Removal Jurisdiction: A Primer and Refresher

(Part 1 of 3)

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The decision has been made. You would rather be in federal court than state court. No matter the basis for the decision – be it the judge, jury pool, your familiarity with the applicable rules (state vs. federal), or a belief that you, as a defendant, have a better chance at success in a federal forum – the question is the same: How do you remove a properly filed and pending case from the state court in which it was filed to federal court and then keep it there?

As "there is no other phase of American jurisprudence with so many refinements and subtleties [than those that] relate to removal proceedings, [as] is known by all who have dealt with them," this article does not deal with every issue that may arise in the removal setting. *See Hagerla v. Mississippi River Power Co.*, 202 F. 771, 773 (S.D. Iowa 1912). Rather, this article (the first of a three-part series on removal-related issues) was designed and intended merely as a primer (or refresher) on removal jurisdiction.

Removal Jurisdiction v. Original Jurisdiction

Removal jurisdiction was established by the First Congress in the Judiciary Act of 1789, when it created the lower federal courts contemplated by Article III of the United States Constitution. *See* Ch. 20, 1 Stat. 73, § 12. Today, it is codified at 28 U.S.C. § 1441, *et seq*. Original jurisdiction, on the other hand, was established by Article III, § 2 of the United States Constitution. Removal jurisdiction and original federal jurisdiction are, generally, co-extensive, as both usually rely on the presence of a federal question or diversity in the citizenship of the parties. In fact, 28 U.S.C. § 1441 states that "any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or defendants, to the district court of the United States for the district and division embracing the place where such action is pending." Removal and original jurisdiction, however, are not exactly the same and should not be treated as such by the practitioner.

- **The Burden of Proof**

The party who alleges federal subject matter jurisdiction bears the burden of proving federal jurisdiction. *See e.g., B. Inc. v. Miller Brewing Co.*, 663 F.2d 545, 549-50 (5th Cir. 1981); *Village Fair Shopping Co. v. Sam Broadhead Trust*, 588 F.2d 431, 433 (5th Cir. 1978). This rule marks an important distinction between removal and original jurisdiction. Indeed, the rule causes a shift in the burden of proof from the plaintiff, in the context of asserting original jurisdiction, to the defendant, in the context of a removal. Thus, in cases originally filed in federal court (in which the plaintiff asserts the presence of federal jurisdiction), the burden is on the plaintiff to prove the jurisdictional requirements are met. *See Village Fair*, 588 F.2d at 433. However, in cases originally filed in state court and subsequently removed to federal court, the burden is on the defendant to prove the jurisdictional requirements are met. *See B., Inc.*, 663 F.2d at 549. This shift in the burden of proof has obvious ramifications for the practitioner.

- **Federalism Concerns**

Removal jurisdiction also raises federalism concerns that are not present in the original jurisdiction context. Specifically, removing a case from state to federal court deprives the state court of its ability to exercise jurisdiction over a case properly before it. *See e.g., Carpenter v. Wichita Falls Indep. Sch. Dist.*, 44 F.3d 362, 365-66 (5th Cir. 1995). Thus, removal jurisdiction impacts the constitutional allocation of authority between the state and federal courts. *See id.* This, obviously, is not a concern in cases initially filed in federal court in which there is original federal jurisdiction.

These concerns, among others, mandate a strict construction of the removal statutes. *See Carpenter*, 44 F.3d at 365-66. In fact, the United States Supreme Court has interpreted the removal statutes to evidence an intent by Congress to restrict removal jurisdiction. *See e.g., Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108 (1941). This results in the rule that doubts regarding the propriety of a removal be construed in favor of remand. *See Acuna v. Brown & Root Inc.*, 200 F.3d 335, 339 (5th Cir. 2000); *see also Manguno v. Prudential Prop. and Cas. Ins. Co.*, 276 F.3d 720, 723 (5th Cir. 2002). Consequently, when removing a case, the defendant must take special care to ensure that all requirements for removal, both substantive and procedural, are fully and properly met.

Substantive Requirements – Original Subject Matter Jurisdiction

Article III of the United States Constitution vests the judicial power of the United States in the United States Supreme Court "and in such inferior Courts as the Congress may from time to time ordain and establish." *See* U.S. CONST. art. III, § 1. In other words, the Constitution provides for, but does not mandate, the existence of what we now know as the federal district courts. *See id.* Moreover, the Constitution provides the ceiling, but not the floor, for the jurisdiction the district courts may exercise. *See id.* at art. III, § 2. Creation of the district courts and the decision as to whether they would be allowed to exercise all, or only part, of the Article III judicial power was left to the discretion of Congress.

The First Congress created what are now known as the federal district courts in the Judiciary Act of 1789. Through that same Act, Congress created removal jurisdiction, allowing the district courts to exercise jurisdiction over cases that could have originally been filed in the district courts (i.e., it allowed the district courts to exercise jurisdiction over actions in which they had original jurisdiction, but which were filed in state court).

District courts have original jurisdiction over actions based on a federal question, *see* 28 U.S.C. § 1331, and actions in which there is diversity of citizenship among the parties, *see* 28 U.S.C. § 1332. Although specific cases may be removed under other statutes, *see e.g.*, 9 U.S.C. § 205; 12 U.S.C. §§ 1441 and 1819(b); 15 U.S.C. § 6614(c)(3)(A) and (B); 28 U.S.C. §§ 1441(d), 1442, 1442a, 1443, 1444, 1446(c), 1452, and 1453, most removals rely on the original jurisdiction provided to the district courts through either 28 U.S.C. §§ 1331 or 1332. Determining whether original jurisdiction is present under either 28 U.S.C. §§ 1331 or 1332 is the first step in determining whether removal jurisdiction is present under 28 U.S.C. § 1441.

- **28 U.S.C. §1331 – Federal Question Jurisdiction**

While district courts have exclusive jurisdiction over some areas of the law, *see, e.g.*, 28 U.S.C. §§ 1334(a) and 1338(a), 28 U.S.C. § 1331 provides the district courts with non-exclusive, original jurisdiction over all civil actions based on a federal question, i.e. claims which arise under the Constitution, laws or treaties of the United States. *See Tafflin v. Levitt*, 493 U.S. 455, 458-460 (1990); *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478-89 (1981).

Obviously, if federal law creates the cause of action stated in the plaintiff's complaint, federal question jurisdiction exists and the case may be properly removed. *See Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804, 809 (U.S. 1986) (citing *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 8-9 (1983) (quoting *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916))). But even if state law creates a party's causes of action, federal question jurisdiction may still be found where the party's right to relief requires resolution of a substantial question of federal law. *See Franchise Tax Bd.*, 463 U.S. at 13.

However, where the defendant must rely on a substantial federal question to "open the arising-under door," it must also be shown that the federal court can entertain the issue without disturbing the congressionally approved balance of federal and state judicial responsibilities. *See Grable & Sons Metal Prod., Inc.*, 545 U.S. at 313-14. The court must make an "assessment of any disruptive portent [that will be caused by it] exercising federal jurisdiction." *Id.* at 314. This factor is a "determination which rests on the importance of having a federal forum decide the issue and the effect of [the federal court] exercising [that] jurisdiction" to the exclusion of the state court's jurisdiction. *See Ball v. Argent Mortgage Company, LLC*, 2007 WL 710156 at *4 (S.D. Miss. March 6, 2007).

The determination of whether a substantial federal question exists in a case is determined by the well-pleaded complaint rule. *See Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987). The well-pleaded complaint rule states that federal question jurisdiction exists only if a federal question is presented on the face of the plaintiff's properly pleaded complaint. *See id.* In this regard, the plaintiff is the master of his complaint and, thus, may avoid federal jurisdiction by exclusive reliance on state law. *See id.; see also The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913).

However, the well-pleaded complaint rule is not without exception. In limited circumstances, if a plaintiff omits a necessary federal question from the complaint, federal question jurisdiction may still remain. *See Franchise Tax Bd., supra.* Thus, for example, if an area is completely preempted by federal law such that a federal claim is required (if there is going to be a claim at all), the case is removable. *Id.* Common examples of federal statutes that completely preempt state law include the Employee Retirement Income Security Act of 1974 (ERISA) and the National Bank Act (NBA). *Id.* (ERISA); *see also Caterpillar Inc. v. Williams, supra,* (ERISA); *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 8 (2003) (NBA). As such, the practitioner should examine the claims stated in the complaint to determine, not only if a federal claim has been pled, but, if any of the state law claims are completely preempted by federal law. *See Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 64-67 (1987).

Three factors are generally taken into account when determining if a substantial federal question exists: (1) Is a federal right an essential element of the plaintiff's claim?; (2) Is interpretation of the federal right necessary to resolve the case?; and, (3) Is the question of federal law substantial? *See Howery*

v. Allstate Insurance Company, 243 F. 3d 912, 918 (5th Cir. 2001). Whether a federal law is essential to the plaintiff's claim "hinges on whether the federal right or obligation, as incorporated within a state law claim or claims, is 'such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another.'" *See Bobo v. Christus Health*, 359 F. Supp. 2d 552 (E.D. Tex. 2005) (quoting *Amalgamated Ass'n of St. Elec. Ry. & Motor Coach Emp. of Am., Div. No. 1127 v. S. Bus Lines*, 189 F.2d 219, 222 (5th Cir. 1951)); *see also Gully v. First Natl. Bank*, 299 U.S. 109, 112 (1936).

- **28 U.S.C. §1332 - Diversity Jurisdiction**

28 U.S.C. §1332, with few exceptions, provides the district courts with original, but not exclusive, jurisdiction over all civil actions where: (1) the sum or value of the amount in controversy exceeds $75,000, exclusive of interest and costs; and (2) the matter is between citizens of different states, citizens of a state and citizens or subjects of a foreign state, citizens of different states and in which citizens or subjects of a foreign state are additional parties, or a foreign state as plaintiff and citizens of a state or different states.

To have diversity jurisdiction under 28 U.S.C. §1332, there must be complete diversity of citizenship between the plaintiffs and defendants. *See Strawbridge v. Curtiss*, 7 U.S. 267, 267-68 (1806). If a single plaintiff shares the citizenship of a single defendant, regardless of the number of plaintiffs and defendants joined, complete diversity is lacking and diversity jurisdiction is not present. *Id; see also Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 829 (1989). Thus, the citizenship of all of the defendants, regardless of whether they have been served in the suit, must be considered when determining if diversity jurisdiction is present. *See New York Life Ins. Co. v. Deshotel*, 142 F.3d 873, 883 (5th Cir. 1998). As such, the first step in determining if diversity jurisdiction exists under 28 U.S.C. § 1332 is determining the citizenship of the parties.

In determining the citizenship of the parties for purposes of 28 U.S.C. §1332: individuals are citizens of the state in which they are domiciled, *see Mas v. Perry*, 489 F.2d 1396, 1399 (5th Cir. 1974); corporations are citizens of any state in which they are incorporated and in the state where its principal place of business is located, *see* 28 U.S.C. § 1332(c); partnerships and unincorporated associations, including limited partnerships and limited liability companies, are citizens of each state in which any partner, limited partner or member reside, *see Carden v. Arkoma Assocs.*, 494 U.S. 185, 190-95 (1990), and *Harvey v. Greywolf Drilling Co.*, 542 F.3d 1077, 1080 (5th Cir. 2008); trusts are citizens of each state in which its trustees reside, *see Navarro Sav. Ass'n v. Lee*, 446 U.S. 458, 465-466 (1980); and representative parties (e.g., executors and administrators) share the citizenship of the parties they represent, *see* 28 U.S.C § 1332(c). The citizenship of fictitious defendants (i.e., John Doe defendants) may be disregarded. *See* 28 U.S.C. § 1441(a).

The citizenship of improperly or fraudulently joined defendants, like fictitious defendants, may be disregarded when determining if complete diversity exists. *See Heritage Bank v. Redcom Labs., Inc.*, 250 F.3d 319, 323 (5th Cir. 2001). To prove improper joinder the defendant must show either that there is fraud in the pleading of jurisdictional facts (i.e., the citizenship of the parties is improperly pled) or that the plaintiff has no reasonable possibility of recovery against the resident defendant(s) in state court. *See Ross v. Citifinancial, Inc.*, 344 F.3d 458, 461-62 (5th Cir. 2003). With regard to the latter, the standard has been stated in a number of ways, including that there be absolutely no possibility that the plaintiff can recover under state law. *See e.g., Ross*, 344 F.3d at 461-62; *Great Plaintiffs Trust Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 312 (5th Cir. 2002). It is clear, however, that – while the burden is heavy – the plaintiff must have more than a mere hypothetical or theoretical possibility of recovery in state court. *See Travis v. Irby*, 326 F.3d 644, 647-48 (5th Cir. 2003); *see also Griggs v. State Farm Lloyds*, 181 F.3d 694, 699 (5th Cir. 1999). Thus, the defendant must meet this burden by setting forth a defense or defenses which dispose of the plaintiff's claims against the resident and/or non-diverse defendant in their entirety.

The second step in determining if diversity jurisdiction exists under 28 U.S.C. § 1332 is determining if the amount in controversy exceeds $75,000, exclusive of interest and costs. In this regard, the relevant amount is the amount demanded by the plaintiff at the time the case is removed. *See Pullman Co. v. Jenkins*, 305 U.S. 534, 537 (1939). More specifically, it is the value of the entire relief demanded as determined by state law. *See Grant v. Chevron Phillips Chem. Co., L.P.,* 309 F.3d 864, 873-77 (5th Cir. 2002).

The defendant bears the burden of proving the amount in controversy is met. *See Manguno*, 276 F.3d at 723; *see also Haney v. Continental Cas. Co.*, 2008 WL 5111021, * 1 (S.D. Miss. Dec. 2, 2008). The defendant may meet its burden by pointing out that it is "facially apparent" from plaintiff's complaint that the amount in controversy exceeds $75,000, exclusive of interest and costs, or, if the amount in controversy is not set out in or not clear from the face of the complaint, by bringing forth evidence that proves, by a preponderance of the evidence, that the amount in controversy exceeds $75,000, exclusive of interest and costs. *See Luckett v. Delta Airlines, Inc.*, 171 F.3d 295, 298 (5th Cir. 1999). If the latter is necessary, the defendant may rely on summary judgment-type evidence, including, among other things, affidavits, discovery responses and demands made by the plaintiff. *See e.g., Luckett, supra.*

Removal jurisdiction premised on diversity has certain exceptions which prevent the federal courts from assuming jurisdiction even though there is complete diversity and the amount in controversy is met. Specifically, diversity-based removal jurisdiction does not extend to domestic relations cases (e.g., divorce, alimony, child custody, etc.). *See Ankenbrandt v. Richards*, 504 U.S. 689, 693-701 (1992); *Johns v. Depart. of Justice of U.S.*, 653 F.2d 884, 894 (5th Cir. 1981). Further, diversity-based removal jurisdiction does not extend to the probate of wills and administration of estates. *See Markham v. Allen*, 326 U.S. 490, 494 (1946); *Breaux v. Dilsaver*, 254 F.3d 533, 536-67 (5th Cir. 2001); *Johns v. Depart. of Justice of U.S., supra.* These exceptions, however, are narrowly construed. *See e.g., Franks v. Smith*, 717 F.2d 183, 185 (5th Cir. 1983); *see also Breaux v. Dilsaver, supra.* Thus, the defendant should be cognizant of other potential claims involved in the suit that may render the exceptions inapplicable.

Procedural Requirements

Once it is established that original jurisdiction exists, the procedural requirements for effectuating a removal must be met. Although some procedural requirements are derived from case law, most of the procedural requirements are set out in, or based on the language of, 28 U.S.C. § 1446. Generally speaking, all removal requirements, including those in 28 U.S.C. § 1446, that do not relate to the federal court's original jurisdiction are procedural. *See In re Allstate Ins. Co.*, 8 F.3d 219, 221 (5th Cir. 1993). If these procedural requirements are not met, however, the case is subject to remand notwithstanding the presence of original jurisdiction. The practitioner should, thus, be careful to ensure that all procedural requirements are met, in addition to the substantive requirements for jurisdiction.

The procedural requirements for removal may be waived. *See In re Shell Oil Co.*, 932 F.2d 1523, 1528-29 (5th Cir. 1991). Subject matter jurisdiction, on the other hand, may not be created by consent. Thus, when subject matter jurisdiction is lacking (i.e., when original jurisdiction is not present) remand is required and may occur at any time. *See* 28 U.S.C. § 1447(c). *See also Wisconsin Dep't of Corr. v. Schacht*, 524 U.S. 381, 391 (1998). The district court, however, should not remand a case *sua sponte* based on a procedural defect, as it should if subject matter jurisdiction is lacking. *See In re Allstate Ins. Co., supra; see also FDIC v. Loyd*, 955 F.2d 316, 321-22 (5th Cir. 1992). Rather, the court should wait to determine if the plaintiff will waive the procedural defect(s) before remanding a case solely as a result of that procedural defect. *Id.*

A plaintiff must move to remand based on a procedural defect, if he is going to, within thirty days after the filing of the notice of removal. *See* 28 U.S.C. § 1447(c). If a plaintiff fails to seek remand within thirty days of removal, he is deemed to have waived all procedural defects. *Id.*; *see also Pavone v. Mississippi Riverboat Amusement Corp.*, 52 F.3d 560, 566 (5th Cir. 1995). In other words, once thirty days has run from the date the notice of removal was filed, the only relevant issue is whether the court has subject matter (i.e., original) jurisdiction. Special care should still be exercised, however, to ensure that all removal requirements, substantive and procedural, are met.

- **28 U.S.C. § 1446(a)**

28 U.S.C. § 1446(a) contains three basic procedural requirements that must be met. Specifically, the statute requires that the notice of removal contain a short plain statement of the grounds for jurisdiction, that the removing defendant sign the notice of removal, and that all pleadings, process, and other papers served on the defendant be attached to the notice of removal. Case law has added to these requirements over the years. Thus, the practitioner must be careful to ensure that each of these requirements, as modified by the case law, is met.

28 U.S.C. § 1446(a) states that the notice of removal should "contain a short and plain statement of the grounds for removal." Thus, it should go without saying that the notice of removal should set out each of the elements required for subject matter jurisdiction to exist. Failure to plead the jurisdictional basis of the case, including the elements thereof, is a defect. *See e.g., In re Allstate Ins. Co., supra.* Thus, for example, if the basis for removal is diversity jurisdiction, the citizenship of the parties should be specifically pled, *see id.*, as should the amount in controversy, *see Harman v. Oki Sys.*, 115 F.3d 477, 478-79 (7th Cir. 1997). Failure to plead any of the necessary elements for federal jurisdiction may lead to remand based on a procedural defect. *Id.*

28 U.S.C. § 1446(a) further states that the notice of removal should be "signed pursuant to Rule 11 of the Federal Rules of Civil Procedure." Case law has added to this provision through the rule of unanimity. Specifically, case law indicates that, not only must the removing defendant sign the notice of removal, but all properly joined and served defendants must sign the notice of removal or file a separate written joinder indicating their consent to removal. *See Chicago, Rock Island & Pac. Ry. v. Martin*, 178 U.S. 245, 248 (1900); *Gillis v. Louisiana*, 294 F.3d 755, 759 (5th Cir. 2002). Each separate written consent must be filed within the time limits for the notice of removal. *See Doe v. Kerwood*, 969 F.2d 165, 169 (5th Cir. 1992). If a defendant does not sign the notice of removal or file a timely written joinder, their absence must be explained. *See Home Owners Funding Corp. of Am. v. Allison*, 756 F.Supp. 290, 291 (N.D. Tex. 1991). Thus, if it is alleged that a defendant has

been improperly joined, the defendant need not join the notice or removal or file a written joinder, but that failure must be explained. *Id.*

28 U.S.C. § 1446(a) states that the notice of removal should include a "copy of all process, pleadings, and orders served upon such defendant or defendants in such action." A good way to meet this requirement is to attach a certified copy of the state court file to the notice of removal, which should include a copy of the summons served on each defendant, as well as the complaint, any answers already filed and any orders entered in the case.

- **28 U.S.C. § 1446(b)**

28 U.S.C. § 1446(b) contains two additional requirements that must be met. Specifically, the statute requires that the notice of removal be filed within thirty days of receipt of the complaint or other paper indicating the case is, or has become, removable. Additionally, in removals premised on diversity jurisdiction under 28 U.S.C. § 1332, the notice of removal must be filed within one year of the commencement of the action.

28 U.S.C. § 1446(b) states that the notice of removal should be filed within thirty days of the defendant's "receipt . . . through service or otherwise of a copy of the initial pleading." The Fifth Circuit requires a case with multiple defendants to be removed within thirty days of service on the first-served defendant. *See Getty Oil v. Ins. Co. of N. Am.*, 841 F.2d 1254, 1262-63 (5th Cir. 1988). Thus, if the first-served defendant does not file a notice of removal within thirty days of service, the later-served defendants lose their right to remove. *See Brown v. Demco, Inc.*, 792 F.2d 478, 481-82 (5th Cir. 1986). The current trend, however, is towards allowing each defendant thirty days after service to file a notice of removal. *See e.g., Marano Enters. v. Z-Teca Rests., L.P.*, 254 F.3d 753, 755-57 (8th Cir. 2001). The Supreme Court has not ruled on this issue, but its precedent tends to support the later rule. *See e.g., Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344 (1999).

If the case stated by the initial pleading is not removable, 28 U.S.C. § 1446(b) provides that the case may be removed within thirty days of the defendants "receipt . . . 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." A defendant does not have a duty to investigate whether a case is removable. *See Chapman v. Powermatic, Inc.*, 969 F.2d 160, 163 (5th Cir. 1992). Thus, if the case stated by the initial pleading is not clearly removable (i.e., it may or may not be removable) the defendant may wait until an "other paper" makes clear that the case is removable. *Id.*

An "other paper" may consist of anything in the case, *see Davis v. Time Ins. Co.*, 698 F. Supp. 1317, 1321 (S.D. Miss. 1988), that results from a voluntary act of the plaintiff, *see Addo v. Globe Life & Accident Ins. Co.*, 230 F.3d 759, 761-62 (5th Cir. 2000). Correspondence between the parties, *see Sunburst Bank v. Summit Acceptance Corp.*, 878 F. Supp. 77, 80-81 (S.D. Miss. 1995), depositions, *see S.W.S. Erectors, Inc. v. Infax, Inc.*, 72 F.3d 489, 494 (5th Cir. 1996), answers to written interrogatories, *see Jackson v. Mississippi Farm Bureau Mut. Ins. Co.*, 947 F.Supp. 252, 254 (S.D. Miss. 1996), and offers of judgment, *see In re Willis*, 228 F.3d 896, 897 (5th Cir. 2000), have specifically been held to constitute "other paper" when they indicate a case has become removable.

28 U.S.C. § 1446(b) states that "a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action." This limitation is found in the second paragraph of 28 U.S.C. § 1446(b) which deals, generally, with cases that are not removable when filed. As a result, it has been held inapplicable to cases that were removable when filed. *See Johnson v. Heublein Inc.*, 227 F.3d 236, 241 (5th Cir. 2000). Furthermore, the Fifth Circuit has specifically held that this limitation is not only procedural, *see Barnes v. Westinghouse Elec. Corp.*, 962 F.2d 513, 516 (5th Cir. 1992), but is subject to equitable tolling, *see Tedford v. Warner-Lambert Co.*, 327 F.3d 423, 425-26 (5th Cir. 2003). Thus, if it can be shown that the plaintiff is engaging in forum manipulation, the district court can disregard the limitation. *Id.* As such, if faced with the one year limitation, the practitioner should determine if there are any arguments that the case was initially, although perhaps not facially, removable, or if the plaintiff has engaged in forum manipulation.

- **28 U.S.C. § 1446(d)**

28 U.S.C. § 1446(d) states: "Promptly after the filing of such notice or 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." This requirement is generally accomplished by filing a short notice of filing in the state court, with a copy of the notice of removal attached.

- **28 U.S.C. § 1441(b)**

In addition to the procedural requirements and limitations set out in 28 U.S.C. § 1446 and the interpretative case law, 28 U.S.C. § 1441(b) contains an additional requirement for diversity cases. Namely, a case is not removable if any defendant is a citizen of the state in which the action was filed. *See* 28 U.S.C. § 1441(b). This rule, because it does not affect whether the district courts would have original jurisdiction under 28 U.S.C. § 1332, has been

deemed to be procedural. *See Denman v. Snapper Div.*, 131 F.3d 546, 548 (5th Cir. 1998). It is important, however, because it marks yet another distinction between removal jurisdiction and original jurisdiction and emphasizes the importance of the improper joinder doctrine and the role it plays in the removal context.

More specifically, in cases originally filed in federal court, so long as there is complete diversity of citizenship and the amount in controversy is met, the district court has original jurisdiction. *See* 28 U.S.C. §1332. Thus, if a plaintiff were a resident of Texas and joined two defendants in a suit brought in Mississippi, one defendant being a resident of Mississippi and the other a resident of Alabama, the district court would have original jurisdiction, assuming the amount in controversy requirement is met. *Id.* There, however, would be no removal jurisdiction by operation of 28 U.S.C. § 1441(b), unless it was proved that the resident defendant was improperly joined such that his citizenship could be disregarded of the plaintiff waived the requirement. *See Denman, supra.*

- **Venue**

28 U.S.C. § 1441 states that a case should be removed to "the district court of the United States for the district and division embracing the place where such action is pending." 28 U.S.C. § 1446(a), likewise, states that the notice of removal shall be filed "in the district court of the United States for the district and division within which such action is pending." Consequently, the venue statutes applicable to cases originally filed in federal court are not applicable in the removal context. *See Polizzi v. Cowles Magazines, Inc.*, 345 U.S. 663, 665-66 (1953). Thus, even if venue would be improper under the general venue statutes, the case should still be removed to the district court embracing the place where such action is pending. *Id.* It may thereafter be transferred if necessary.

Summary

The removal statutes and the jurisdiction they create are filed with subtle phrases which have been interpreted and built upon by the courts since their first enactment 220 years ago. Today, the rules governing removal jurisdiction, their interpretations, and the commentaries on the same literally fill volumes. Parsed to their core, however, the rules (at least in the Fifth Circuit) can be divided into a primary requirement that federal subject matter jurisdiction exist and the various procedural rules and limitations governing the removal of the case such that the jurisdiction may be exercised. Although every issue effecting removal jurisdiction, obviously, is not discussed in this article, the rules set out herein should provide a good primer for answering the removal question. The subsequent articles that will follow in this series will address some of the more subtle nuances and problematic areas in the arena of removal jurisdiction. ■