REMOVAL AND REMAND
OF SUITS INVOLVING GOVERNMENTAL ENTITIES

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CHAPTER 21

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Mr. Hightower has authored and presented articles on local government law and litigation at educational programs sponsored by the International Municipal Lawyers Association, the Texas City Attorneys Association, the Texas Municipal League, the State Bar of Texas, the University of Texas School of Law, the Center for American and International Law, and the Houston Bar Association. During his legal career, he has represented governmental entities in disputes covering such matters as: vested property rights, land use regulation, regulatory takings, eminent domain, open meetings act compliance, employment discrimination, and civil rights and law enforcement liability. Reported cases in which Mr. Hightower has been involved include:

- *Gulf Coast Waste Disposal Auth. v. Four Seasons Equip., Inc*., 321 S.W.3d 168 (Tex.App.–Houston [1st Dist.] 2010, no pet.);
- *Artisan/Am. Corp. v. City of Alvin, Tex*., 588 F.3d 291 (5th Cir. 2009);
- *Howeth Inv., Inc. v. City of Hedwig Vill.*, 259 S.W.3d 877 (Tex.App.–Houston [1st Dist.] 2008, pet. denied);
- *Montgomery County v. Park*, 246 S.W.3d 610 (Tex. 2007);
- *ABT Galveston Ltd. P'ship v. Galveston Cent. Appraisal Dist*., 137 S.W.3d 146 (Tex.App.–Houston [1st Dist.] 2004, no pet.);
- *Sledd v. Garrett*, 123 S.W.3d 592 (Tex.App.–Houston [14th Dist.] 2003, no pet.);
- *Tollett v. City of Kemah*, 285 F.3d 357 (5th Cir. 2002);
- *Hagood v. City of Houston Zoning Bd. of Adjustment*, 982 S.W.2d 17 (Tex.App.–Houston [1st Dist.] 1998, no pet.);
- *Tex. Manufactured Hous. Ass'n, Inc. v. City of Nederland*, 101 F.3d 1095 (5th Cir. 1996);
- *Clawson v. Wharton County*, 941 S.W.2d 267 (Tex.App.–Corpus Christi 1996, writ denied);
- *Hobson v. Moore*, 734 S.W.2d 340 (Tex. 1987);
- *City of Houston v. Houston Gulf Coast Bldg. and Const. Trades Council*, 710 S.W.2d 181 (Tex.App.–Houston [1st Dist.] 1986, writ ref'd n.r.e.);
- *Pietzsch v. Mattox* , 719 F.2d 129 (5th Cir. 1983);
- *Duckett v. Civil Serv. Comm'n of City of Houston*, 598 S.W.2d 640 (Tex.Civ.App. – Houston [14th Dist.] 1980, writ ref'd n.r.e.)

In addition to his litigation practice, Mr. Hightower also serves as general counsel to the City of Hunters Creek Village and the Memorial Villages Police Department, a joint police department serving the Houston area cities of Piney Point Village, Bunker Hill Village, and Hunters Creek Village.

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I. INTRODUCTION

A. Scope and intent of this article. This article is offered as a general overview of the substantive and procedural rules governing a defendant's right to remove a civil case from state court to federal court, in certain circumstances, and is addressed to attorneys who have occasion to sue or defend governmental entities located in Texas. In consideration of the intended audience, special emphasis is given to issues commonly arising in cases involving governmental entities. Other issues, relevant to the subject of removal and remand but not commonly encountered in cases involving governmental entities, are addressed summarily or not at all. For a similar reason, the article emphasizes authority from the United States Court of Appeals for the Fifth Circuit and the federal district courts within the Fifth Circuit, particularly those within Texas.

B. A note of caution. This article is not intended as legal advice applicable to a particular situation. The subject of removal and remand is a complicated one. The statutes granting the right of removal are fairly brief. However, they have been in existence for more than 100 years and have been amended many times. Moreover, because of their relative brevity, the courts have had many opportunities to interpret the statutes and engraft their own requirements on the removal process. Some of those requirements are not apparent from the language of the statute. Care should be exercised in determining whether or not to remove a given case or to seek remand of a case that has been removed. Courts are expressly authorized by statute to award attorney's fees and costs against a defendant who removes a case without an objectively reasonable basis for doing so, and Rule 11 provides a similar basis for awarding costs and fees against a plaintiff who seeks remand without a reasonable basis.

For all these reasons, detailed analysis is sometimes required to determine the applicable rules governing removal and remand within a particular jurisdiction and to apply those rules to a given situation. Comprehensive legal works on the subject of federal practice and procedure such as James Wm. Moore et al., MOORE'S FEDERAL PRACTICE (3d ed. 2010) and Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, FEDERAL PRACTICE AND PROCEDURE (4th ed. 2011) are a good starting point for that effort but they are no substitute for individual review and analysis.

C. The defendant's right to remove. As a general rule, the plaintiff in civil litigation has the right to select the court and venue in which he wishes to proceed. The defendant has no choice in the matter, provided that the court selected by the plaintiff has subject matter jurisdiction and the venue is appropriate. A major exception to this general rule occurs when a case initially filed in state court is eligible for removal to federal court. In that circumstance, a defendant can control the choice between federal court and state court by exercising, or refraining from exercising, his statutory right of removal. This right of removal is an important weapon in the government defense lawyer's arsenal.

D. Considerations for removing a case to federal court. Where a case is eligible for removal from state court to federal court, the lawyers for the defendants have the opportunity to remove the case but are not obligated to do so. Any decision to remove a case should be based on the removing lawyer's professional judgment that his client will fare better in federal court than in state court and that the benefits of removal will outweigh any costs or risks. In some cases, a lack of care in evaluating the consequences of removal can result in significant harm to the removing party's position. For instance, where the state is a defendant, the removal of a case to federal court results in a waiver of the state's Eleventh Amendment immunity. *Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 623, 122 S.Ct. 1640, 1643-1646 (2002).

In the author's experience, many, if not most, lawyers who represent local governmental entities in Texas believe that, where federal claims are asserted against their clients and removal is permitted, it is almost always best to remove the case. This is sometimes true even when the state court would otherwise be considered a more favorable forum. The underlying beliefs supporting this opinion vary but include the following:

- Federal judges are more familiar with federal law and are more likely to apply that law correctly. Governmental defendants generally benefit from a correct application of the law because of the many immunity defenses that apply and the difficult burdens that are imposed on claimants under various federal statutes.
- The rules of federal procedure are more conducive than the state court rules to resolving a case on legal grounds in the early stages of the litigation. The opportunity provided by Fed. R. Civ. P. 12(b)(6) to file a motion to dismiss for failure to state a claim is not available under the state rules of civil procedure. Moreover, many defense attorneys believe that federal judges are more likely to grant dispositive motions and federal appellate courts are more likely to affirm them on appeal.
- A plaintiff's lawyer who elects to file a case in state court that includes claims that could have

> been brought in federal court is either deliberately trying to avoid federal court or is unfamiliar with the removal rights of the defendant. Where the plaintiff's lawyer is unfamiliar with removal it is likely that he will be inexperienced and uncomfortable in federal court. By removing the case, the defendants not only deprive the plaintiff's attorney of his choice of forum but often place him in an unfamiliar environment as well.

E. Federal question jurisdiction provides the basis for removing most cases. The two principal opportunities for removing cases to federal court occur when the federal court has original jurisdiction of a case filed in state court under either diversity or federal question jurisdiction. Of these two sources of subject matter jurisdiction, the one most often applicable to cases involving local governmental entities is federal question jurisdiction. This is true because local governmental entities are not often sued outside the state under whose law they were created and, as discussed below, only a non-resident defendant can remove a case based on diversity of citizenship.

II. REMOVAL

A. Removable Cases. "The right of removal is statutory; before a party may avail himself of it, he must show that he comes within the provisions of the statute." *Edwards v. E.I. Du Pont De Nemours & Co*., 183 F.2d 165, 168 (5th Cir. 1950). The authority for removal of cases from state court to federal court is found in Chapter 89 of Title 28 of the United States Code. 28 U.S.C.A. §§ 1441 – 1452. Generally, a defendant can remove "any civil action brought in a State court of which the district courts of the United States have original jurisdiction." 28 U.S.C.A. § 1441.

The two primary jurisdictional bases for removal are: a) diversity jurisdiction under 28 U.S.C.A. § 1332; and b) federal question jurisdiction under 28 U.S.C.A. § 1331. Other jurisdictional bases for removing cases will be of little interest to those suing or defending Texas governmental entities, but include: a) cases in which federal officers or agencies are sued or prosecuted, *id.* § 1442; b) cases in which members of the armed forces are sued or prosecuted; *id.* § 1442(a); c) civil actions or prosecutions against persons who are denied, or cannot enforce in state court "a right under any law providing for the equal civil rights of citizens of the United States", *id.* § 1443; and d) foreclosure actions against the United States, *id.* § 1444.

1. Diversity cases, generally. The authority for a federal court's diversity jurisdiction is found in 28 U.S.C.A. § 1332, which provides, in pertinent part,

> The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—(1) citizens of different States ….

28 U.S.C.A. § 1332. A federal court's removal jurisdiction in diversity cases is narrower than its jurisdiction under § 1332. Under § 1332, a court has jurisdiction over cases in which the defendants are citizens of the state in which the suit is brought but the plaintiff is not. A court's removal jurisdiction under § 1441(b) applies only to suits in which the defendant is not a citizen of the state in which the suit is brought. Otherwise the jurisdictional requirements are the same.

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

28 U.S.C.A. § 1441(b).

2. Federal Question cases, generally. The authority for a federal court's federal question jurisdiction is found in 28 U.S.C.A. § 1331:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C.A. § 1331. A federal court has jurisdiction over a case raising a federal question, regardless of the amount in controversy. See section VII. below for a discussion of issues that commonly arise in the determination of whether a federal question exists.

3. Statutory Bars to Removal. Not all cases that give rise to federal question jurisdiction are removable. Four categories of cases are defined in the removal statute itself as non-removable. The four categories are: (a) certain civil actions against railroads, *id.* § 1445(a); (b) certain civil actions against common carriers where the amount in controversy does not exceed $10,000, *id.* § 1445(b); (c) actions bought under state workers compensation laws, *id.* § 1445(c); and (d) actions brought under the Violence Against Women Act of 1994. *id.* § 1445(d). Congress has also passed other statutes limiting the federal courts' jurisdiction in various substantive areas. Examples include the following:

- The Anti-Injunction Act, 28 U.S.C.A. § 2283, prohibits injunctions of state proceedings, "except as authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments". *See, e.g., Zewe v. Law Firm of Adams & Reese*, 852 F.Supp. 516, 521 (E.D. La. 1993).
- The Tax Injunction Act, 28 U.S.C.A. § 1341, prohibits injunctions of a state tax where "plain, speedy, and efficient remedy can be had in the Courts of such state". *City of Houston v. Standard-Triumph Motor Co*., 347 F.2d 194, 196 (5th Cir. 1965).
- The Johnson Act, 28 U.S.C.A. § 1342, prohibits injunctions of rate regulation orders of state utility rate setting boards. *Gulf Water Benefaction Co. v. Pub. Util. Comm'n of Tex.*, 674 F.2d 462, 467 (5th Cir. 1982).

4. Federal Abstention. Additionally, some cases that are otherwise eligible for removal are subject to remand on the basis of various judge-made abstention doctrines.

> These cases reflect a doctrine of abstention appropriate to our federal system whereby the federal courts, "exercising a wise discretion", restrain their authority because of "scrupulous regard for the rightful independence of the state governments" and for the smooth working of the federal judiciary.

R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496, 501, 61 S.Ct. 643, 645 (U.S. 1941).

The United States Supreme Court has acknowledged several situations where, although a federal court may have federal question or diversity jurisdiction, abstention by a federal court is appropriate. Those situations include the following:

- To avoid federal constitutional question that could be rendered unnecessary by state-court interpretation of unclear state law. *R.R. Comm'n of Tex. v. Pullman Co*., 312 U.S. 496, 501, 61 S.Ct. 643, 645 (1941).
- To avoid interference with a complex state regulatory scheme. *Burford v. Sun Oil Co*., 319 U.S. 315, 334, 63 S.Ct. 1098, 1107 (1943).
- To avoid unclear state law in diversity case. *La. Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 25, 79 S.Ct. 1070, 1071 (1959).
- To avoid federal interference with essential state functions such as state criminal proceedings. *Younger v. Harris*, 401 U.S. 37, 54, 91 S.Ct. 746, 755 (1971).

A defendant who removes a case from state court to federal court will be equitably barred from asserting that the federal court should abstain from deciding any issues in the case. However, the plaintiff may assert that the court should abstain from assuming jurisdiction and remand the case back to state court based upon the appropriate abstention doctrine. *See, e.g., Brown v. Pearl River Valley Water Supply Co.*, 292 F.2d 395 (5th Cir. 1961).

5. Waiver by conduct. Under certain circumstances, actions taken by a defendant after a case has become removable, but before a notice of removal is filed, may be held to constitute a waiver of the defendant's right to remove. *Tedford v. Warner-Lambert Co*., 327 F.3d 423, 428 (5th Cir. 2003). The idea behind the waiver by conduct rule is that a defendant should not be allowed to "experiment" in state court before removing the case to federal court. *Moore v. Permanente Med. Group, Inc*., 981 F.2d 443, 447 (9th Cir. 1992).

However, in order to constitute a waiver, the defendant's action must be one that seeks to resolve the state court case on the merits. *Id*.

> A waiver of the right to remove must be clear and unequivocal; the right to removal is not lost by participating in state court proceedings short of seeking an adjudication on the merits.

Tedford, 327 F.3d at 428. A removing defendant's participation in a summary judgment hearing after a case has become removable constitutes a waiver of the right to remove. *Jacko v. Thorn Am., Inc*., 121 F. Supp. 2d 574, 577 (E.D. Tex. 2000).

Examples of actions in the state court that have been found not to constitute a waiver include:

- Moving to transfer venue, moving for entry of a confidentiality order, moving to consolidate, and filing special exceptions. *Tedford v. Warner-Lambert Co*., 327 F.3d 423, 428 (5th Cir. 2003).
- Filing a motion for summary judgment before the case became removable, and filing a motion to strike summary judgment evidence after the case became removable, but not participating in the summary judgment hearing. *Ortiz v. Brownsville Indep. Sch. Dist.*, 257 F.Supp.2d 885, 889 (S.D. Tex. 2003).
- Filing a general denial in state court prior to removing the case. *Gore v. Stenson*, 616 F.Supp. 895, 897 (S.D. Tex. 1984).
- A foreign corporation's failure to contest jurisdiction in state court. *Morgan Dallas Corp. v. Orleans Parish Sch. Bd.*, 302 F.Supp. 1208, 1209 (E.D. La. 1969).
- A defendant's filing of motions in state court prior to learning that case had become removable. *Custom Blending Int'l v. E.I. Dupont*, 958 F.Supp. 288, 289 (S.D. Tex. 1997).
- Filing a notice of deposition on written questions. *Great W. Inn v. Certain Underwriters*

at Lloyds of London, 2011 WL 1157620, at *8 (S.D. Tex. March 24, 2011).

- Seeking to dissolve a state court injunction. *George-Blanchard v. Wells Fargo Home Mortgage, Inc*., 2010 WL 5173004, at *4 (S.D. Tex. Dec. 14, 2010).
- Filing a plea to jurisdiction on the state claims and having that plea granted by the trial court prior to removal. *Suter v. Univ. of Tex. San Antonio*, 2010 WL 4690717, at *1 (W.D. Tex. Nov. 1, 2010).

6. Contractual waivers. Contractual provisions providing for the waiver of a defendant's right to remove are enforceable where that intent is clearly expressed. *Waters v. Browning-Ferris Indus., Inc*., 252 F.3d 796, 797 (5th Cir. 2001). In one Fifth Circuit case, a contractual clause that provided exclusive venue in a particular county was held to be an express waiver of removal rights where there was no federal district court located in that county. *Collin County v. Siemens Bus. Serv., Inc*., 250 F.App'x 45, 52, 2007 WL 2908926, at *5 (5th Cir. Oct. 3, 2007). Though the Fifth Circuit panel affirmed the district court's enforcement of the venue clause as a waiver of removal rights under the particular facts, it rejected the district court's conclusion that a choice of venue clause that provides venue in a particular county necessarily constitutes a waiver of removal rights. *Id*.

B. Jurisdiction over state law claims. If a case raises a federal question, the court's jurisdiction extends to "otherwise non-removable claims and causes of action." 28 U.S.C.A. § 1441(c). Once a case is properly removed, the federal court may rule on all issues properly before it, including "otherwise non-removable claims and causes of action … or, in its discretion, may remand all matters in which State law predominates." 28 U.S.C.A. § 1441(c). See more detailed discussion of this issue at section III. E. below.

C. Venue. The venue for a case that is removed from state court to federal court is in,

> the district court of the United States for the district and division embracing the place where such action is pending.

28 U.S.C.A. § 1441(a).

> There is no provision of federal law which would permit a defendant to remove an action to a federal court sitting in a district and division other than that where the state court action is pending.

Hoover v. Gershman Inv. Corp., 774 F. Supp. 60, 63 (D. Mass. 1991).

D. Procedure for Removal.

1. Applicable statutes and rules. The procedural requirements for removal are set out in the statute and, in some cases, in the local rules of the district courts. Courts have construed the statutory language to include other requirements that are not apparent from the express language of the statute. The basic procedural requirements for removal are set out in 28 U.S.C.A. § 1446.

The federal rules of procedure do not specifically address the procedural requirements for removing a case. However, three of the four Texas federal district courts have adopted their own local rules adding to or interpreting the requirements set out in § 1446. The relevant local rules are: a) Rule CV 81 of the Local Court Rules of the United States District Court for the Eastern District of Texas; b) Rules LR 81.1 and 81.2 of the Local Rules of the United States District Court for the Northern District of Texas; and c) Rule LR 81 of the Local Rules of the United States District Court for the Southern District of Texas. The Western District has not adopted a local rule specifically governing removal.

2. Notice of removal. The removal of a case from state to federal court is accomplished by filing a "notice of removal." The notice must contain "a short and plain statement of the grounds for removal" and must be "signed pursuant to Rule 11 of the Federal Rules of Civil Procedure." 28 U.S.C.A. §1446(a). The filing of the notice of removal in the federal court, the giving of notice to the opposing parties, and the filing of a copy of the notice of removal in the state court are all that is required to effect the removal. There is no requirement that the federal court enter an order accepting or confirming the removal. 28 U.S.C.A. § 1446(d); *In re Diet Drugs*, 282 F.3d 220, 232 (3rd Cir. 2002). In *Great W. Inn v. Certain Underwriters at Lloyds of London*, 2011 WL 1157620, at *3 (S.D. Tex. March 24, 2011), the district court rejected an argument that the defendant's removal notice was defective because it contained a "typographical error" mistakenly stating that another defendant, who had not been served, had joined in the removal.

3. Attachments. The statute requires that the notice of removal must be accompanied by "a copy of all process, pleadings, and orders served upon" the defendants in the state court. 28 U.S.C.A. § 1446(a). In some cases, the failure to include required attachments may provide a basis for remand.

In *Plaintiff 67,634-69,607 v. Trans Union LLC*, 2010 WL 4284956, at *2 (S.D. Tex. Oct. 22, 2010), the defendant attempted to remove 1,974 separate state court suits filed in Justice of Peace Court in Nueces

County, by filing a single notice of removal and attaching only a copy of a petition from an early multidistrict litigation proceeding in another court. The district court remanded the case, finding the attempt at removal to be defective because it purported to remove multiple non-consolidated cases with a single notice and because the notice of removal was not accompanied by copies of the individual state court petitions.

The local rules for the United States District Courts for the Eastern, Northern, and Southern Districts contain their own descriptions of the categories of state court documents that must be filed with the removal petition, as well as a list of other documents that must be filed when a case is removed. The local rules for the Western District do not contain a rule governing removals. The local rules for the district courts are different and a lawyer considering removal of a case should consult the rule for the district to which the case is being removed and meet all of the requirements contained in that rule. A summary of the district court filing requirements follows.

a. Eastern District. The rules for the United States District Court for the Eastern District of Texas require the removing party to file:

- a list of all parties in the case;
- a certified copy of the state court docket sheet;
- all pleadings that assert causes of action;
- all answers to pleadings;
- all process and orders;
- a complete list of attorneys involved in the action being removed;
- a record of which parties have requested trial by jury; and
- the name and address of the court from which the case is removed.

E.D. Tex. Local R. CV-81.

b. Northern District. The rules for the United States District Court for the Northern District of Texas require the removing party to file:

- an index of all documents that clearly identifies each document and indicates the date the document was filed in the state court;
- a copy of the docket sheet in the state court action; and
- each document filed in the state court action, except discovery material.

N.D. Tex. Local R. 81.1. The rule further requires that the state court documents be "individually tabbed and arranged in chronological order according to the state court file date." *Id.*

c. Southern District. The rules for United States District Court for the Southern District of Texas requires the removing party to file "only the following documents":

- all executed process in the case;
- pleadings asserting causes of action;
- all answers to such pleadings;
- all orders signed by the state judge;
- the docket sheet;
- an index of matters being filed; and
- a list of counsel of record, including addresses, telephone numbers, and parties being represented.

S.D. Tex. Local R. 81.

4. Time Period for Removal.

a. Generally. A notice of removal must be filed within 30 days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading if the initial pleading shows the case to be removable. 28 U.S.C.A. § 1446(b). Otherwise, the notice must be filed,

> within 30 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 be first ascertained that the case … has become removable.

Id. The time limit for removal is a procedural requirement, not a jurisdictional one, and for that reason a complaint that a removal notice was filed beyond the time limit is waived if not raised in a timely filed motion to remand. *Leininger v. Leininger*, 705 F.2d 727, 729 (5th Cir. 1983).

b. One year time limit on diversity removals. In addition to the 30-day requirement, a removal based on the existence of diversity jurisdiction must be filed within one year after commencement of the action. 28 U.S.C.A. § 1446(b). Thus, a defendant who first ascertains the existence of diversity jurisdiction more than one year after a case is filed cannot remove the case, even if he acts within 30 days. However, the Fifth Circuit has recognized an equitable exception to the one-year limitation on the removal of diversity cases.

> [W]here a plaintiff has attempted to manipulate the statutory rules for determining federal removal jurisdiction, thereby preventing the defendant from exercising its rights, equity may require that the one-year limit in § 1446(b) be extended.

Tedford v. Warner-Lambert Co., 327 F.3d 423, 428 – 29 (5th Cir. 2003).

c. Trigger Date for 30-day period. In the Fifth Circuit, the time period for removal begins to run for

all defendants from the earliest date that any defendant receives the requisite notice. *See Brown v. Demco, Inc*., 792 F.2d 478, 481 (5th Cir. 1986). A defendant who is added to the suit after the expiration of the 30-day removal period has no right to remove the case. *Id.* at 482. Thus, if defendant A is served with the initial complaint in a removable case on X date and takes no action to remove the case, defendant B, who is served on X date + 31 days, will have no right to remove the case. At least three circuits have rejected this first-served defendant rule in favor of a rule that allows a defendant to remove regardless of whether the deadline for removal has passed for another defendant. *Bailey v. Janssen Pharmaceutica, Inc*., 536 F.3d 1202, 1209 (11th Cir. 2008).

In a case removed on the basis of federal question jurisdiction, the removal clock does not begin to run until the defendant receives a pleading that reveals, on its face, that the plaintiff is "asserting a cause of action based on federal law." *Lefall v. Dallas Indep. Sch. Dist*., 28 F.3d 521, 525 (5th Cir. 1994). Where the basis for removal is found in the initial complaint, the trigger date for removal will be the date the first defendant is served with citation in the state court proceeding. *See Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc*., 526 U.S. 344, 354 (1999); *Bd. of Regents of Univ. of Tex. Sys. v. Nippon Tel. & Tel. Corp*., 478 F.3d 274, 278 (5th Cir. 2007). Where the removal is based on receipt of an amended complaint or other paper showing the case is removable, the trigger date will be the date of receipt of the amended complaint or other paper. *Lefall*, 28 F.3d at 525.

5. Joinder or Consent of other Defendants.

a. Generally. All defendants must join in, or consent to, the removal of a case to federal court. *See Chicago, R. I. & P. Ry. Co. v. Martin*, 178 U.S. 245, 248 (1900).

> [A]ll defendants who are properly joined and served must join in the removal petition, and failure to do so renders the petition defective.

Getty Oil Corp., Div. of Texaco, Inc. v. Insurance Co. of N. Am., 841 F.2d 1254, 1262 (5th Cir. 1988).

This requirement is neither apparent from the language of the statute nor intuitively obvious. Why, for instance, should a defendant against whom no federal claims have been asserted be required to consent to a removal desired by a defendant against whom federal claims have been asserted? Obvious or not, the requirement exists and is enforced by the courts.

> When there are multiple defendants, the judiciary has grafted onto § 1446(b) the requirement that all defendants "join" in the petition for removal.

Glover v. W.R. Grace & Co., Inc., 773 F.Supp. 964, 965 (E.D. Tex. 1991).

The removing defendant must obtain joinder or consent from those defendants who have been served. *See Getty Oil*, 841 F.2d at 1262. However, there is some authority for the proposition that the removing defendant may be excused from joining or obtaining consent from a defendant, if he had no reasonable basis for knowing that defendant had been served. *See Milstead Supply Co. v. Cas. Ins. Co*., 797 F.Supp. 569, 573 (W..D. Tex. 1992) (removing defendant excused from joining defendant who was served only three hours before removal notice was filed).

The joinder or consent must be accomplished within the 30-day period for removal. *See Getty Oil*, 841 F.2d at 1263. However, in exceptional circumstances a court might permit the late joinder or consent of a defendant. *See Brown v. Demco Inc*., 792 F.2d 478, 482 (5th Cir. 1986).

b. Joinder of Nominal Parties not required. A defendant who is merely a "nominal" or "formal" party to the suit is not required to join in the removal of the case. *See Farias v. Bexar County Bd. of Tr. for Mental Health Mental Retardation Serv.*, 925 F.2d 866, 871-72 (5th Cir. 1991). This exception to the joinder requirement applies in both diversity and federal question cases. *Id.* In order to avoid joining a nominal party the removing defendant must demonstrate that,

> there is no possibility that the plaintiff would be able to establish a cause of action against the non-removing defendants in state court.

B., Inc. v. Miller Brewing Co., 663 F.2d 545, 549 (5th Cir. 1981).

c. Documenting joinder or consent. The joinder or consent must be evidenced in a written document filed with the court. *See Getty Oil* 841 F.2d at 1262. It is probably not enough for the removing defendant to simply assert in the removal notice that all other defendants have consented. *See Marshall v. Skydive Am. S.*, 903 F.Supp. 1067, 1070 (E.D. Tex. 1995).

> [W]hile it may be true that consent to removal is all that is required under section 1446, a defendant must do so itself. This does not mean that each defendant must sign the original petition for removal, but there must be some timely filed written indication from each served defendant, or from some other person or entity purporting to formally act on its behalf in this respect and to have authority to do so, that it has actually consented to such action.

Getty Oil, 841 F.2d at 1262.

The safest practice is to state in the removal notice that the notice is being filed on behalf of all of the

defendants and to have the notice of removal signed by the attorney-in-charge for each defendant. In a federal question case, this includes defendants against whom no federal claim has been asserted. If circumstances make this impossible, any defendant that does not sign the removal notice should submit, within the 30-day removal period, a separate document stating that the defendant has consented to the removal of the case.

6. Filing the Notice with the State Court. A removing party must file a copy of the notice of removal with the state court. The removal becomes effective when the copy is filed with the state court and the state court is prohibited from proceeding further.

> Promptly after the filing of such notice of removal of a civil action the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the notice with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.

28 U.S.C.A. § 1446(d). In *Calderon v. Pathmark Stores, Inc*., 101 F.Supp.2d 246, 247 (S.D.N.Y. 2000), a district court held that a 35-day delay between the filing of a notice of removal in federal court and the filing of a copy of that notice in the state court was harmless and did not provide a basis for remand.

7. Service on other parties. A defendant who removes a case must give prompt written notice to all adverse parties. *Calderon*, 101 F.Supp.2d at 247. District courts that have written on the subject are divided as to the consequences of a failure to give, or a delay in giving, notice of removal to the opposing party. In *Kovell v. Pa. R. Co*., 129 F.Supp. 906, 907 (N.D. Ohio. 1954), the district court concluded that the defendant had made a diligent effort to serve the notice on the plaintiff, using an address listed in the telephone directory, but nonetheless remanded the case finding that actual compliance was required. In *L & O P'ship No. 2 v. Aetna Cas. and Sur. Co*., 761 F.Supp. 549, 551 (N.D. Ill. 1991), the district court denied a motion to remand based on lack of notice where the defendant made a good faith, but unsuccessful, effort to give notice and the plaintiff suffered no harm.

III. REMAND

There are several grounds on which a federal court can remand a case to state court. Those grounds include: the discretionary authority to remand any pendant state law claims, 28 U.S.C.A. § 1367(c); the obligation to remand cases where subject matter jurisdiction is lacking, *Buchner v. FDIC*, 981 F.2d 816, 819-20 (5th Cir. 1993); and the obligation to act on a timely filed motion to remand for procedural defects, *Id.*

A. Motions to remand, generally. A plaintiff has the right to seek the remand of a removed case based on lack of subject matter jurisdiction or defects in the removal procedure. 28 U.S.C.A. § 1447(c). A district court lacks authority to remand a case on its own motion because of a procedural defect, but can and must do so when the defect is one of jurisdiction. *See In re Allstate Ins. Co*., 8 F.3d 219, 223-24 (5th Cir. 1993).

B. Time for filing. A motion to remand based on a defect in removal procedure must be filed "within 30 days after the filing of the notice of removal …." *In re Allstate*, 8 F.3d at 221. A motion to remand based on lack of subject matter jurisdiction may be filed at anytime. *Id.* For example, in *Maguire Oil Co. v. City of Houston*, the federal district court remanded the case to state court more than two years after it was removed to federal court, and after conducting a jury trial on the merits and considering post-trial motions. *Maguire Oil Co.*, 143 F.3d 205, 208 (5th Cir. 1998).

The 30-day time period for filing a motion to remand based on a procedural defect is not extended by Rule 6(e) of the Federal Rules of Civil Procedure, which provides additional time for actions after service by mail. *See Pavone v. Miss. Riverboat Amusement Corp*., 52 F.3d 560, 566 (5th Cir. 1995); *Graef v. Chem. Leaman Tank Lines*, 860 F.Supp. 1170, 1176 (E.D. Tex. 1994).

C. Procedural defects. Any defects in the removal procedure that are not timely raised in a motion to remand are waived. *See Baris v. Sulpico Lines, Inc*., 932 F.2d 1540, 1544 (5th Cir. 1991) ("[A] 'procedural' defect is any defect that does not go to the question of whether the case originally could have been brought in federal district court."); *In re Digicon Marine, Inc*., 966 F.2d 158, 160 (5th Cir. 1992) ("[A]ll removal defects are waivable except for lack of original subject matter jurisdiction …."). *Id.*

Examples of procedural defects include the following:

- Failure to timely remove a case. *Howard v. Nw. Airlines, Inc*., 793 F.Supp. 129, 131 (S.D. Tex. 1992).
- Failure of all defendants to join in the removal. *Harris v. Edward Hyman Co*., 664 F.2d 943, 944-45 (5th Cir. 1981).
- Removal of a Jones Act case. *Benjamin v. Natural Gas Pipeline Co. of Am.*, 793 F.Supp. 729, 732 (S.D. Tex. 1992).
- Removal of case arising under state workmens compensation laws. *Patin v. Allied*

Signal, Inc., 865 F.Supp. 370, 372 (E.D. Tex. 1994).

In 1996, section 1447(c) was amended to make it clear that any defect other than lack of subject matter jurisdiction must be raised in a timely filed motion to remand. Pub. L. No. 104-219, 1996 S 533 (1996).

1. Waiver of procedural defects. A plaintiff's right to seek remand on the basis of a procedural defect is waived if not made within 30 days. *Coury v. Prot*, 85 F.3d 244, 252 (5th Cir. 1996). The right to seek remand may also be waived by the plaintiff's conduct in federal court. *Harris v. Edward Hyman Co*., 664 F.2d at 945-946.

> The record indicates that subsequent to the action being removed from the Chancery Court of Copiah County, Harris served on both Edward Hyman and the Union requests for admissions, requests for production of documents, and a set of interrogatories. Harris also responded to Edward Hyman's request for the production of documents. Indeed, until the motion to remand was filed, the action proceeded as any other with Harris giving no indication that she was dissatisfied with her federal forum. These acts are consistent with a waiver of a litigant's right to seek a remand to state court and the district court could have so found.

Id.

2. Defendant's right to cure procedural defects. A defendant is free to amend its removal notice to cure procedural defects within the 30-day period for removal. *See Strauss v. Am. Home Prod. Corp*., 208 F.Supp.2d 711, 717 (S.D. Tex. 2002). A defendant may amend its notice of removal after the expiration of the 30-day time period to cure defective allegations of jurisdiction. *Id.* "[W]hen the record establishes the diversity of the parties, but the party asserting federal jurisdiction has failed to specifically plead that the parties are diverse, we allow that party to amend its pleadings to correct for their technical deficiency." *Howery v. Allstate Ins. Co*., 243 F.3d 912, 919-20 (5th Cir. 2001).

D. Motions for reconsideration of order of remand. The issuance of an order of remand terminates the district court's jurisdiction over the case. *Browning v. Navarro*, 743 F.2d 1069, 1078 (5th Cir. 1984)("Even a federal court, persuaded that it has issued an erroneous remand order, cannot vacate the order once entered."). However, there is some authority for the proposition that a district court retains jurisdiction to reconsider its order of remand after the issuance of the remand order but before a certified copy of the order is sent to the state court. *See Bucy v. Nev. Const. Co*., 125 F.2d 213, 218 (9th Cir. 1942), cited in *Browning v. Navarro*, 743 F.2d 1069, 1078 (5th Cir. 1984).

E. Remand of state claims, generally. A district court has subject matter jurisdiction over state claims that are related to the federal claims that provided the basis for removal.

> In any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.

28 U.S.C.A. § 1367. However, a district court may decline to exercise its supplemental jurisdiction over related state claims if:

> (1) the claim raises a novel or complex issue of State law;
>
> (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction;
>
> (3) the district court has dismissed all claims over which it has original jurisdiction; or
>
> (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

Id. § 1367(c).

The case of *Suter v. Univ. of Tex. San Antonio*, 2010 WL 4690717, at *1 (W.D. Tex. Nov. 1, 2010), illustrates the application of this discretionary standard. In *Suter*, the plaintiff, who had brought claims under the federal Equal Pay Act, asked the district court to sever and remand her related state court claims, arguing that the state law claims predominated over the federal claims. The district court declined, explaining as follows.

> In the present case, it is apparent from plaintiff's original petition that all of her claims, including her EPA claim, arise out of her negotiations with UTSA for a teaching position and the alleged promises made during those negotiations by UTSA and the individual defendants. Thus, plaintiff's EPA claim arises out of the same set of facts as her state-law claims and will involve many of the same witnesses and overlapping evidence. The EPA claim is thus so closely connected to and factually intertwined with her state-law claims that none of the various causes of action substantially predominates over the others. Further, if the Court were to sever the state claims it would create redundancies in

> discovery and increase trial time and expenses to the parties. Hence, the interests of judicial economy and convenience also compel the Court to exercise its supplemental jurisdiction over plaintiff's state-law claims.

Id. at *2.

F. Remand where federal claims have been dismissed. Where all federal claims have been dismissed after removal, a federal court retains subject matter jurisdiction over the state claims but may decline to exercise that jurisdiction. *Suter*, 2010 WL 4690717 at *1. *See Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 351 (1988).

> When the single federal-law claim in the action was eliminated at an early stage of the litigation, the District Court had a powerful reason to choose not to continue to exercise jurisdiction.

Id.

If the plaintiff is willing to dismiss his federal claims after removal and the defendant does not object to the dismissal as an attempt at forum manipulation, there is a strong likelihood that the court will remand the remaining state claims. A joint motion to dismiss the federal claims and remand the remaining claims to state court is one way of accomplishing this end. Generally, a defendant should insist that the federal claims be dismissed with prejudice to avoid the possibility that they might be reasserted in state court.

If the plaintiff seeks to unilaterally non-suit his federal claims to provide a basis for remand to state court, a defendant can argue that the motion should be denied as an attempt at forum manipulation.

> [C]ourts should consider whether the plaintiff has "attempted to manipulate the forum" in which his case will be heard "simply by deleting all federal-law claims from the complaint and requesting that the district court remand the case," and should guard against such manipulation by denying motions to remand where appropriate.

Brown v. Sw. Bell Tel. Co., 901 F.2d 1250, 1255 (5th Cir. 1990).

The general rule in the Fifth Circuit is that remaining state law claims should be remanded if the federal claims are dismissed. *Parker & Parsley Petroleum Co. v. Dresser Indus.*, 972 F.2d 580, 585 (5th Cir. 1992). However, districts court are vested with "wide discretion" in determining whether to remand state claims. *Guzzino v. Felterman*, 191 F.3d 588, 595 (5th Cir. 1999). In some cases, district courts have denied plaintiffs' motions for leave to dismiss federal claims and remand state claims. *See generally, Suter,* 2010 WL 4690717, at *1 (denying request to sever Equal Pay Act claim and remand state claims); *S. Technical Diesel, Inc. v. Volvo Group N. Am., LLC*, 2011 WL 830330, at *2 (S.D. Tex. March 3, 2011) (denying motion to amend complaint to eliminate federal RICO claim).

IV. POST-REMOVAL PROCEDURE

Fed. R. Civ. P. 81(c) governs post-removal procedure in federal court and provides specific rules for the transition from state court to federal court, including special deadlines for filing answers and making jury demands.

A. Rules of Procedure. The federal rules of procedure apply to a case removed from state court. Fed. R. Civ. P. 81(c)(1).

B. Answer Date. A defendant who has not answered prior to the date of removal must answer within:

> (A) 21 days after receiving – through service or otherwise – a copy of the initial pleading stating the claim for relief;
>
> (B) 21 days after being served with the summons for an initial pleading on file at the time of the service; or
>
> (C) 7 days after the notice of removal is filed.

Fed. R. Civ. P. 81(c)(2).

C. Repleading Requirements. Plaintiffs and defendants, who have answered in state court prior to removal, are not required to amend their pleadings to meet the requirements of the federal rules, unless ordered to do so by the court. Fed. R. Civ. P. 81(c)(2).

D. Jury Demands. A proper jury demand or request that was filed in state court, prior to removal, is sufficient to preserve the party's right to a jury trial and no further action is required in federal court. Fed. R. Civ. P. 81(c)(3)(A).

> If the state law does not require an express demand for a jury trial, a party need not make one after removal unless the court orders the parties to do so within a specified time.

Id. Where state procedural rules require a formal demand for jury trial, and no demand is made prior to removal, a party desiring a jury trial in federal court must serve a jury demand within 14 days after the date that party filed the notice of removal or was served with a notice of removal filed by another party. Fed. R. Civ. P. 81(c)(3).

The Texas Rules of Civil Procedure require both a "written request for a jury trial" and payment of the prescribed jury fee. Tex. R. Civ. P. 216. In *Mills v Degesch Am., Inc*., the district court deemed plaintiff's right to a jury trial waived, where the plaintiff had paid

a jury fee in the state court prior to removal but had not filed a written jury request in state court and where the plaintiff had not filed a timely jury demand in federal court after removal. *Mills v. Degesch Am., Inc.*, 835 F. Supp. 923, 924 (E.D. Tex. 1993).

In another case, a plaintiff who filed a late jury demand in federal court argued that he had delayed filing the demand pending the resolution of his motion to remand to avoid the possibility of waiving that motion. The Fifth Circuit rejected the argument holding, "[t]he pendency of removal proceedings does not excuse the requirement of a timely jury demand." *Farias v. Bexar County Bd. of Tr. for Mental Health Mental Retardation Serv.*, 925 F.2d 866, 873 n. 7 (5th Cir. 1991).

E. Suspension of State Court proceedings. The filing of a copy of the notice of removal with the clerk of the state court suspends all proceedings in the state court "unless and until the case is remanded." 28 U.S.C.A. § 1446(d). "The filing of a removal petition terminates the state court's jurisdiction until the case is remanded, even in a case improperly removed." *See Maseda v. Honda Motor Co., Ltd*., 861 F.2d 1248, 1255 (11th Cir. 1988), *citing Lowe v. Jacobs*, 243 F.2d 432, 433 (5th Cir. 1957). Any action taken by the state court after the filing of the removal notice with the state clerk is void *ab initio. See Nat'l S.S. Co. v. Tugman*, 106 U.S. 118, 122 (1882); *E. D. Sys. Corp. v. Sw. Bell Tel. Co*., 674 F.2d 453, 457 (5th Cir. 1982).

The question of whether a removed case should be retained or remanded is for the federal court to decide. *Id.* at 457-58. Where a state court continues to exercise jurisdiction over a case after its removal, the federal court has authority to enjoin the state court proceedings. *See E. D. Sys. Corp.* 674 F.2d at 457.

F. Effect of state court orders issued prior to removal. Chapter 89 provides that "[a]ll injunctions, orders, and other proceedings had in [state court prior to removal] shall remain in full force and effect until dissolved or modified by the district court." 28 U.S.C.A. § 1450. The United States Supreme Court has explained that,

> Section 1450 was simply designed to deal with the unique problem of a shift in jurisdiction in the middle of a case which arises whenever cases are removed from state to federal court. In this respect two basic purposes are served. Judicial economy is promoted by providing that proceedings had in state court shall have force and effect in federal court, so that pleadings filed in state court, for example, need not be duplicated in federal court. In addition, the statute ensures that interlocutory orders entered by the state court to protect various rights of the parties will not lapse upon removal.

Granny Goose Foods, Inc. v. Bhd. of Teamsters, 415 U.S. 423, 435-436, 94 S.Ct. 1113, 1122 (1974).

A federal district court may dissolve or modify injunctions, orders, and all other proceedings which have taken place in state court prior to removal. *See Maseda v. Honda Motor Co., Ltd*., 861 F.2d 1248, 1252 (11th Cir. 1988). Additionally, a state court judgment in a case removed to federal court does not foreclose subsequent proceedings in the case in federal court. *See E.D. Sys. Corp.*, 674 F.2d at 458; *See also Maseda*, 861 F.2d at 1252.

> [W]henever a case is removed, interlocutory state court orders are transformed by operation of 28 U.S.C. § 1450 into orders of the federal district court to which the action is removed. The district court is thereupon free to treat the order as it would any such interlocutory order it might itself have entered.

Nissho-Iwai Am. Corp. v. Kline, 845 F.2d 1300, 1304 (5th Cir. 1988).

G. Motions pending in state court. As a practical matter, any motions filed in state court prior to removal will not be taken up by the federal district court unless a party requests the court to do so. The Local Rules for the United States District Court for the Eastern District of Texas specifically warn litigants that they must re-urge any motions pending in state court at the time of removal or the federal court will consider them moot. E.D. Tex. Local R. CV-81(d).

V. APPEALS

A. Generally. The denial of a motion to remand is reviewable on appeal. *See* C*aterpillar, Inc. v. Lewis*, 519 U.S. 61, 74 (1996). In contrast, the issuance of an order of remand, with certain narrow exceptions, is not. 28 U.S.C.A. § 1447(d); *See Mobil Corp. v. Abeille Gen. Ins. Co*., 984 F.2d 664, 665 (5th Cir. 1993).

B. Denial of motion to remand. An order denying a motion to remand may be reviewed on appeal whether the motion is based on procedural defects or lack of subject matter jurisdiction. *See Caterpillar*, 519 U.S. at 74. An order denying remand is not a final order for purpose of appeal. *Id.* However, a plaintiff may seek permission from the district court to take an interlocutory appeal from denial of a motion to remand. 28 U.S.C.A. § 1292(b); *Poirrier v. Nicklos Drilling Co*., 648 F.2d 1063, 1064-65 (5th Cir. 1981). An interlocutory appeal is not necessary to preserve the point for review. *See Caterpillar, Inc.*, 519 U.S. at 74. The denial of a motion to remand an action removed

from state to federal court is a question of federal subject matter jurisdiction and statutory construction subject to *de novo* review. *Carpenter v. Wichita Falls Indep. Sch. Dist*., 44 F.3d 362, 365 (5th Cir. 1995).

C. Granting of motion to remand. Under the express terms of the statute, "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise …." 28 U.S.C.A. § 1447(d). The only statutory exception to this rule is for cases removed under authority of § 1443 (allowing removal by defendants who are unable to enforce their federal civil rights in a state court proceeding). However, the courts have recognized other exceptions to the general rule of non-reviewability. *Thermtron Prod., Inc. v. Hermansdorfer*, 423 U.S. 336, 345-46 (1976).

1. Remand orders based on non-statutory grounds. In *Thermtron*, the Supreme Court considered the reviewability of an order of remand that was based on a district court's determination that its heavy trial docket would unduly delay the trial of the removed case. *Id.* at 344. The Court concluded that such an order was reviewable by petition for mandamus. In reaching that conclusion the Court observed that the non-reviewability provision in 28 U.S.C.A. § 1447(d) must be read in context with the bases for remand described in § 1447(c). Where a district court remands a case on grounds not encompassed within § 1447(c), review of the order of remand is not precluded by § 1447(d). *Id.* "[O]nly remand orders issued under § 1447(c) and invoking the grounds specified therein that removal was improvident and without jurisdiction are immune from review under § 1447(d)." *Id.*

The Fifth Circuit has permitted review, by writ of mandamus, of an order of remand based on procedural defects first raised beyond the 30-day period prescribed for raising procedural defects. *See In re Shell Oil Co*., 932 F.2d 1518, 1520-21 (5th Cir. 1991). Similarly, the Supreme Court has permitted review by direct appeal from a remand order based on *Burford* abstention. *See Quackenbush v. Allstate Ins. Co*., 517 U.S. 706, 711-12 (1996). Orders of remand based on enforcement of contractual venue clauses are also appealable. *Dixon v. TSE Intern. Inc*., 330 F.3d 396, 398 (5th Cir. 2003).

2. Other orders. Orders or determinations that are independent of, or collateral to, the remand order may be reviewable. For instance, an order awarding costs and fees in connection with a remand is reviewable. *See Maguire Oil Co. v. City of Houston*, 143 F.3d 205, 208 (5th Cir. 1998); *See also Miranti v. Lee*, 3 F.3d 925, 928 (5th Cir. 1993).

VI. SANCTIONS FOR IMPROVIDENT REMOVAL

If the court remands a case, its order of remand "may require payment of just costs and any actual expenses, including attorney's fees incurred as a result of the removal". 28 U.S.C.A. § 1447(c). An award of fees and costs under § 1447(c) is limited to "fees and costs incurred in federal court that would not have been incurred had the case remained in state court." *Avitts v. Amoco Prod. Co*., 111 F.3d 30, 32 (5th Cir. 1997); *Brown v. Ascent Assur*., 191 F.Supp.2d 729, 731 (N.D. Miss. 2002).

A. Attorney's fee awards are reviewable. As discussed above, an order awarding attorney's fees is reviewable as an independent or collateral order. *Maguire Oil Co.*, 143 F.3d at 208; *Miranti*, 3 F.3d at 928.

B. Standard of review. A district court's decision to award attorney's fees under 28 U.S.C.A. § 1447(c) is reviewed under an abuse of discretion standard. *See Garcia v. Amfels, Inc*., 254 F.3d 585, 587 (5th Cir. 2001); *Valdes v. Wal-Mart Stores, Inc.*, 199 F.3d 290, 292 (5th Cir. 2000); *Miranti v. Lee*, 3 F.3d at 928. The award of attorney's fees under § 1447(c) is not automatic. *Valdes*, 199 F.3d at 292. The question to be considered on appeal is "whether the defendant has objectively reasonable grounds to believe the removal was legally proper." *Id.* at 293.

The defendant's motive in removing the case is not considered. *Valdes*, 199 F.3d at 292; *Morgan Guar. Trust Co. v. Republic of Palau*, 971 F.2d 917, 923 (2d Cir. 1992). If the removal was proper, or if it was reasonable for the defendant to believe it was, then it is an abuse of discretion to award attorney's fees to the plaintiff. *Valdes*, 199 F.3d at 292-93. The reviewing court "evaluate[s] the objective merits of the removal at the time of the removal, irrespective of the fact that it might ultimately be determined that the removal was improper." *Id.* at 294. Also, in a circumstance where a case is remanded because of a lack of subject matter jurisdiction,

> a plaintiff may in certain cases be estopped from recovering costs and attorney's fees under § 1447(c) when his conduct after removal plays a substantial role in causing the case to remain in federal court.

Maguire Oil Co. 143 F.3d at 209.

VII. DETERMINING FEDERAL QUESTION JURISDICTION

A. Generally. Federal courts are courts of limited jurisdiction. *Howery v. Allstate Ins. Co*., 243 F.3d 912,

916 (5th Cir. 2001). Consequently, a party seeking a federal forum has the burden of establishing the existence of federal jurisdiction. *Id.* A defendant who removes a case must prove that federal jurisdiction existed at the time of removal. *Id.* Because the effect of removal is to deprive the state court of an action properly before it, removal raises significant federalism concerns that mandate strict construction of the removal statute. *See Carpenter v. Wichita Falls Indep. Sch. Dist*., 44 F.3d 362, 365-66 (5th Cir. 1995).

The determination of whether a state court pleading raises a federal issue giving rise to federal question jurisdiction is not always an easy one, particularly in light of the relatively short window a defendant has for removing a case to federal court. When a defendant acts to remove a case based on an amended pleading he should be prepared to demonstrate not only that the current pleading raises a federal question but also that no prior pleading did so.

The case of *Howeth Inv., Inc. v. City of Hedwig Vill. Planning and Zoning Comm'n*, 113 F.App'x 11, 2004 WL 1936096, at *1 (5th Cir. Aug. 31, 2004) provides an example of why it is important to confirm that a federal claim was not present in prior pleading when removing based on an amended pleading. In *Howeth*, the defendants removed the case to federal court after the plaintiffs filed a sixth amended petition alleging substantive takings and substantive due process violations under the federal constitution. The plaintiffs moved for remand arguing that the removal was untimely because they had included federal takings claims in their fourth amended petition. The district court granted the motion for remand and entered an order of sanctions requiring the defendants to pay the plaintiffs attorney's fees and costs. The defendants appealed the sanctions order and the Fifth Circuit reversed, holding that the generic takings allegations in the plaintiffs' fourth amended petition did not put the defendants on notice that they were alleging federal claims because the pleadings made no reference to reliance on the federal constitution or federal statutes. *Id*.

The determination of whether a pleading raises a federal question is made from an objective review of the face of the pleadings. The defendant is entitled to rely on the pleadings themselves and is not required to guess at the plaintiff's subjective intent. There is no due diligence standard requiring the defendant to look beyond the face of the pleadings.

B. Well-pleaded complaint rule. The well-pleaded complaint rule governs the determination of federal question jurisdiction. *See Louisville & Nashville R.R. v Mottley*, 211 U.S. 149, 152-53 (1908); *Howery*, 243 F.3d at 916; *Hart v. Bayer*, 199 F.3d 239, 243 (5th Cir. 2000); and applies to a case removed from state court on the basis of federal question jurisdiction. *Howery*, 243 F.3d at 916, n. 12. The well-pleaded complaint rule,

> provides that the plaintiff's properly pleaded complaint governs the jurisdictional inquiry. If, on its face, the plaintiff's complaint raises no issue of federal law, federal question jurisdiction is lacking.

Hart, 199 F.3d at 243-244.

Under the rule, a plaintiff is the master of his own pleadings and may refrain from asserting a claim that would create federal jurisdiction if he chooses to do so. *See Caterpillar Inc. v. Williams*, 482 U.S. 386, 390-91 (1987). Consequently, a defendant must look to the face of the plaintiff's pleadings to determine the existence of a federal claim and may not speculate as to the plaintiff's true intentions. As a general rule, where a complaint makes no reference to underlying federal law and pleads facts and theories that are consistent with state law claims, the case is not removable, absent federal preemption of the field. *See Giles v. Nylcare*, 172 F.3d 332, 336 (5th Cir. 1999). *Accord*, *Bezy v. Floyd County Plan Comm'n*, 199 F.R.D. 308, 311-12 (S.D. Ind. 2001); *Hearst Corp. v. Shopping Ctr. Network, Inc*., 307 F.Supp. 551, 556 (S.D.N.Y. 1969).

> [W]here a plaintiff has the right to relief either under federal law or under state law as an independent source of that right, the federal court on removal proceedings may not generally look beyond the face of the initial pleading in the state action to determine whether a federal question is presented.

Id.

A state court pleading that asserts a claim that is cognizable under both state and federal law but makes no reference to federal law will not give rise to federal question jurisdiction. *See St. Luke's Episcopal Hosp. Corp. v. Stevens Transp.*, 172 F.Supp.2d 837, 841 (S.D. Tex. 2001); *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987). Even if the factual predicate underlying a plaintiff's complaint could have served as the basis for a federal claim, the plaintiff has the prerogative to forgo the federal claim and assert only state law claims in order to prevent removal. *St. Luke's Episcopal,* 172 F.Supp.2d at 841.

C. The "artful pleading" doctrine. The courts have recognized the "artful pleading" doctrine as a necessary corollary to the well-pleaded complaint rule. *See Rivet v. Regions Bank*, 522 U.S. 470, 475 (1998); *MSOF Corp. v. Exxon Corp*., 295 F.3d 485, 490 (5th Cir. 2002). Under this doctrine, a plaintiff cannot avoid federal jurisdiction by deliberately failing to plead a federal question. *MSOF Corp.*, 295 F.3d at 490. The doctrine applies only where federal law

completely preempts the field. *Terrebonne Homecare, Inc. v. SMA Health Plan, Inc*., 271 F.3d 186, 188 (5th Cir. 2001).

D. Due diligence. The Fifth Circuit "has specifically rejected a due diligence standard for determining removability." *Bosky v. Kroger Tex.*, 288 F.3d 208, 210 (5th Cir. 2002); *Chapman v. Powermatic, Inc*., 969 F.2d 160, 163 (5th Cir.1992). In federal question cases, the existence of a federal claim must be "unequivocally clear and certain" in order to start the removal clock running. *Bosky*, 288 F.3d at 211. If a plaintiff desires to start the removal clock running, it is incumbent on him to include specific allegations making the existence of a federal claim clear. *Id.* at 210.

VIII. CONCLUSION

A defendant's right to remove, to federal court, a case filed in state court gives her lawyer the ability, in appropriate cases, to select the forum in which the case is to be decided. This ability to cancel out the plaintiff's initial choice of forum is a powerful litigation tool. A careful plaintiff's attorney will consider the possibility of removal when filing a case that might include federal claims and take appropriate steps to preserve his choice of forum. Lawyers who regularly sue or defend governmental entities will likely have frequent opportunity to either exercise or refrain from exercising the right to removal, or to seek to defeat that right by careful pleading in state court or by pursuing remand of a case that has been removed. For these reasons, lawyers who sue or defend governmental entities in Texas should acquire a working knowledge of the law governing removal and remand and plan their litigation strategy accordingly.

DEFENDANT'S REMOVAL CHECKLIST FOR FEDERAL QUESTION CASES

1. **INITIAL DETERMINATION**. Immediately upon receipt of the state court petition or "other paper" conclude whether the case is removable by determining, from the face of the document; a) whether a federal claim has been asserted; and b) whether there are any statutory or other bars to removal.

2. **TRIGGER DATE.** Determine the date that the petition or "other paper" was first received by a defendant (the "trigger date").

3. **NOTICE OF REMOVAL.** If removal is desired, complete the following activities on or before the 30th day following the trigger date:

   a. Contact any other defendants, who have been served, and persuade them to join in, or consent to, the removal;

   b. Obtain a certified copy of the state court docket sheet; and

   c. Prepare and file a Notice of Removal, and required attachments, in federal court and serve copies on all parties (have the Notice signed by the attorney-in-charge for each served defendant or arrange for preparation and filing of a separate written notice of consent signed by the attorney-in-charge).

4. **NOTICE TO STATE COURT.** Immediately after filing the Notice of Removal in federal court, prepare and file a copy in the state court and serve copies of the state court filing on all parties.

5. **FEDERAL COURT ORDERS PACKET.** Promptly after filing the Notice of Removal in federal court, serve copies of the federal court's orders packet, if any, on all parties.

6. **ANSWER**. If no answer has been filed in state court, file an answer within the later of 21 days after the date of service of the citation in state court or 7 days after the date the notice of removal is filed, whichever is later.

7. **JURY REQUEST.** If a jury trial is desired, and a written request for jury trial was not filed, and a jury fee paid, in the state court prior to removal, file a jury demand in federal court within 14 days of the date of removal.

PLAINTIFF'S REMAND CHECKLIST FOR FEDERAL QUESTION CASES

1. INITIAL DETERMINATION. Immediately upon receipt of a Notice of Removal, determine whether there are any procedural defects in the removal process:

a. Was the Removal Notice filed within the 30-day removal period?
b. Have all served defendants joined in the notice?
c. Are there any statutory bars to removal that are applicable?
d. Have all the required attachments been included with the Removal Notice?

2. MOTION TO REMAND FOR PROCEDURAL DEFECTS. If any procedural defects have been identified, prepare and file a motion to remand within 30 days after the date the removal notice was filed (do not add days for the mail rule).

3. MOTION TO REMAND FOR LACK OF SUBJECT MATTER JURISDICTION. If the court lacks subject matter jurisdiction, file a motion to remand on that basis at any time.

4. JURY TRIAL. If a jury trial is desired, and a written request for jury trial was not filed, and a jury fee paid, in the state court prior to removal, file a jury demand in federal court within 14 days of the date of removal.

IN THE UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF TEXAS
_____ DIVISION

X and Y		§	
	Plaintiffs,	§	
		§	
VS.		§	**C.A. NO. _____**
		§	
A, B, C, and D		§	
	Defendants.	§	

DEFENDANTS' NOTICE OF REMOVAL OF CIVIL ACTION

A, B, C, and D, the defendants in this civil action, hereby file this Notice of Removal under the authority of 28 U.S.C.A. § 1446(a) and (b).

I.

Identity of State Court Action Being Removed

The civil action being removed was initiated in the _____ Judicial District Court of _____ County, Texas, on or about _____, and was assigned docket number _____.

II.

Basis for Removal

In their [original petition, amended petition, or other paper], the Plaintiffs allege [specify the federal statutory or constitutional rights at issue, for example "that the actions of the Defendants violated their rights to due process and equal protection under the Fifth and Fourteenth Amendments to the United States Constitution and seek recovery of damages under 42 U.S.C.A. § 1983 and recovery of attorney's fees under 42 U.S.C.A. § 1988].

III.

Subject Matter Jurisdiction

This Court has original jurisdiction of this action under 28 U.S.C.A. §§ 1331, 1343, and 1441 because the Plaintiffs have alleged claims arising under the Constitution or laws of the United States.

IV.

Defendants Have Complied with the Requirements for Removal

This action is removable under 28 U.S.C.A. § 1441(b) and the Defendants' Notice of Removal is timely filed pursuant to 28 U.S.C.A. § 1446(a). The Defendants first received notice of the contents of the [petition, amended petition, or other paper], on [date], when a copy was [served on Defendant A or received by Defendant A's attorney].

[All of the Defendants are represented by the undersigned attorney-in-charge and have joined in the removal of this case to federal court.] or

[Defendants A, B, and C have joined in the removal of this case as evidenced by the signature of their attorneys below. As of the date of filing of this Notice, Defendant D has not been served with process and has not entered an appearance in the state court. As Defendant D has not been served, her joinder in, or consent to, the removal is not required.] or

[Defendants A, B, and C have joined in the removal of this case as evidenced by the signature of their attorneys below. The Plaintiffs fraudulently joined Defendant D for the sole purpose of preventing the other defendants from exercising their right to remove this case. For that reason, the joinder or consent of Defendant D is not required.] or

[Defendants A, B, and C have joined in the removal of this case as evidenced by the signature of their attorneys below. Defendant D has consented to the removal as evidenced by a separate Notice of Consent that has, or will be filed with the Court within the time permitted for removal.]

V.

State Court Process, Pleadings, and Orders and Other Required Attachments

The following documents are attached as required by 28 U.S.C.A. § 1446(a) [and Local Rule __].

Exhibit A – An index of the state court documents that are being filed with this Notice and that are included in Exhibit C;

Exhibit B – A certified copy of the state court docket sheet;

Exhibit C – Copies of

[each document filed in state court, excluding discovery material, individually tabbed and arranged in chronological order in accordance with the state court file date]. Northern District

[all executed process, pleadings, and orders in the state court case, individually tabbed and arranged in chronological order in accordance with the state court file date]. Southern, Western, and Eastern Districts

Exhibit D – A certificate of interested persons. [Northern District] or
A list of all counsel of record, including addresses, telephone numbers, and parties represented. [Southern and Eastern Districts]

FORM C

CAUSE NO. _____

X and Y	**§**	**IN THE DISTRICT COURT OF**
	§	
Plaintiffs,	**§**	
	§	
v.	**§**	**_____ COUNTY, TEXAS**
	§	
A, B, C, and D	**§**	
	§	
Defendants.	**§**	**_____ JUDICIAL DISTRICT**

DEFENDANTS' NOTICE OF REMOVAL TO FEDERAL COURT

A, B, C, and D, the defendants herein, have filed their notice of removal of the above captioned and numbered cause to the United States District Court for the _____ District of Texas, _____ Division. A copy of that document is attached to this notice as Exhibit "A".

Respectfully submitted,