a case-by-case basis and focuses on whether the defendant has taken "substantial offensive or defensive actions in state court."[76]

Although the Eleventh Circuit has not required it, some Alabama federal district courts have required that the defendant's actions express a clear and unequivocal intent to waive the right of removal.[77]

B. Waiver by Consent

Alabama's federal district courts have not directly addressed this issue.

C. Waiver by Contract

Contractual waivers of removal are binding in the Eleventh Circuit.[78] A contractual waiver does not have to be expressed clearly and unequivocally to be binding.[79] Instead, ordinary contract principles govern a contractual waiver of removal jurisdiction based on diversity.[80] When ordinary contract principles fail to provide a single reasonable interpretation and the language is ambiguous, the preferred interpretation will be the one that operates against

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[75] Yusefzadeh v. Nelson, Mullins, Riley, and Scarborough LLP, 365 F.3d 1244, 1246 (11th Cir. 2004) (quoting 14B CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 3721 (2003)).
[76] *Id*. at 1246-47.
[77] Franklin v. City of Homewood, No. 07-TMP-006-S, 2007 U.S. Dist. LEXIS 47586, *14 (N.D. Ala. June 21, 2007); Brown v. Sasser, 128 F. Supp. 2d 1345, 1348 (M.D. Ala. 2000); Haynes v. Gasoline Marketers Inc., 184 F.R.D. 414, 416 (M.D. Ala. 1999); Fain v. Biltmore Sec. Inc., 166 F.R.D. 39, 40 (M.D. Ala. 1996).
[78] Snapper, Inc. v. Redan, 171 F.3d 1249, 1263 (11th Cir. 1999).
[79] *Id*. at 1260.
[80] *Id*. at 1261; *see also* Global Satellite Comm'n Co. v. Starmill U.K. Ltd., 378 F.3d 1269, 1271 (11th Cir. 2004).

the drafter.[81] A contractual waiver will be prima facie valid and should be enforced unless it can be shown to be unreasonable, unjust, or invalid for reasons of fraud or overreaching.[82]

V. PRACTICE POINTERS

Because orders remanding cases to state court are not generally reviewable on appeal,[83] there is a lack of consistency in the application of the law in this area between Circuits, districts, and even judges within the same district. For that reason, successfully removing a case to federal court can hinge on how well counsel for the removing party understands the tendencies of each judge within a given federal district. Anticipating the judge's reaction to a case removed on diversity grounds can be crucial.

The various interpretations judges in Alabama's federal district courts have had of *Lowery v. Alabama Power Co.*,[84] as previously discussed,[85] highlight the point. Knowing what proof a judge will require in determining whether the amount in controversy is met can be the difference between a successful removal and a remand order.

Accordingly, parties wishing to remove a case to federal court should gather as much information as possible about the prior removal / remand decisions of the judges that could be assigned to the case in federal court.

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[81] *Global Satellite*, 378 F.3d at 1271.
[82] Travelers Prop. Cas. Co. of Am. v. Onesource Facility Serv., Inc., No. 3:05-cv-0618-WKW, 2006 U.S. Dist. LEXIS 23342, at *3-4 (M.D. Ala. Mar. 23, 2006).
[83] *See* 28 U.S.C. § 1447(d).
[84] 483 F.3d 1184 (11th Cir. 2007).
[85] *See* discussion *supra* Section I.B.2.

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Removal of a case from state to federal court could be of great strategic benefit to a defendant. However, the process of removal may become complicated as procedures vary circumstantially. The goal of this article is to provide a brief overview of special considerations in removal practice in the state of Florida, which is governed by the United States Court of Appeals for the Eleventh Circuit.

I. POWER AND RIGHT TO REMOVE

Any civil action filed in a state court may be removed by the defendant to federal court if, the case could have been brought originally in federal court.[1] To meet the requirements for diversity removal, the matter in controversy must exceed $75,000, and the parties must be citizens of different or foreign states as provided by 28 U.S.C. §1332.

A. The Parties

1. Defining "Parties in Interest"

A party has standing to bring a suit in federal court only if he is a real party in interest.[2] A real party in interest is a person who is actually and substantially interested in the subject matter as distinguished from one who has nominal, formal, or technical interest in or connection

[1] 28 U.S.C. §1441(b) (2007).
[2] FED. R. CIV. P. 17(1).

to the matter.[3] To demonstrate that he is a real party in interest, the plaintiff must allege facts sufficient to reveal that he suffered injury, that the injury was caused by the defendant's allegedly improper conduct, and that his injury could be redressed by a favorable outcome to the lawsuit.[4]

2. Presence of "Doe" Defendants

For removal to be proper under 28 U.S.C. §1441(b), no defendant can be a citizen of the state in which the action was brought. Plaintiffs may identify "Doe" defendants, parties to be identified at a later date, defendants "X, Y and Z", or other unknown defendants.[5] Section 1441(a) provides that, "citizenship of defendants sued under fictitious names shall be disregarded."[6] As a result, the citizenship of unnamed defendants is ignored for diversity purposes.

3. Diversity for Putative Class Actions

To determine subject matter jurisdiction in a diversity class action, only the named plaintiffs must be completely diverse from the defendants.[7] Accordingly, absent class members may come from the same state as the opposing party.[8]

B. Amount in Controversy

1. Establishing the Amount in Controversy

To determine the amount in controversy, the court considers the judgment that would be entered if the plaintiff prevails on the merits of his case as it stands at the time of removal.[9] When a petition for removal on diversity grounds is filed, the starting point for ascertaining the

[3] Sumitomo Corp. of America v. M/V Saint Venture, 683 F. Supp. 1361 (M.D. Fla.1988).
[4] Seckler v. Star Enterprise, 124 F.3d 1399 (Fla. 11th Cir. Ct. 1997).
[5] Graham v. Medtronic, Inc., 2006 WL 2194012 (M.D. Fla. 2006).
[6] 28 U.S.C. § 1441(a).
[7] Klempner v. Northwestern Mutual Life Ins. Co., 196 F. Supp.2d 1233, 1239 (S.D. Fla. 2001).
[8] *Id.*
[9] Burns v. Windsor Ins. Co., 31 F.3d 1092, 1097 n. 13 (11th Cir. 1994).

amount in controversy is the complaint itself.[10] For example, the ad damnum clause of the complaint may seek damages in excess of the jurisdictional amount.

2. Application When a Specific Dollar Amount is Not Pled

In a diversity removal action, the defendant bears the burden of proving by a preponderance of the evidence that each plaintiff's claim exceeds the jurisdictional amount.[11] "When the complaint does not claim a specific amount of damages, removal from state court is proper if it is facially apparent from the complaint that the amount in controversy exceeds the jurisdictional requirement."[12] The amount in controversy requirement has been satisfied where, the complaint is silent as to a demand for a dollar amount, but alleges serious permanent injury, substantial medical expenses, great pain and suffering, and substantial loss of income.[13] The defendant must however, offer more than bare, conclusory allegations that the amount in controversy exceeds $75,000.[14]

If it is not facially apparent from the allegations of the complaint that the amount in controversy jurisdictional requirement is met, the court may consider facts in the removal petition and may "require parties to submit summary-judgment-type evidence relevant to the amount in controversy at the time of removal."[15] The importance of providing such extraneous evidence was recently made abundantly clear in *Lowery v. Alabama Power Co.*[16] In that case, the defendants removed a public nuisance action to federal court under the Class Action Fairness Act of 2005 ("CAFA"). To satisfy the CAFA, the *Lowery* defendants had to show that the amount placed in controversy by the over 400 plaintiffs' claims exceeded $5 million in the

[10] Williams v. Best Buy Co., 269 F.3d 1316, 1319 (11th Cir. 2001).
[11] Kirkland v. Midland Mortgage Co., 243 F.3d 1277, 1281 n. 5 (11th Cir. 2001).
[12] *Williams*, 269 F.3d at 1319.
[13] Lee v. Altamil Corp., 457 F.Supp. 979, 981 (M.D. Fla. 1978); Estevez-Gonzalez v. Kraft, Inc., 606 F.Supp. 127, 129 (S.D. Fla. 1985); Baker v. Firestone Tire & Rubber Co., 537 F.Supp. 244, 247 (S.D. Fla. 1982).
[14] *Williams*, 269 F.3d at 1319.
[15] *Id.*
[16] 483 F.3d 1184 (11th Cir. 2007), *reh'd denied*, 2008 WL 41327 (11th Cir. 2008).

aggregate. The operative complaint, however, was silent as to the specific amount of damages. The defendants attempted to meet their burden by (1) citing to the ad damnum clause of a *superseded* complaint; (2) calculating the average, per plaintiff, value needed to reach the $5 million aggregate; (3) citing to an admission by plaintiffs' counsel that some of the individual plaintiffs' claims exceeded $75,000; and (4) citing to two allegedly similar cases brought by different plaintiffs against different defendants for unspecified claims.[17]

The Eleventh Circuit determined that none of these approaches satisfied defendants' burden to demonstrate the amount in controversy. Significantly, the Eleventh Circuit stated, "[t]racking § 1446(b), we note that the defendants' notice of removal contained no document clearly indicating that the aggregate value of the plaintiffs' claims exceeds [the jurisdictional] amount and, as such, they are unable to establish federal jurisdiction by a preponderance of the evidence."[18] In light of the preponderance of the evidence standard and the recent *Lowery* decision, it is critical that the removing party provide sufficient evidence in his notice of removal to allow the court to conclude that the jurisdictional amount in controversy is satisfied where the complaint is silent on that issue.

3. Amount in Controversy Where Equitable Relief is Sought

In actions seeking equitable relief, it is well established that the amount in controversy is measured by the value of the object of the litigation.[19] In such actions, the amount in controversy is the monetary value that would flow to the plaintiff if the equitable relief was granted.[20] If the monetary value is too speculative and immeasurable, there is simply no

[17] *Id.* at 1188-91.
[18] *Id.* at 1221.
[19] R&Q Reinsurance Co. v. Rapid Settlements, Ltd., No. 06-14329-CIV-MOORE, 2007 WL 1428746 (S.D. Fla. 2007).
[20] Evanston Ins. Co. v. Southern Gulf West Constr., Inc., No. 2:06-cv-683-FtM-29DNF, 2007 WL 1080003 (M.D. Fla. 2007).

monetary value for amount in controversy purposes and federal jurisdiction cannot be predicated upon 28 U.S.C § 1332.[21]

4. Defeating Removal by Amending Relief Sought

The majority viewpoint is that a plaintiff's voluntary amendment to a complaint after removal, to eliminate the federal claim upon which removal was based will not defeat federal jurisdiction.[22] It is impermissible for a plaintiff to destroy removal jurisdiction by amending his complaint to allege an amount in controversy below the jurisdictional minimum.[23] This rule encourages a plaintiff to select his forum carefully, and to sacrifice his federal claims if the state forum is a priority to the plaintiff.[24] It also prevents tactical manipulation by the plaintiff, which could cause a case to be bounced back and forth between state and federal court.[25]

C. Time of Existence of Grounds for Removal

1. Event Triggering Thirty-Day Period for Actions Initially Removable

It has been held that the thirty-day removal period begins to run when a defendant actually receives a copy of a filed initial pleading by any means.[26] Where the basis for federal jurisdiction does not appear in the initial pleading, but arises subsequently in the case, the defendant must file a notice of removal within thirty days after receipt by the defendant of a copy of an amended pleading, motion, order, or other paper from which it may first be ascertained that the case is one which is or has become removable.[27]

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[21] *Id.*
[22] Estate of Olmstead v. Beverly Enterprises-FL, Inc., No. 96-1941-CIV-T-17, B, 1997 WL 155410 (M.D. Fla. 1997).
[23] *Id.*
[24] *Id.* at 3.
[25] Boelens v. Redman Homes, Inc., 759 F.2d 504, 507 (5th Cir. 1985).
[26] Sims v. Aropi, Inc., 8 F.Supp.2d 1367 (S.D. Fla. 1967).
[27] 28 U.S.C. § 1441; Austin v. Harbour Behavioral Health Care Inst., No. 5:07-cv-173-Oc-10GRJ, 2007 WL 2050912 (M.D. Fla. 2007).

2. Event Triggering Thirty-Day Period for Actions Not Initially Removable

The United States Supreme Court has held that formal service is required to satisfy the "receipt, through service or otherwise" requirement of §1446(b).[28] This can be done in four basic ways. First, if the summons and complaint are served together, the thirty-day removal period runs at once. Second, if the defendant is served with the summons but is furnished with the complaint sometime after, the removal period runs from the receipt of the complaint. Third, if the defendant is served with the summons and the complaint is filed in court, but under local rules service of the complaint is not required, the removal period runs from the date the complaint is made available through filing. Fourth, if the complaint is filed in court prior to any service, the removal period runs from the service of the summons.[29]

The term "other paper" refers to papers generated within the specific state proceeding to be removed and not other unrelated judicial opinions that might suggest removability.[30] "Other paper" may include, but is not limited to, settlement demands, offers of judgment, discovery, documents and correspondence between the parties.[31] The "other paper" does not have to be filed in court to trigger the thirty-day removal period. Rather, it is enough for the written document to contain information sufficient to put the defendant on notice that the case is now removable.[32]

[28] Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc., 526 U.S. 344 (1999).
[29] *Id.* at 346.
[30] Morsani v. Major League Baseball, 79 F. Supp.2d 1331, 1333 (M.D. Fla. 1999).
[31] *Id.*
[32] *Id.*

II. FRAUDULENT JOINDER

A. Test for Fraudulent Joinder

The Eleventh Circuit has articulated three situations when joinder of a nondiverse defendant that defeats diversity may be deemed fraudulent: (1) when there is no possibility that the plaintiff can prove a cause of action against the nondiverse defendant; (2) when there is outright fraud in the plaintiff's pleading of jurisdictional facts; or (3) when a diverse defendant is joined with a nondiverse defendant as to whom there is no joint, several, or alternative liability, and the claim against the diverse defendant has no real connection to the claim against the nondiverse defendant.[33] On a motion to remand an action that was removed on diversity grounds, the removing party bears the burden of proving that joinder of a non-diverse defendant is a fraudulent attempt to defeat removal.[34]

B. Evidence of Fraudulent Joinder

A district court must evaluate the factual allegations in the light most favorable to the plaintiff and must resolve any uncertainties about state substantive law in favor of the plaintiff.[35] Further, defendant's evidence in support of a fraudulent joinder claim must be clear and convincing.[36] The defendant is not required to prove the absence of any theoretical possibility that Plaintiff can establish a cause of action against the resident defendant. Rather, the defendant must prove only the absence of any *reasonable* prospect of Plaintiff's success.[37] If, however, there is even a possibility that a state court would find that the complaint states a cause of action against the non-diverse defendant, the district court must find that the joinder was proper and

[33] Triggs v. John Crump Toyota, Inc., 154 F.3d 1284, 1287 (11th Cir. 1998); *see also* Tapscott v. MS Dealer Serv. Corp., 77 F.3d 1353, 1360 (11th Cir. 1996), *abrogated on other grounds by* Cohen v. Office Depot, Inc., 204 F.3d 1069 (11th Cir. 2000).
[34] Tran v. Waste Management, Inc., 290 F.Supp.2d 1286, 1293 (M.D. Fla. 2003).
[35] Lewis v. Wyeth, 2004 WL 3569843, * 3 (N.D. Fla. 2004).
[36] *Id.*
[37] Legg v. Wyeth, 428 F.3d 1317, 1325 n. 5 (11th Cir. 2005).

remand the case to the state court.[38] The district court may base this determination on the plaintiff's pleadings at the time of removal and may consider affidavits and deposition transcripts submitted by the parties.[39]

III. VOLUNTARY / INVOLUNTARY RULE

The Eleventh Circuit follows the voluntary/involuntary rule. This rule provides that a defendant may remove a qualified diversity action from state to federal court after dismissal of a non-diverse defendant only if the plaintiff voluntarily dismisses the non-diverse defendant or takes some other voluntary action that causes the case to be removable. If the dismissal is the result of either the defendant or the court's action, against the wishes of the plaintiff, the case cannot be removed.[40]

A. "Voluntary" Dismissal

Voluntary acts rendering an initially non-removable case removable would include amendments to the state court complaint to increase the amount in controversy or amendments that drop a nondiverse party, voluntarily settling a claim against the non-diverse defendant, and voluntarily moving to another state, thereby creating diversity.[41]

B. Exceptions

The fraudulent joinder exception derives from the statutory requirements of 28 U.S.C. §1441(b). In referring to diversity cases, the statute's language directs the court to align the citizenship of the parties *properly joined*.[42] If a party is improperly added, that party is deemed a sham party and is disregarded for purposes of removal.[43]

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[38] *Lewis*, 2004 WL 3569843 at * 3.
[39] *Id.*
[40] Katz v. Costa Armatori, 718 F. Supp. 1508, 1509 (S.D. Fla. 1989).
[41] PENELOPE A. DIXON & DAVID J. WALZ, *Removal, in* The Defense Speaks 91 (Barbara Busharis ed., 2006).
[42] *Katz*, 718 F. Supp. at 1510.
[43] *Id. See* discussion regarding Fraudulent Joinder *supra* Section II.

IV. WAIVER OF RIGHT TO REMOVE

A. Waiver by Defending

Waiver can occur if a defendant's conduct indicates submission to the jurisdiction of the state court, manifests intent to litigate on the merits in state court, or indicates an abandonment of the federal forum.[44] Determination of whether a waiver of the right to remove has occurred by active participation in state court proceedings must be made on a case-by-case basis.[45] The relevant question appears to be whether the defendant has taken further action that would indicate an intention to make affirmative use of the state court process.[46] However, the inconsistency of the rulings even within a given district demonstrate the risk a defendant takes in taking any action in state court before removal.

For instance, one judge in the Middle District of Florida held that the filing of a motion to dismiss before the case became removable did not constitute waiver of right to remove through active participation in state court proceedings where the motion to dismiss was followed by a timely and proper removal.[47] Another judge presiding in the Middle District of Florida found that the defendant did waive his right to a federal forum and remanded a case where the defendant moved to dismiss and set the motion for hearing.[48] In a more obvious case pending in the Middle District of Florida, diverse defendants named in the plaintiff's original state court complaint waived their right to remove the case to federal court where they failed to file a notice of removal within thirty days and instead willingly proceeded in state court, deposed the plaintiff's president, answered interrogatories, requested document production, and moved to

[44] Scholz v. RDV, 821 F.Supp. 1469 (M.D. Fla. 1993).
[45] Hill v. State Farm Mut. Auto. Ins. Co., 72 F.Supp.2d 1353 (M.D. Fla. 1999).
[46] Somoano v. Ryder Systems, Inc., 985 F.Supp. 1476, 1478 (S.D. Fla. 1998).
[47] *Hill*, 72 F.Supp.2d at 1353.
[48] *Scholz*, 821 F.Supp. at 1470-71.

compel discovery and to dismiss the plaintiff's original complaint.[49]

In the Southern District of Florida, one judge held that a defendant waived the right to remove where the parties submitted an agreed order granting a motion to dismiss prior to removal to federal court.[50] In another Southern District of Florida case, neither filing an answer with affirmative defenses nor defending against preliminary injunction constituted waiver.[51]

B. Waiver by Consent

While we were unable to locate any cases directly on point on this topic, we believe that whether a Defendant's consent to Plaintiff's filing in state court operates as a waiver of the right to remove would be evaluated on a case by case basis and would involve a case specific analysis of the facts and circumstances surrounding the defendant's consent.

C. Waiver by Contract

A forum selection clause may operate as a waiver of a defendant's right to remove an action to federal court, but the waiver must be clear and unequivocal.[52] A forum selection clause that provides for the submission of jurisdiction to a particular county, but fails to specify that the matter must be filed in state court, will not operate as a waiver of a defendant's right to remove an action to federal court.[53] The clause must provide unambiguously that all litigation arising under the subject contract is to be conducted in a specific state court before such a clause may prevent removal.[54]

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[49] Nationawide Anesthesia Serv., Inc. v. Diaz, 442 F.Supp.2d 1353 (M.D. Fla 1999).
[50] Fernandez v. Amrep, Inc., 1999 WL 54524 (S.D. Fla. 1999).
[51] Miami Herald Publishing Co. v. Ferre, 606 F.Supp. 122 (S.D. Fla.1984).
[52] Links Design, Inc. v. Lahr, 731 F.Supp. 1535 (M.D. Fla. 1990).
[53] Global Satellite Communication Co. v. Starmill U.K. Ltd., 378 F.3d 1269, 1272 (11th Cir. 2004); Ocwen Orlando Holdings Corp. v. Harvard Prop. Trust LLC, No. 6:07-cv-1113-Orl-31DAB, 2007 WL 2330915 (M.D. Fla. Aug. 13, 2007).
[54] Submersible Systems Technology, Inc. v. 21st Century Film Corp., Inc., 767 F.Supp. 266, 268 (S.D. Fla. 1991).

V. PRACTICE POINTERS

The most common reasons for remand are lack of subject matter jurisdiction and defects in the removal procedure. When the federal court lacks jurisdiction over the subject matter, mandatory remand of the matter is required at any time prior to final judgment.[55] Accordingly, attention to the procedural and substantive details in your Notice of Removal is critical since many district court judges will remand a case *sua sponte* before you are given the opportunity to brief the issues in opposition to a motion for remand.

[55] 28 U.S.C. § 1447(c).

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I. POWER AND RIGHT TO REMOVE

Pursuant to 28 U.S.C. § 1441, a state court action is removable to federal court if the federal court would have had original jurisdiction.[1] Thus, the claims asserted must either (1) arise under federal law or, (2) the plaintiffs and defendants must be diverse, and a threshold amount in controversy must be satisfied.[2]

Because removal is purely a statutory right, federal courts in Georgia will strictly and narrowly construe the relevant statutes and resolve all doubts and uncertainties in favor of remand.[3] In the absence of a fraudulent purpose to defeat removal, a plaintiff may by the allegations of its complaint, determine the status of the case with respect to its removability when the case is commenced.[4] The power to determine the removability of the case generally remains with the plaintiff throughout the litigation.[5]

[1] 28 U.S.C. § 1441 (2007); *See also* Kuhn v. Brunswick Corp., 871 F. Supp. 1444, 1445 (N.D. Ga. 1994).
[2] 28 U.S.C. § 1441(b).
[3] *Kuhn*, 871 F. Supp. at 1446; Townsend v. Monumental Life Ins. Co., 2007 U.S. Dist. LEXIS 38011, at *7 (N.D. Ga. May 7, 2007).
[4] Jenkins v. National Union Fire Ins. Co. of Pa., 650 F. Supp. 609 (N.D. Ga. 1986).
[5] *Id.*

A. The Parties

1. Defining "Parties in Interest"

A defendant, but not a plaintiff, may remove a state court action to federal court.[6] Additionally, a defendant who has been served with the lawsuit may only remove an action on the basis of diversity if the defendant is not a resident of the forum state.[7] When determining whether diversity of citizenship exists, a corporation is a resident both of the state of its incorporation and the state in which it has its principal place of business.[8] A third-party defendant may remove an action if a "separate and independent" federal question is stated in the third-party complaint.[9]

In cases involving multiple defendants, all defendants must consent to or join in the notice of removal, and their consent must be expressed to the court.[10] Georgia courts are divided as to whether a later-served defendant may remove an action more than thirty days after service on the first-served defendant.[11] At least one court has noted, however, that the trend is toward allowing the later-served defendant to remove.[12]

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[6] *See* 28 U.S.C. § 1441.
[7] 28 U.S.C. § 1441(b).
[8] *See* 28 U.S.C. § 1332(c); Fritz v. Am. Home Shield Corp., 751 F.2d 1152, 1153 (11th Cir. 1985); Barnett v. Norfolk Dedham Mut. Fire Ins. Co., 773 F. Supp. 1529, 1530 (N.D. Ga. 1991).
[9] *See* Charter Medical Corp. v. Friese, 732 F. Supp. 1160, 1162 (N.D. Ga. 1989) (citing Carl Heck Engineers, Inc. v. Lafourche Parish Police Jury, 622 F.2d 133 (5th Cir. 1980)). *See also* 28 U.S.C. § 1441(a), (c). *Carl Heck* was superseded by a 1990 amendment to 28 U.S.C.A. § 1441(c), which required that the "separate and independent claim or cause of action [be] within the jurisdiction conferred by section 1331 of this title." 28 U.S.C.A. § 1441(c). *See, e.g.,* Cross Country Bank v. McGraw, 321 F. Supp. 2d 816, 822-23 (S.D. W.Va. 2004); Moss Land & Mineral Corp. v. Fidelity & Cas. Co. of N.Y., 2003 U.S. Dist. LEXIS 9940, at *7-8 (N.D. Ala. 2003). Thus, third-party defendants cannot remove if diversity is the basis for federal court jurisdiction. *See id. See also* Nat'l Am. Ins. Co. v. Advantage Contracts Servs., 200 F. Supp. 620, 621-22 (E.D. La. 2002).
[10] *Kuhn*, 871 F. Supp. at 1446.
[11] *See, e.g.,* General Pump & Well, Inc. v. Laibe Supply Corp., 2007 U.S. Dist. LEXIS 80656 (S.D. Ga. Oct. 31, 2007) (permitting a later-served defendant to remove but citing other cases in Georgia where courts have held that a later-served defendant may not remove if more than thirty days has passed since the first-served defendant was served). *But see Kuhn*, 871 F. Supp. at 1447 (precluding later-served defendant from initiating removal).
[12] *See General Pump & Well*, 2007 U.S. Dist. LEXIS 80656, at *9.

2. Presence of "Doe" Defendants

Diversity jurisdiction generally requires "complete diversity;" every plaintiff must be diverse from every defendant.[13] Despite the requirement of complete diversity, the existence of unidentified or "Doe" defendants will not defeat diversity.[14]

3. Diversity for Putative Class Actions

The Class Action Fairness Act of 2005 ("CAFA")[15] broadly redefined removal for qualified class actions and mass actions. For example, complete diversity gives way to "minimal diversity," which requires that only one member of the plaintiff class – named or unnamed – be diverse from any one defendant.[16] Further, the amount in controversy must be proved to be more than $5,000,000, in the aggregate.[17] The defendant does not bear the burden of proving that each individual class member's claims exceed $75,000. Additionally, the CAFA eliminated the one-year limited removal period for diversity suits.[18] Further, it allows one defendant to remove the entire case, with or without the consent of its codefendants.[19] Moreover, any one defendant may remove a qualified class action or mass action even if other defendants would not be *authorized* to remove the action.[20]

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[13] 28 U.S.C. § 1332; *See also* Hodach v. Caremark Rx, Inc., 374 F. Supp. 2d 1222, 1224 (N.D. Ga. 2005); Peebles v. Merrill Lynch, Pierce, Fenner & Smith Inc., 431 F.3d 1320, 1325 (11th Cir. 2005).

[14] *See, e.g.*, Jordan v. Equitable Variable Life Ins. Co., 2006 U.S. Dist. LEXIS 21341, at *2 (N.D. Ga. April 29, 2006). *See also* 28 U.S.C. § 1441 (". . . the citizenship of defendants sued under fictitious names shall be disregarded").

[15] *See* Pub. L. No. 109-2, 119 Stat. 4. This article deals only briefly with the CAFA and does not attempt to provide a detailed analysis of the Act. The CAFA does not govern all class actions. That said, it is worth noting that mass actions, which are not brought as class actions under Fed. R. Civ. P. 23 or any state analogue may fall under the broad sweep of the CAFA. *See* 28 U.S.C. § 1332(d)(11); Lowery v. Alabama Power Co., 483 F.3d 1184, 1195 (11th Cir. 2007). Thus, practitioners attempting to remove or remand a mass action or a traditional class action should consult the CAFA.

[16] *Lowery*, 483 F.3d at 1193.

[17] 28 U.S.C. § 1332(d)(2), (6); *Lowery*, 483 F.3d at 1193.

[18] *See* 28 U.S.C. § 1453; *Lowery*, 483 F.3d at 1195.

[19] *See* 28 U.S.C. §§ 1453 and 1446; *Lowery*, 483 F.3d at 1196.

[20] *See Lowery*, 483 F.3d at 1197.

B. The Amount in Controversy

1. Establishing the Amount in Controversy

Generally, the amount in controversy must exceed $75,000 exclusive of interest and costs.[21] Courts in Georgia employ the "plaintiff viewpoint" rule, which assesses the amount in controversy with respect to "the value of the plaintiff's right sought to be enforced."[22] This is true regardless of whether the plaintiff seeks pecuniary or injunctive or declaratory relief.[23] Any amount sought by the defendant in a counter claim or cross-claim cannot be used to meet the jurisdictional amount, even if the defendant's claim is compulsory under state law.[24]

The burden of proof to establish the amount in controversy in removed cases rests with the defendant.[25] The defendant cannot carry its burden with conclusory allegations in the notice of removal that the jurisdictional amount is satisfied.[26] Furthermore, plaintiff's refusal to stipulate that its claims do not exceed the jurisdictional amount is insufficient to satisfy the defendant's burden.[27]

2. Application When a Specific Dollar Amount is Not Pled

If the plaintiff fails to plead a specific amount of damages, the removing defendant must show by a preponderance of the evidence that the amount in controversy exceeds the jurisdictional requirement.[28] This requires an examination of "whether it is facially apparent

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[21] 28 U.S.C. § 1332; *See also Hodach*, 374 F. Supp. 2d at 1223; *Peebles*, 431 F.3d at 1325.
[22] *Townsend*, 2007 U.S. Dist. LEXIS 38011, at *7 (internal quotes omitted) (citing Ericsson GE Mobile Commc'ns, Inc. v. Motorola Commc'ns & Elec. Inc., 120 F.3d 216, 219 (11th Cir. 2006)).
[23] *See, e.g.*, Friedman v. New York Life Ins. Co., 410 F.3d 1350, 1358 (11th Cir. 2005).
[24] *See* Continental Carriers, Inc. v. Goodpasture, 169 F. Supp. 602 (M.D. Ga. 1959).
[25] *See* Allen v. Toyota Motor Sales, U.S.A., Inc., 155 Fed. Appx. 480 (11th Cir. 2005) (unpublished); *Townsend*, 2007 U.S. Dist. LEXIS 38011, at *7.
[26] Williams v. Best Buy Co., Inc., 269 F.3d 1316, 1319-20 (11th Cir. 2001).
[27] *See* Orbitz, Inc. v. City of Columbus, 2007 U.S. Dist. LEXIS 37932, at *5 (M.D. Ga. May 24, 2007); *Williams*, 269 F.3d at 1320.
[28] Tapscott v. MS Dealer Serv. Corp., 77 F.3d 1353, 1356-57 (11th Cir. 1996) *superseded on other grounds by* Cohen v. Office Depot, Inc., 204 F.3d 1069, 1072-73 (11th Cir. 2000); Miedema v. Maytag Corp., 450 F.3d 1322, 1330 (11th Cir. 2006); *Williams*, 269 F.3d at 1319; *Allen*, 155 Fed. Appx. at 481; *Townsend* 2007 U.S. Dist. LEXIS, at *7-8.

from the complaint that the amount in controversy exceeds the jurisdictional requirement."[29] The court may consider post-removal evidence in assessing jurisdiction provided that the court judge any jurisdictional facts supporting removal as of the time of removal.[30] A court may not, however, order post-removal discovery for the purpose of establishing jurisdiction in diversity cases.[31]

If the plaintiff has specifically claimed less than the jurisdictional amount, the removing defendant must prove to a "legal certainty" that plaintiff could not recover less than the jurisdictional amount if plaintiff prevails.[32] The removing defendant must show that "an award below the jurisdictional amount would be outside the range of permissible awards should plaintiff ultimately prevail."[33] Plaintiff is not required to specify an exact amount of claimed damages for the legal certainty standard to apply.[34] Thus, a complaint requesting "judgment in [plaintiff's] favor and against Defendants, the total for all Defendants on all counts, including statutory penalties and interests, not to exceed Seventy Four Thousand Five Hundred and 00/100 Dollars" will invoke the legal certainty test.[35] Conclusory allegations based on "ambiguous calculations" supplied by defendant will not satisfy the legal certainty standard.[36] Likewise, a relatively specific damage estimate by a defendant that does not "provide the Court with the underlying facts necessary to support [the] damage estimate" will not suffice.[37]

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[29] *Miedema* 450 F.3d at 1330; *Williams* 269 F.3d at 1319; *Townsend* 2007 U.S. Dist. LEXIS 38011, at *8.
[30] Poore v. Am. Amicable Life Ins. Co., 218 F.3d 1287, 1290-91 (11th Cir. 2000); Sierminski v. Transouth Fin. Corp., 216 F.3d 945, 949 (11th Cir. 2000); *Townsend*, 2007 U.S. Dist. LEXIS 38011, at *8; *Allen*, 155 Fed. Appx. at 482.
[31] *Lowery*, 483 F.3d at 1215, 1217-18 (stating that "[t]he defendants' request for discovery is tantamount to an admission that the defendants do not have a factual basis for believing that jurisdiction exists. The natural consequence of such an admission is remand to state court").
[32] Burns v. Windsor Ins. Co., 31 F.3d 1092, 1097 (11th Cir. 1994); *Orbitz*, 2007 U.S. Dist. LEXIS 37932, at *3-4.
[33] *Orbitz*, 2007 U.S. Dist. LEXIS 37932, at *5-6.
[34] *Id.* at *4.
[35] City of Columbus v. Hotels.com, Inc., 2007 U.S. Dist. LEXIS 37934, at *7 (M.D. Ga. May 24, 2007).
[36] *Orbitz*, 2007 U.S. Dist. LEXIS 37932, at *10.
[37] *Hotels.com*, 2007 U.S. Dist. LEXIS 37934, at *12.

3. Amount in Controversy Where Equitable Relief is Sought

"The value of injunctive or declaratory relief for amount in controversy purposes is the monetary value of the object of the litigation that would flow to the plaintiffs if the injunction were granted."[38] If a defendant assigns only "speculative and immeasurable" value to equitable relief, the defendant will not have met its burden of establishing that the amount in controversy requirement is satisfied.[39]

4. Defeating Removal by Amending Relief Sought

The court must determine whether subject matter jurisdiction exists at the time of removal.[40] Plaintiffs' amendment of its pleadings after removal will not destroy federal court jurisdiction.[41] Thus, in *Poore v. American-Amicable Life Ins. Co.*,[42] the Eleventh Circuit held that the district court erred in remanding the case based on the amount in controversy alleged in the plaintiff's post-removal complaint.[43]

Practitioners should note that the Eleventh Circuit has recognized that at least one post-removal event, namely the failure to join indispensable parties, may require remand.[44] The United States District Court for the Northern District of Georgia has explained the sensibility of this rule as follows:

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[38] Leonard v. Enterprise Rent a Car, 279 F.3d 967, 973 (11th Cir. 2002); Long v. DeAngelo Bros., Inc., 2006 U.S. Dist. LEXIS 42797, at *3 (M.D. Ga. June 26, 2006).
[39] *Long*, 2006 U.S. Dist. LEXIS 42797, at *4.
[40] *See, e.g.*, Pintando v. Miami-Dade Housing Agency, 2007 U.S. App. LEXIS 22676, at *7 (11th Cir. September 25, 2007) (citing cases); *Poore*, 218 F.3d at 1291; *Townsend*, 2007 U.S. Dist. LEXIS 38011, at *8; Bota v. Clark Atlanta Univ., Inc., 2006 U.S. Dist. LEXIS 72698, at *3 (N.D. Ga. September 19, 2006).
[41] *See Pintando*, 2007 U.S. App. LEXIS 22676, at *7-8.
[42] 218 F.3d 1287 (11th Cir. 2000).
[43] *Id.* at 1291. *See also* Behlen v. Merrill Lynch, Phoenix Inv. Partners, Ltd., 311 F.3d 1087 (11th Cir. 2002) (holding that the district court must determine whether a federal question exists at the time of removal by reviewing the original complaint rather than after removal under an amended complaint that dropped the federal claim).
[44] *See Poore*, 218 F.3d at 1291 n.2. In *Poore*, the Eleventh Circuit noted that in *In re Merrimack Mut. Fire Ins. Co.*, 587 F.2d 642, 646 (5th Cir. 1978) the court held that a trial court must remand if indispensable parties are not joined. *Id.* The Eleventh Circuit observed that it is bound by *Merimack* pursuant to *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.) (en banc).

> This exception for indispensable parties is sensible because in diversity cases the question of indispensable parties is inherent in the issue of federal jurisdiction and indispensable parties must be joined, sua sponte by the court if need be, even though to do so destroys complete diversity of citizenship of the parties and ousts federal courts of jurisdiction.[45]

Under this rationale, therefore, the failure to join a non-diverse indispensable party would only support a remand in a diversity case and should have no bearing on federal question cases.

C. Time of Existence of Grounds for Removal

1. Event Triggering Thirty-Day Period for Actions Initially Removable

Pursuant to 28 U.S.C. § 1446(b), a defendant wishing to remove has a thirty day window to notice its removal "after the receipt . . . of a copy of the initial pleading" or "after receipt . . . of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained" that the case has become removable if it was not removable initially.[46]

An action becomes removable when the defendant can "intelligently ascertain" the removability of the case from the face of the pleading. Thus, a defendant may "first ascertain" the case is removable on diversity grounds from an initial pleading, even when the plaintiff fails to state its own residence,[47] if "the initial pleading provides at least a clue as to the plaintiff's citizenship."[48] For example, the United States District Court for the Northern District of Georgia has held that a complaint filed in Georgia alleging damages against a foreign defendant for an accident that occurred in another state puts the defendant on notice of the action's removability on diversity grounds.[49] Thereafter, the burden is on the defendant to file for removal within thirty days of receipt of the . . . pleading."[50]

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[45] Davenport v. Ford Motor Co., 2006 U.S. Dist. LEXIS 49481, at *17 n.7 (N.D. Ga. July 20, 2006) (internal quotations omitted).
[46] 28 U.S.C. § 1446(b).
[47] *Kuhn*, 871 F. Supp. at 1446.
[48] *Id.*
[49] *Id.*
[50] *Id.*

2. Event Triggering Thirty-Day Period for Actions Not Initially Removable

The removal statute directs that the thirty days beings to run from the defendant's "receipt . . . through service or otherwise" of the document apprising the defendant of federal subject matter jurisdiction.[51] Courts in Georgia follow the "service rule" and not a "receipt rule" to determine when the removal period begins to run.[52] Thus, the thirty-day removal period begins running after proper service of the initial pleading or paper setting out a removable claim.[53] Informal service of a pleading is not sufficient to begin the thirty-day period.[54]

The Northern District of Georgia has indicated that "other papers" can only be "written vehicle[s] communicating the nature of plaintiff's . . . claims."[55] Moreover, "the import of the communication" likely has to be susceptible to independent verification.[56] "Other papers" therefore do not include oral communications between counsel, not reduced to writing and not of a specific nature.[57] Similarly, an affidavit of counsel regarding purported oral settlement communications likely is not an "other paper" within the meaning of 28 U.S.C. § 1446(b).[58] Deposition testimony and statements made in open court, however, may constitute "other papers" because they are recorded by a court reporter and available in transcript form.[59] In

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[51] 28 U.S.C. § 1446(b).
[52] *See* Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc., 526 U.S. 344, 347-48 (1999) (overruling Michetti Pipe Stringing, Inc. v. Murphy Bros., Inc., 125 F.3d 1396, 1398 (11th Cir. 1997)); *General Pump & Well*, 2007 U.S. Dist. LEXIS 80656, at *8; Brown v. Macon-Bibb County Planning & Zoning Comm'n, 2007 U.S. Dist. LEXIS 54842 (M.D. Ga. July 30, 2007).
[53] *Id.*
[54] *Id.*
[55] Smith v. Bally's Holiday, 843 F. Supp. 1451, 1454-55 (N.D. Ga. 1994) (noting that the "plain language of [§1446(b)] does not leave room to 'wiggle' oral communications into its meaning").
[56] *Id.* at 1455.
[57] *Id.*
[58] *Id.* (stating, in dicta, that "[g]iven the nature of settlement negotiations (a likely setting for telephonic conversations between counsel) and the natural combative tendencies of litigation counsel in general, there can be no assurance whatsoever that even a sworn affidavit by an officer of the court will be free of "spin doctoring" upon the contents of the purported conversation").
[59] *Id.*

addition, a response to "a carefully drafted, specific interrogatory to plaintiff regarding the amount of . . . damages sought" could constitute an "other paper."[60]

II. FRAUDULENT JOINDER

A. Test for Fraudulent Joinder

Because diversity jurisdiction generally requires complete diversity,[61] joinder of a non-diverse party prior to removal will usually defeat removal and require remand to state court. Courts have recognized, however, that plaintiffs may attempt to defeat removal by fraudulently joining a non-diverse defendant or plaintiff.[62] The defendant who wishes to avoid a remand based on lack of diversity bears the "heavy"[63] burden of proving fraudulent joinder.[64] "[T]he Court must evaluate the factual allegations in the light most favorable to plaintiffs and must resolve any uncertainties about state substantive law in favor of plaintiffs."[65] If there exists "even a possibility" that a state court would determine that the challenged party was properly joined, the federal court must remand.[66]

B. Evidence of Fraudulent Joinder

If the removing defendant claims a non-diverse *defendant* was joined, it must prove that either: (1) "there is no possibility the plaintiff can establish a cause of action against the resident defendant; or (2) the plaintiff has fraudulently pled jurisdictional facts to bring the resident defendant into state court."[67] If the removing defendant seeks to avoid remand on the basis that a *plaintiff* was fraudulently joined, the defendant is required to prove that either: "(1) the non-

[60] *Hodach*, 374 F. Supp. 2d at 1225.
[61] *See* 28 U.S.C. § 1332; *Hodach*, 374 F. Supp. 2d at 1222.
[62] *See, e.g.*, *Hodach*, 374 F. Supp. 2d at 1224 ("The vast majority of fraudulent joinder decisions involve a defendant alleging that a non-diverse defendant was fraudulently joined to defeat complete diversity").
[63] *Davenport*, 2006 U.S. Dist. LEXIS 49481, at *6.
[64] *Hodach*, 374 F. Supp. 2d at 1225.
[65] *Id.*; *Davenport*, 2006 U.S. Dist. LEXIS 49481, at *6.
[66] *Hodach*, 374 F. Supp. 2d at 1225.
[67] *Id.* at 1224 (quoting Crowe v. Coleman, 1137 F.3d 1536, 1538 (11th Cir. 1997)).

diverse plaintiff cannot state a cause of action against the defendants in state court (for example, where the non-diverse plaintiff's claims are barred as a matter of law or the non-diverse plaintiff is not a real party in interest); or (2) the plaintiff has fraudulently pleaded jurisdictional facts to destroy complete diversity."[68]

III. VOLUNTARY / INVOLUNTARY RULE

A. "Voluntary" Dismissal

The voluntary/involuntary rule provides that a case that was non-removable when commenced shall not thereafter become removable except where the plaintiff, by its sole voluntary action, alters or amends its pleadings to give rise to federal court subject matter jurisdiction.[69] In a diversity case, "if the resident defendant [that destroyed diversity initially] [is] dismissed from the case by the voluntary act of the plaintiff, the case [becomes] removable, but if the dismissal was the result of either the defendant's or the court's acting against the wish of the plaintiff, the case [can]not be removed."[70] Courts in Georgia do not follow a "finality rule" to determine voluntariness.[71]

B. Exceptions

The voluntary/involuntary rule does not apply to cases where a court orders dismissal of a diverse defendant for reasons that are purely jurisdictional and does not reach the merits of the case.[72] Additionally, "[f]raudulent joinder is a well established exception to the voluntary-involuntary rule."[73]

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[68] *Hodach*, 374 F. Supp. 2d at 1224.
[69] *See Jenkins*, 650 F. Supp. at 609.
[70] *Id.* at 611.
[71] *Id.* at 612 (declining to adopt a rule that a final, unappealable order of a state court that results in complete diversity always supports removal).
[72] *See* Insinga v. LaBella, 845 F.2d 249, 254 (11th Cir. 1988).
[73] In *Insinga*, the Eleventh Circuit explained that "a trial court's finding that it lacks jurisdiction over a resident defendant is akin to a finding of fraudulent joinder of the defendant in that it involves a determination by the court that the resident defendant was never properly before the court, rather than a determination that the court had

IV. WAIVER OF RIGHT TO REMOVE

A defendant's right to remove is not absolute and may be waived, even when the federal court's subject matter jurisdiction is not in question.

A. Waiver by Defending

A defendant may waive its right to remove if it can be shown that the defendant "actively participated" in the state court proceedings.[74] Active participation is synonymous with litigating on the merits or "taking some substantial offensive or defensive action in the state court action indicating a willingness to litigate in that tribunal before filing a notice of removal."[75] A finding of waiver by active participation "must be made on a case-by-case basis."[76] The defendant does not waive its right to remove if the defendant's participation in the state court action was "dictated by the rules of that court."[77] Thus, in Georgia, a defendant does not waive its right to remove the case to federal court if the defendant first files an answer in state court and then files a timely petition for removal.[78]

B. Waiver by Contract

A defendant may also contractually waive its right to remove.[79] A contractual waiver must be specific in its terms,[80] but it need not be "clear and unequivocal."[81] For example, a contract with a service of suit clause that states that the defendant "will submit to the jurisdiction

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jurisdiction of that defendant but that the case against him, although not frivolous, was not meritorious." *Insinga*, 845 F.2d at 254-55.

[74] Yusefzadeh v. Nelson, Mullins, Riley & Scarborough, LLP, 365 F.3d 1244 (11th Cir. 2004) (per curiam).

[75] *Id.* at 1245.

[76] *Id.* at 1246 (internal quotes omitted).

[77] *Id.* (internal quotes omitted) (holding that a defendant did not waive its right by filing a responsive pleading before its notice of removal in a case originally brought in Florida because Florida requires the filing of responsive pleadings within 20 days after receipt of the complaint, which is 10 days sooner than the defendant was required to notice removal under 28 U.S.C.A. § 1441).

[78] Cotton v. Federal Land Bank of Columbia, 246 Ga. 188, 269 S.E.2d 422 (1980).

[79] Russell Corp. v. Am. Home Assurance Co., 264 F.3d 1040 (11th Cir. 2001).

[80] *See, e.g.*, Holiday Hospitality Franchising, Inc. v. The Inn at Gulf Shores, Inc., 2006 U.S. Dist. LEXIS 9709 (N.D. Ga. February 15, 2006).

[81] Snapper Inc. v. Redan, 171 F.3d 1249, 1260 (11th Cir. 1999).

of any Court of competent jurisdiction within the United States and will comply with all requirements necessary to give such Court jurisdiction" has been held to be a contractual waiver of the right to remove.[82] A similarly worded forum selection clause also constitutes a waiver of the ability to seek removal.[83]

C. Waiver in Multi-Defendant Cases

Because removal requires the consent of all defendants to an action, waiver by one defendant will render the entire cause nonremovable.[84]

V. PRACTICE POINTERS

Although Georgia requires defendants to serve an answer within 30 days of service of the summons and complaint,[85] a Georgia defendant that does not answer in state court within 30 days will not be found in default by the state court, even if the action is remanded, so long as the defendant properly noticed its removal within 30 days.[86] In such circumstances, the defendant generally is under no obligation to replead in state court if the action is remanded.[87]

Similarly, if the defendant answers in state court, the defendant is under no obligation to replead post-removal. The Eleventh Circuit has explained that "the Federal Rules of Civil

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[82] *Russell Corp.* 264 F.3d at 1047.
[83] *Snapper*, 171 F.3d at 1260, 1262. *But see Holiday Hospitality*, 2006 U.S. Dist. LEXIS 9709, at *3-4 (holding that the following language did not constitute a waiver of the right to remove: "To the extent permitted by law, the undersigned (i) consent and submit, at [plaintiff]'s election and without limiting [plaintiff]'s rights to commence an action in any other jurisdiction, to the personal jurisdiction and venue of any courts (federal, state or local) situated in the County of Dekalb, State of Georgia; (ii) waive any claim, defense or objection in any proceeding based on lack of personal jurisdiction, improper venue, forum non conveniens or any similar basis").
[84] *Russell Corp.* 264 F.3d at 1044, 1050; *Holiday Hospitality*, 2006 U.S. Dist. LEXIS 9709, at *3. This may not be the case with class actions or mass actions removed pursuant to CAFA. *See supra* n. 11-16 and accompanying text.
[85] *See* O.C.G.A. 9-11-12(a).
[86] *See* Teamsters Local 515 v. Roadbuilders, Inc. of Tennessee, 249 Ga. 418, 291 S.E.2d 698 (1982) *overruled on other grounds by* Shields v. Gish, 280 Ga. 556, 629 S.E.2d 244 (2006); Cotton v. Federal Land Bank of Columbia, 246 Ga. 188, 269 S.E.2d 422 (1980).
[87] *Cotton*, 246 Ga. at 189-90, 269 S.E.2d at 423-24.

Procedure contemplate the filing of a responsive pleading prior to the removal of a case" and that Federal Rule of Civil Procedure 81(c) makes re-pleading unnecessary in removed actions.[88]

[88] *Yusefzadeh*, 365 F.3d at 1246.

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