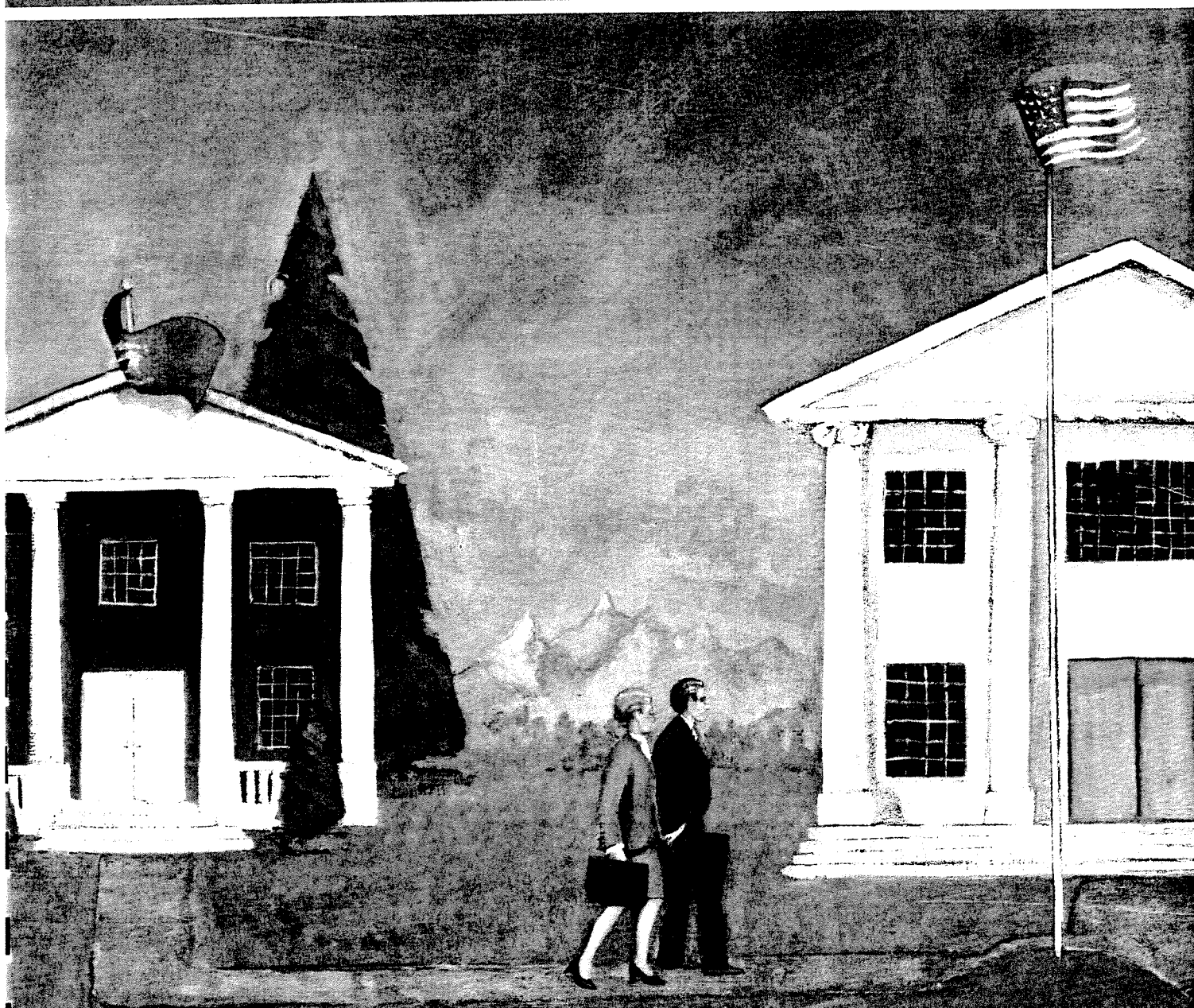


# DEFENSE

DRI

The Magazine for Defense, Insurance and Corporate Counsel

December 1992



# REMOVAL TO FEDERAL COURT

*C. Schweigert*

# FOR THE DEFENSE<sup>®</sup>

The Magazine for Defense, Insurance and Corporate Counsel

Vol. 34, No. 12

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## In This Issue

- 1 **On the Record**  
by Archie S. Robinson
- 2 **Waiver of Defects in Removal Jurisdiction: Another Path to Federal Court**  
by Quentin F. Urquhart, Jr.
- 11 **Unavoidably Unsafe Products: The Future of Comment k**  
by Edward W. Gerecke
- 16 **Opening Statement and Closing Argument: A Golden Opportunity and the Last Chance**  
by David A. Handley
- 22 **An Objection to Using Verdict Sheets**  
by Joseph T. Williams
- 25 **The State-of-the-Art Defense**  
by Louis Genevie
- 27 **1992 For The Defense Index**
- 32 **DRI 1993 Election Information**

## Advocates and New Members

Statement of Ownership, Management and Circulation	
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# Waiver of Defects in Removal Jurisdiction: Another Path to Federal Court

BY QUENTIN F. URQUHART, JR.

**Y**ou receive a telephone call from an out-of-state client who tells you that he has been sued in one of your state courts by a local plaintiff. He explains that since receipt of the suit he has tried to work out a settlement, but it is now apparent there is no way of resolving the matter short of tendering \$100,000 to the other side. He wants you to handle the case. You explain to him that because there is complete diversity of citizenship and the amount in controversy exceeds \$50,000, it would be in his best interest to remove the case to federal court. You then ask him when he was served. He says, "Oh, about four or five weeks ago." Upon further investigation you learn that 35 days have passed since service and you know that a notice of removal must be filed within 30 days under the federal rules. *Can you still get your client's case into federal court?* The answer is maybe, if you know there is a different path into federal court.

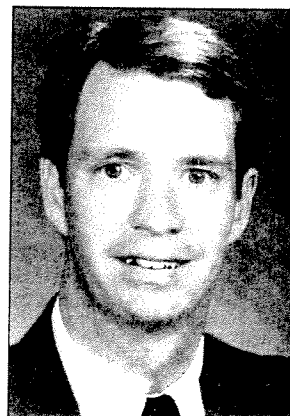
## INTRODUCTION

The removal statute, 28 U.S.C. §§1441-1446, governs the removal of a case from state court to federal court. Twice over the past four years, Congress has revised the statute in an attempt to limit the number of cases which can be removed. Passage of the Judicial Improvements and Access to Justice Act ("Judicial Improvements Act"), Pub.L. No. 100-702, 102 Stat. 4642 (1988), narrowed federal subject matter jurisdiction in diversity cases by increasing the amount in controversy requirement from \$10,000 to \$50,000. 28 U.S.C. §1332(a). The Judicial Improvements Act further limited access to the federal courts when 28 U.S.C. §1446(b) was amended to prohibit removal of

a case if it had been pending in state court for more than a year. Maintaining a federal forum after removal also was dealt a major blow when the Act gave district courts the discretion to allow joinder of a non-diverse party even when that joinder would destroy subject matter jurisdiction. 28 U.S.C. §1447(e). Finally, the Judicial Improvements Act of 1990, Pub.L. No. 101-650, 104 Stat. 5114 (1990), restricted removal jurisdiction even further by prohibiting removal of separate and independent claims unless they are based on a federal question. 28 U.S.C. §1441(c).

While most of the attention has been on the effect the foregoing changes have had on the defendant's ability to *remove* a case to federal court, largely ignored has been a significant restriction placed on the plaintiff's ability to *remand* a case to state court. The Judicial Improvements Act of 1988 amended 28 U.S.C.

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§1447(c) to require the filing of a motion to remand on the basis of any "defect in removal procedure" within 30 days after the filing of the notice of removal. This amendment has become the focus in an increasing number of cases where the plaintiff's failure to file a timely motion to remand has presented the court with the question of whether a federal forum should be maintained where it otherwise should not exist. This article will review the background of the amendment, the different categories of cases to which it has been applied, and then comment upon the tactical and ethical implications which arise in its use.

#### PRE-AMENDMENT LAW

Prior to passage of the Judicial Improvements Act of 1988, 28 U.S.C. §1447(c) provided:

If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs. A certified copy of the order of remand shall be mailed by its clerk to the clerk of the State court. The State court may thereupon proceed with such a case.

One issue which continually surfaced under this section was determining how long a plaintiff could wait before filing his motion to remand. Although the statute was not so worded, the federal courts developed a distinction between defects in subject matter jurisdiction and other defects in removal procedure when determining whether a motion to remand was timely filed. The easy decisions were those in which federal subject matter jurisdiction was lacking. Because the parties could not confer jurisdiction over the subject matter of the action on a federal court by consent, those cases were properly remanded at any point prior to final judgment. See, e.g., *In re Carter*, 618 F.2d 1093 (5th Cir. 1980); *Parks v. Montgomery Ward & Co.*, 198 F.2d 772 (10th Cir. 1952).

The more difficult cases to decide were those where the court had subject matter jurisdiction, but other irregularities in the removal procedure were not asserted promptly by the plaintiff. In those cases, the rule was developed that a plaintiff could waive his right to seek remand by "participating extensively" in the federal proceeding. For example, in *Nolan v. Prime Tanning Co.*, 871 F.2d 76 (8th Cir. 1989), the plaintiffs argued that the case had been removed improperly

because one defendant did not join in the removal petition. In rejecting the motion, the court held that the plaintiffs had waived their right to remand because they had "spent almost two years actively engaging in litigation, including the filing of their own motions, without questioning the district court's ability to hear the case. Only after several unfavorable rulings did the [plaintiffs] seek to remand." *Id.* at 78-79.

For other pre-amendment holdings that a plaintiff may waive his right to remand, see *Johnson v. Odeco Oil & Gas Co.*, 864 F.2d 40 (5th Cir. 1989); *Farm Construction Services, Inc. v. Fudge*, 831 F.2d 18 (1st Cir. 1987); *Meadows v. Bicrodyne Corp.*, 785 F.2d 670 (8th Cir. 1986); *Commercial Associates v. Tilcon Gammino, Inc.*, 670 F.Supp. 461 (D.R.I. 1987). But see, *Knowles v. Hertz Equipment Rental Co.*, 657 F.Supp. 109, 111 (S.D.Fla. 1987), where remand was ordered more than eight months after removal where the court found there was no "real prejudice or hardship" to the defendants.

#### IMPACT OF THE 1988 AMENDMENT

After passage of the Judicial Improvements Act, Section 1447(c) of the United States Code was amended to provide:

A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

A number of fundamental changes were effected by this amendment. First, Section

### **S**ection 1447(c) now makes a clear and express distinction between defects in removal procedure and lack of subject matter jurisdiction.

1447(c) now makes a clear and express distinction between defects in removal procedure and lack of subject matter jurisdiction. Because the statute does not recognize any other grounds for remand, the district court is now required to determine whether "the defect" goes to the subject matter jurisdiction of the court or to the procedure for removal. This distinction is critical because the statute requires that a motion to remand on any ground other than lack of subject matter jurisdiction be made within 30 days of

the filing of a notice of removal. The policy behind this change is to prevent a party who is aware of a defect in removal procedure from using the defect as insurance against later unfavorable developments in federal court. See H.R.Rep. No. 889, 100th Cong., 2d Sess. 72 (1988), reprinted in U.S.Code Cong. & Admin. News 1988, at 5982, 6033. Finally, the amendment explicitly provides for the payment of costs, including attorney fees, incurred as the result of improper removal. Along with Rule 11 of the Federal Rules of Civil Procedure, which is expressly referred to in the procedure for removal (28 U.S.C. §1446(a)), Section 1447(c) puts a defendant on notice of the potential consequences of improperly removing a case.

The strength of the new 30-day time period was demonstrated shortly after its enactment in *Air-Shields, Inc. v. Fullam*, 891 F.2d 63 (3d Cir. 1989). In *Fullam*, the district court *sua sponte* remanded a case to state court more than seven months after an allegedly improper removal. In vacating the remand order, the Third Circuit expressly found that the district court had "exceeded [its] statutorily defined power" by remanding the case for procedural defects after the 30-day time limit imposed by Section 1447(c) had expired. *Id.* at 66, citing *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 351 (1976). An identical result was reached in *In re Shell Oil Co.*, 932 F.2d 1523, 1529 (5th Cir. 1991), wherein the court held that once the 30-day time limit has expired the district court has "no discretion" to remand on the basis of improper removal.

Naturally, the 30-day time limitation set forth in Section 1447(c) applies only to defects in "removal procedure" and does not restrict an objection to the subject matter jurisdiction of the court which, as under pre-amendment law, can be raised at any time prior to final judgment. See, e.g., *State v. Ivory*, 906 F.2d 999, 1000 n.1 (4th Cir. 1990); *Andrews v. United States Fidelity & Guaranty Co.*, 789 F.Supp. 784 (S.D.Miss. 1992). See also, *Melahn v. Pennock Insurance, Inc.*, 965 F.2d 1497 (8th Cir. 1992) (30-day rule did not bar "untimely" motion to remand based on abstention). On the other hand, a significant amount of jurisprudence has developed since the amendment in determining whether other irregularities in removal are related to the court's subject matter jurisdiction or are procedural defects subject to the 30-day time period.

Under the former a remand is required, while under the latter the plaintiff may waive the defect if his motion to remand is untimely. In considering the various circumstances in which such waivers have arisen, it is helpful to distinguish between true defects in removal procedure and what are statutory or jurisprudential prohibitions against removal.

#### TRUE DEFECTS IN REMOVAL PROCEDURE

28 U.S.C. §1446 sets forth the rules which must be followed by a defendant in removing a case to federal court. The failure to follow these rules creates a true "defect in removal procedure" which must be asserted by motion within 30 days after filing of the notice of removal under §1446(a). 28 U.S.C. §1447(c). As will be demonstrated, the courts have generally found that such defects are considered waived if not timely asserted by the plaintiff.

**Untimely Removal by Defendant.** Probably the most common defect in removal procedure is the failure of a defendant to timely file his notice of removal. 28 U.S.C. §1446(b) requires that the notice of removal of a civil action be filed within 30 days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief. 28 U.S.C. §1446(c) further provides that where the case stated by the initial pleading is not removable,

a notice of removal may be filed within 30 days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order, or some other paper from which it may first be ascertained that the case is one which is or has become removable.

Although untimely removal can occur in a number of different ways, it takes place primarily when the defendant miscalculates the commencement of the 30-day time period. There is currently a split in authority over whether the 30-day time period set forth in §1446(b) begins to run from the date when the defendant receives a copy of the initial pleading. Compare *Marion Corp. v. Lloyds Bank, PLC*, 738 F.Supp. 1377 (S.D.Ala. 1990), with *Schwartz Brothers, Inc. v. Striped Horse Records*, 745 F.Supp. 338 (D.Md. 1990). In the case of multiple defendants, the courts are also divided over the issue of whether the 30-day period begins to run from the date the first defendant is served or whether each defendant enjoys its own time period

**Probably the most common defect in removal procedure is the failure of a defendant to timely file his notice of removal.**



for removal. Compare *Getty Oil Corp. v. Insurance Co. of North America*, 841 F.2d 1254 (5th Cir. 1988), with *Garside v. Osco Drug, Inc.*, 702 F.Supp. 19 (D.Mass. 1988).

There can also be considerable uncertainty in determining the commencement of the 30-day time period under the supplementary removal period provided in Section 1446(c). The courts have held that receipt of correspondence, responses to deposition questions, answers to interrogatories, and even oral pronouncements from the bench can constitute sufficient notice to commence the running of the 30-day time period. See, e.g., *Hessler v. Armstrong World Industries, Inc.*, 684 F.Supp. 393 (D.Del. 1988); *Smith v. International Harvester Co.*, 621 F.Supp. 1005 (D.Nev. 1985); *Riggs v. Continental Baking Co.*, 678 F.Supp. 236 (N.D.Cal. 1988); *King v. Kayak Manufacturing Corp.*, 688 F.Supp. 227 (N.D.W.Va. 1988).

Given the inconsistent and sometimes unclear criteria used for determining commencement of the 30-day time period for removal, it is obvious that late removal cannot always be avoided. In addition, there will always be circumstances, like that described at the beginning of this article, where the defendant simply does not inform his attorney that service of suit has been made until after the 30-day time period has expired. However, even under those conditions, the pursuit of a federal forum need not be abandoned. For example, in *Rosciti Construction, Inc. v. Lot 10 of East Greenwich*, 754 F.Supp. 14 (D.R.I. 1991), the defendant removed the case to federal court even though he failed to file his notice of removal within the 30-day period required in Section 1446(b). The plaintiff responded by filing a motion to remand 70 days after the notice of removal was filed. The court denied the plaintiff's motion because, "28 U.S.C. §1447(c) requires that a motion to remand based on a defect in removal procedure be made 'within 30 days after the filing of the notice of removal under section 1446(a).'" *Id.* at 16-17.

A similar result was reached in *F.D.I.C. v. Loyd*, 955 F.2d 316 (5th Cir. 1992), a case where the FDIC failed to remove within the 30-day time limit imposed by §1446(b). Twenty-one months after removal, the district court remanded, finding that the time limit in 28 U.S.C. §1447(c) did not apply when the court was acting on its own initiative. See *Federal Deposit Insurance Corp. v. Loyd*, 744 F.Supp. 126, 131 (N.D.Tex. 1990). On appeal, the Fifth Circuit vacated the remand order and held that the district court was not empowered to remand a case for a defect in removal procedure, whether *sua sponte* or on motion of the parties more than 30 days after removal. 955 F.2d at 323. Thus, the untimely removal was waived by the failure to file a timely motion to remand. *Id.* See also, *Air-*

*Shields, Inc. v. Fullam*, 891 F.2d 63 (3d Cir. 1989); *Patient Care, Inc. v. Freeman*, 755 F.Supp. 644, 645 n.1 (D.N.J. 1991); *Callaway v. G.S.P., Inc.*, 793 F.Supp. 133 (S.D.Tex. 1992); *Ginn v. Stegall*, 132 F.R.D. 166 (E.D.Va. 1990); *Financial Timing Publications, Inc. v. Compugraphic Corp.*, 893 F.2d 936 (8th Cir. 1990) (pre-amendment law).

**Failure of all Defendants to Join in Removal.** In cases involving multiple defendants, it is the general rule that all defendants who have been served must join in the removal. *Chicago, Rock Island & Pacific Railway Co. v. Martin*, 178 U.S. 245 (1900). Failure to follow this rule creates a defect in removal procedure which, if timely asserted, requires remand to state court. In some jurisdictions, this rule can present a formidable obstacle to removal because of the requirement that all served defendants must join in the removal no later than 30 days from the day on which the first defendant was served. See, e.g., *Getty Oil Corp. v. Insurance Co. of North America*, *supra*. However, as with the failure to timely file for removal, the courts have found this defect to be waivable. Thus, a defendant should not abandon his right to removal solely because he is unable to obtain the timely consent of all defendants.

In *Winners Corp. v. Lafayette Life Insurance Co.*, 734 F.Supp. 812, 815 (M.D.Tenn. 1989), the action was removed by one of the defendants more than 30 days after initial service. The remaining defendants did not join in the removal until after the plaintiff filed its motion to remand 56 days later. The court explicitly held that the plaintiff's failure to move for remand within the 30-day limit set forth in 28 U.S.C. §1447(c) barred not only any objection to the defendant's failure to remove within the time limit prescribed by Section §1446(b), but also barred any objection to the failure of all defendants to join in the removal. *Id.* at 815.

In one pre-amendment decision, *Fellhauer v. City of Geneva*, 673 F.Supp. 1445 (N.D.Ill. 1987), the court ordered remand, finding that although the requirement that all defendants consent to removal of a case to federal court within 30 days under §1446 was not a jurisdictional limitation, it was nevertheless a mandatory requirement and its waiver was to be strictly construed. *Id.* at 1447-49. However, given the deliberate imposition of a specific time limit in the current version of §1447(c), it is unlikely that the court would reach the same conclusion today. Under the amended statute, a defect is either subject matter oriented and thus not waivable, or it is procedurally oriented and thus waivable by failing to file a timely motion to remand. See also, *Wade v. Fireman's Fund Insurance Co.*, 716 F.Supp. 226 (M.D.La. 1989); *Cowart v. Penske Truck Leasing, Inc.*, 1992 Westlaw 137409 (N.D.Ill. 1992). But

see, *Samuel v. Langham*, 780 F.Supp. 424 (N.D.Tex. 1992) (*sua sponte* remand where all defendants failed to timely join in removal even after expiration of the 30-day time period).

**Improper Venue.** A defect in removal procedure can also be created by the failure to follow 28 U.S.C. §1441(a), which provides that the proper venue for removal is "the district court of the United States for the district and division embracing the place where such action is pending." In *Cook v. Shell Chemical Co.*, 730 F.Supp. 1381 (M.D.La. 1990), the action was removed to the wrong district court by the defendant, but the plaintiff did not file a motion to remand until six months later. In concluding that remand was not warranted, the court noted that "[u]nder Fed.R.Civ.P. 12(h), the defense of improper venue is waived if not made timely. Therefore, removal to the wrong district is a procedural defect, like improper venue, which was waived by the failure to object to it timely. Plaintiff has therefore waived her grounds for remand." *Id.* at 1382.

Another growing line of cases are those dealing with the Resolution Trust Corporation and the provisions of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, 12 U.S.C. §1441(a)(1)(3), which provide that the RTC may only remove cases to the United States District Court for the District of Columbia. Once again, however, the courts have interpreted this provision to be procedural, and thus the plaintiff may waive his right to object to the removal of a case by the RTC when he does not file his motion to remand within 30 days. See *Resolution Trust Corp. v. Sonny's Old Land Corp.*, 937 F.2d 128 (5th Cir. 1991); *Sweeney v. Resolution Trust Corp.*, 765 F.Supp. 33 (D.Mass. 1991). See also, *In re Trafficwatch*, 138 B.R. 841, 844 (E.D.Tex. 1992) (removal of bankruptcy case to improper district is a procedural defect which is waived by failure to object within the 30-day time period).

## PROHIBITIONS AGAINST REMOVAL

A number of prohibitions against removal are found in the United States Code, or have developed jurisprudentially. These prohibitions are not strictly procedural in nature but are aimed at preventing the removal of certain types or classes of cases to federal court. The question of whether these prohibitions are nevertheless to be considered "procedural" for the purposes of 28 U.S.C. §1447(c), and thus waivable, has been addressed with increasing frequency since the statute was amended.

**Home State Defendant.** As with original diversity jurisdiction, the right of removal was primarily intended to protect nonresidents from the local prejudices of state courts. Accordingly, one of the most

fundamental prohibitions against removal to federal court is found in 28 U.S.C. §1441(b), which provides:

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.

Pursuant to this provision, a defendant may not remove a case to federal court if he or any other defendant resides in the same state in which the action is pending. The question of whether removal of a case in violation of this prohibition is a "defect in removal procedure" under Section 1447(c) was presented in *In re Shell Oil Co.*, 932 F.2d 1518 (5th Cir. 1991) ("*Shell I*"), and in *In re Shell Oil Co.*, 932 F.2d 1523 (5th Cir. 1991) ("*Shell II*"). In *Shell I* and *Shell II*, the plaintiffs filed suit in Texas state court against various defendants, including two Texas residents. Despite the existence of the "home state" defendants, the case was removed to federal court. A motion to remand was filed by the plaintiffs 33 days after removal; in spite of its lateness, the district court granted the motion on the basis of 28 U.S.C. §1441(b). The defendants subsequently applied to the appellate court for a writ of mandamus compelling the district court to recall the remand order.

After concluding that it had the authority to review the remand order, the Fifth Circuit in *Shell I* engaged in a thorough analysis of the amendments to Section 1447(c) and, in particular, what was meant by the term "defect in removal procedure." Taking into account the official commentary to the 1988 revision and opinions of other learned commentators, the court concluded that "any defect in removal procedure" includes "all non-jurisdictional defects existing at the time of removal." *Id.* at 1522. Because the presence of home state defendants in violation of §1441(b) was not a jurisdictional defect, the court found that the plaintiffs had waived any objection to the improper removal by failing to file a timely motion to remand. *Id.* at 1523. See also, *Taylor v. St. Louis Southwestern Railway Co.*, 128 F.R.D. 118 (D.Kan. 1989).

Despite the logic of *Shell I*, a contrary result was recently reached by the Eighth Circuit in *Hurt v. Dow Chemical Co.*, 963 F.2d 1142 (8th Cir. 1992). Suit was filed in Missouri state court against Dow Chemical Co. and Rose Exterminating Co., a Missouri resident. Dow removed the case to federal court on the basis of federal question jurisdiction or, alternatively, diversity jurisdiction. A motion to remand was filed by the

plaintiff some eleven months later. After finding that federal question jurisdiction did not exist, the court reached the issue of whether a federal forum could be maintained on diversity grounds even though a home state defendant was present.

In holding that remand was warranted, the court in *Hurt* found that even though Dow and Rose could have originally been sued in federal court by the plaintiff, this was irrelevant to the assertion of removal jurisdiction. The court held that presence of the home state defendant was not a mere procedural irregularity capable of being waived, but rather it created an absence of subject matter jurisdiction. *Id.* at 1146 n.1. The court thus equated removal jurisdiction with subject matter jurisdiction.

This proposition, equating removal jurisdiction with subject matter jurisdiction, for which the *Hurt* court cited no precedent, is contrary to the weight of authority which has always drawn a clear distinction between the two. See, e.g., *Grubbs v. General Electric Credit Corp.*, 405 U.S. 699 (1972). More to the point, the decision is in direct conflict with a long line of cases which have held that the presence of a home state defendant is a defect in removal procedure which does not go to the original jurisdiction of the federal court. See, e.g., *McKay v. Boyd Construction Co.*, 769 F.2d 1084 (5th Cir. 1985); *American Oil Co. v. McMullin*, 433 F.2d 1091 (10th Cir. 1970); *Stromberg v. Costello*, 456 F.Supp. 848 (D.Mass. 1978). See also, decisions cited in 1A *Moore's Federal Practice*, ¶10.157[11.-4], 172-73.

**Admiralty Cases.** Another prohibition against removal has developed in cases arising under the admiralty jurisdiction of the United States. 28 U.S.C. §1333 provides that the district courts shall have original jurisdiction, exclusive of the courts of the states, of any civil case of admiralty or maritime jurisdiction, "saving to suitors" in all cases all other remedies to which they are otherwise entitled. The "savings clause" has been construed to permit the filing of admiralty actions, otherwise exclusively within the jurisdiction of the federal courts, in state court. In *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959),

the United States Supreme Court held that where a plaintiff exercises his option of bringing suit in state court under the savings clause, the case could not be removed in the absence of diversity jurisdiction.

The question of whether an admiralty plaintiff's right to a state forum could be waived by failing to timely move for remand under 28 U.S.C. §1447(c) was recently addressed in *Baris v. Sulpicio Lines, Inc.*, 932 F.2d 1540 (5th Cir. 1991). The plaintiff brought an action in state court pursuant to general maritime law

under the "saving to suitors" clause. The defendant timely removed the case to federal court pursuant to 28 U.S.C. §1333 and the Death on the High Seas Act ("DOHSA"), 46 U.S.C. §761. The plaintiff failed to file a motion to remand within the 30-day time period set forth in 28 U.S.C. §1447(c), but subsequently argued that the federal court had to remand because it lacked subject matter jurisdiction. In rejecting that argument, the court held that the term "lacks subject matter jurisdiction" in §1447(c) referred only to federal subject matter jurisdiction. 932 F.2d at 1544. Consistent with this ruling, the court went on to hold that the prohibition against removal of "savings clause" cases was thus a "defect in removal procedure" under §1447(c) which could be waived. *Id.* The court justified its exercise of jurisdiction in the following manner (*id.* at 1548):

[T]his is an action that the plaintiffs *could have brought* in federal court, in admiralty. No special averment under rule 9(h) would have been required, because, as a DOSHA claim, the action could have been brought only in admiralty, there being no diversity. The point is that had the plaintiffs so chosen, the federal district court would have had original subject matter jurisdiction over the claim. That is why, once any objection to removal was waived, the district court was able to retain jurisdiction.

The court in *Baris* thus held that the defendant could remove the action from state court to the admiralty side of the federal court. If the plaintiff failed to move for remand within the 30-day time period set forth in §1447(c), his initial selection of a state court forum was subject to waiver, which car-

## The right of removal was primarily intended to protect nonresidents from the local prejudices of state courts.



ried with it "the waiver of any rights or procedures peculiar to state court, such as, *inter alia*, the right to a jury or to special time limits or discovery procedures under state law and state procedural rules." *Id.* See also, *In re Digicon Marine, Inc.*, 966 F.2d 158 (5th Cir. 1992).

**FELA/Jones Act Cases.** Section 1445(a) of Title 28 expressly prohibits the removal of a case arising under the Federal Employer's Liability Act ("FELA"), 45 U.S.C. §51, to federal court. Because maritime common law did not afford a seaman a cause of action against his employer, Congress adopted the Jones Act, 46 U.S.C. §688, which provides that a seaman may maintain an action for damages against his employer subject to the provisions of the FELA. Thus, by incorporating the FELA, Congress created a general prohibition against the removal of Jones Act cases to federal court. In *Lirette v. N.L. Sperry Sun, Inc.*, 820 F.2d 116 (5th Cir. 1987), an *en banc* panel of the United States Fifth Circuit nevertheless held that a plaintiff could waive the statutory prohibition against the removal of a Jones Act case. The holding in *Lirette* is based on the proposition that a plaintiff may waive his objection to the improper removal by participating in the proceedings in the federal forum and allowing the federal district court to reach a decision on the merits of the case. *Id.* at 117-118.

Because *Lirette* was decided before the enactment of the Judicial Improvements Act of 1988, it did not address the issue of waiver under the 30-day time limit now set forth in 28 U.S.C. §1447(c). However, there appears to be no valid reason why a court would not allow such a waiver based upon the strong precedent set forth in *Lirette* and its classification of the prohibition of the removal of a Jones Act case as "procedural" in nature. For two later cases which followed *Lirette* and reached the same conclusion, see *Courville v. Texaco, Inc.*, 741 F.Supp. 108 (E.D.La. 1990), and *Johnson v. Odeco Oil & Gas Co.*, 864 F.2d 40 (5th Cir. 1989).

**Workers Compensation Cases.** One of the better known restrictions against removal is found in 28 U.S.C. §1445(c), which prohibits the removal of a civil action in any state court arising under the workmen's compensation laws of such state to any district court of the United States. In *Cook v. Shell Chemical Co.*, 730 F.Supp. 1381 (M.D.La. 1990), the court was faced with the precise issue of whether this prohibition against the removal of a workers compensation case could be waived by failing to object to the improper removal within the 30-day time period. In answering that question in the affirmative, it stated that "[a]lthough this court has been unable to find a case stating clearly that this provision on worker's compensation cases is procedural, *Lirette* . . . holds that the statutory bar in

§1445(a) of removal of Jones Act cases can be waived. Applying this interpretation of §1445(a) to §1445(c) by analogy, the failure to object timely to the removal of a worker's compensation suit in the case at bar results in a waiver of plaintiff's objection to removal based on §1445." *Id.* at 1382.

A contrary result was reached in *Blackmore v. Rock-Tenn Co.*, 756 F.Supp. 288, 289 (N.D.Tex. 1991), where the court held that it could *sua sponte* remand a workers compensation case removed in violation of §1445(c) even after expiration of the 30-day time limit imposed by §1447(c). *Blackmore* is based, in large part, on reasoning set forth in *Federal Deposit Insurance Corp. v. Loyd*, 744 F.Supp. 126 (N.D.Tex. 1990). However, the remand order in the latter case was subsequently vacated. *F.D.I.C. v. Loyd*, 955 F.2d 316 (5th Cir. 1992). Thus, *Blackmore* cannot be viewed as persuasive authority on this question. The validity of *Blackmore* is also called into doubt by *Cedillo v. Valcar Enterprises & Darling Delaware Co.*, 773 F.Supp. 932, 938 (N.D.Tex. 1991), a decision from the same district holding that §1445(c) does not withdraw federal court jurisdiction over civil actions that arise under the workers compensation laws of the forum state.

#### A SPECIAL CASE: THE ONE YEAR TIME LIMIT

Perhaps the most far reaching removal restriction brought about by the Judicial Improvements Act of 1988 is found in 28 U.S.C. §1446(b), which now provides that "a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after the commencement of the action." This restriction does not fit neatly into either of the two categories outlined above. Although "procedural" in that it contains a time limit within which a certain act must be accomplished, *i.e.*, removal to federal court, it also contains an explicit prohibition against removal of a certain type of case, *i.e.*, one that has been pending in state court for more than a year. Perhaps because of these dual characteristics, considerable jurisprudence has developed over the question of whether this provision should be considered as a jurisdictional or procedural bar for the purposes of remand under 28 U.S.C. §1447(c). At this point in time, there is a split among the federal courts in deciding this issue.

In *Gray v. Moore Business Forms, Inc.*, 711 F.Supp. 543 (N.D.Cal. 1989), the defendant removed the case to federal court more than a year after it was filed in state court, but the plaintiff did not move to remand until 50 days later. In determining whether remand was warranted, the court initially concluded that the one-year time limit on removal imposed by the Judicial Improvements Act was a procedural change which could be applied retroactively. *Id.* at 545. Consistent

with that finding, the court held that the 30-day limit on filing motions to remand was also procedural and thus, although the defendant had improperly removed, the plaintiff waived this defect when he failed to move for remand within the statutory time limit. *Id.* at 546.

In *Barnes v. Westinghouse Electric Corp.*, 962 F.2d 513 (5th Cir. 1992), the Fifth Circuit recently reached an identical result. The removal took place more than three years after filing when the plaintiff filed a Sixth Amended Petition naming completely diverse defendants for the first time. The plaintiff initially moved to remand on the basis that the defendant had waived the right to remove by seeking affirmative relief in state court. Some 20 months after this motion was denied, the plaintiff moved for rehearing based on the defendant's failure to remove within one year of original filing, as required by §1447(c). Consistent with its prior holdings in *Baris v. Sulpicio Lines* and *In re Shell Oil Co.*, 932 F.2d 1518 (5th Cir. 1991), the Fifth Circuit found that the word "procedural" in §1447(c) referred to "any defect that does not go to the question of whether the case originally could have been brought in federal district court . . ." *Id.* at 516, quoting *Baris*, 932 F.2d at 1544. Accordingly, because the plaintiff did not move to remand until more than 30 days after the removal, he waived the opportunity to call the one-year procedural defect to the attention of the district court. *Id.* See also, *Leidolf v. Eli Lilly & Co.*, 728 F.Supp. 1383 (E.D.Wis. 1990); *Wilson v. General Motors Corp.*, 888 F.2d 779 (11th Cir. 1989); *Taylor v. Hayes*, 1990 Westlaw 192486 (E.D.La. 1990).

Other decisions, however, have flatly rejected the proposition that the one-year time limit for removal is waivable. For example, in *Foiles v. Merrell National Laboratories*, 730 F.Supp. 108 (N.D.Ill. 1989), the plaintiff brought suit in state court, but the case could not be removed because of the presence of non-diverse defendants. Some five years later, the only remaining defendant was Merrell Dow, whose citizenship was diverse from that of the plaintiff. Merrell removed the case to federal court and the plaintiff failed to file a timely motion to remand. Based on the "plain language" of the statute, the court found that §1446(b) was intended to create a nonwaivable blanket prohibition on removal of a diversity case more than one year after the commencement of the action. *Id.* at 110. The court thus held that the plaintiff's failure to file a timely motion to remand did not result in a waiver of the one-year limit. *Id.*

A similar result was recently reached in *Brock v. Syntex Laboratories, Inc.*, 791 F.Supp. 721 (E.D.Tenn. 1992). The plaintiffs initially filed suit in state court but limited their demand to \$10,000, the then pending jurisdictional limit in diversity cases. Approximately

ten years later the plaintiffs amended their complaint to increase their *ad damnum* from \$10,000 to over \$5 million. The defendant timely removed the case to federal court, but the plaintiffs did not file a motion to remand until almost three months later. Nevertheless, the court found that the one-year limit on removal was intended to be a "substantive limit" on the jurisdiction of the federal courts which could not be waived. *Id.* at 723. The court thus concluded that it lacked "subject matter jurisdiction" and could order remand despite the plaintiff's failure to comply with the requirements of 28 U.S.C. §1447(c). *Id.* See also, *Perez v. General Packer, Inc.*, 790 F.Supp. 1464 (C.D.Cal. 1992); *Smith v. MBL Life Assurance Corp.*, 727 F.Supp. 601 (N.D.Ala. 1989).

There is a strong division of authority on this issue and it ultimately may require resolution by the United States Supreme Court. However, it is submitted that from a standpoint of pure statutory construction, the cases which argue that the one-year limit is procedural in nature, and thus waivable, are more persuasive. Perhaps the clearest support for this position is found in the fact that the one-year limit is contained in 28 U.S.C. §1446, which is titled "Procedure for removal." More importantly, however, the cases which have held the one-year limit to be "jurisdictional" have failed to draw the critical distinction between removal jurisdiction and subject matter jurisdiction. 28 U.S.C. §1447(c), as amended by the Judicial Improvements Act, authorizes remand on only two grounds: (1) for "any defect in removal procedure" or (2) where "it appears that the district court lacks *subject matter jurisdiction*" (emphasis added). The statute does not recognize a third basis for remand due to defects in *removal* jurisdiction. Because the one-year limit is clearly not a form of subject matter jurisdiction, it can only be classified as a "defect in removal procedure" subject to the 30-day time limit of §1447(c).

#### TACTICAL AND ETHICAL CONSIDERATIONS

When faced with the question of whether to remove a case that is technically unremovable, a number of factors need to be taken into account. First, you will need to consider the type of removal defect you are faced with and whether there is any precedent in your jurisdiction indicating how the court would rule if the plaintiff fails to file a timely motion to remand. Second, you will need to consider the position and skill of your opponent, *e.g.*, whether there is a possibility (for whatever reason) he might allow the 30-day time period in 28 U.S.C. §1447 to expire before filing a motion to remand. If you conclude he would not make that "mistake," then there is no reason to waste your client's time and money in removing the

case. However, as the wealth of case law on this subject suggests, you should not be too quick to presume that your opponent will automatically act as the statute requires.

Third, you will need to consider the downside in the event that your opponent *does* file a timely motion to remand. 28 U.S.C. §1447(c) specifically provides that "[a]n order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." Furthermore, §1446(a) requires that the notice of removal be signed "pursuant to Rule 11 of the Federal Rules of Civil Procedure. . . ." Accordingly, counsel for defendant should consider the possibility of being levied with attorney fees, costs, or sanctions if the plaintiff files a motion to remand within the 30-day time period of §1447(c).

In *Knudsen v. Samuels*, 715 F.Supp. 1505 (D.Kan. 1989), the defendant filed a petition for removal even though more than 30 days had elapsed since the service of the initial summons. The plaintiff filed a timely motion to remand on the basis that the defendant had waived any right to removal by filing a third party complaint in state court and, further, on the grounds that the removal petition was untimely. The court granted the motion to remand and awarded the plaintiff attorneys' fees. *Id.* at 1507. Based upon the same logic, a court may very well award a plaintiff attorneys' fees and costs for an "improper" removal of a Jones Act case, a state workers compensation case, or any of the other so-called procedural defects. Therefore, you and your client will need to carefully weigh this possibility against the potential benefit of a federal forum before removal is attempted.

Whether the district court makes an award of attorneys' fees or costs will likely depend on its determination of whether the attempted removal was reasonable. See *Schering Corp. v. Vitarine Pharmaceuticals, Inc.*, 889 F.2d 490 (3d Cir. 1989); *Davis v. Crush*, 862 F.2d 84 (6th Cir. 1988). For example, if a defendant filed his notice of removal five days late, a court would be less likely to make an award of sanctions than if the defendant removed the case six months after service. An award of attorneys' fees and costs also would be more likely if, at the time removal took place, the case had reached a critical stage in state court. For example, if the plaintiff dismissed a non-diverse defendant on the eve of trial, the remaining defendants should think long and hard before removing if the case has been pending in state court for significantly more than a year. An implicit recognition of this reasonableness standard is found in *Samuel v. Langham*, 780 F.Supp. 424 (N.D.Tex. 1992),

where an award of attorneys' fees and costs was made where the removing defendants refused to honor plaintiff's request for a voluntary remand within the 30-day time period. But see, *Coman v. International Playtex, Inc.*, 713 F.Supp. 1324, 1329 (N.D.Cal. 1989) (court refused to make an award of attorneys' fees and costs "[b]ecause the law regarding the application of [§1447(c)] is still developing and defendant's basis for removing the action was colorable. . .").

Finally, if the district judge remands the case on a procedural ground even though the plaintiff failed to file a timely motion to remand, relief should be sought through a mandamus to the appellate court. Although 28 U.S.C. §1447(d) provides that an order remanding a case to state court is not reviewable on appeal, recent interpretations of this statute hold that the availability of appellate review depends entirely on the reason for issuance of the order. It is now recognized that if the remand order is based on a lack of subject matter jurisdiction it is clearly unreviewable. In *re Shell Oil Co.*, supra, 932 F.2d at 1520, citing *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976). However, if the remand order is based on the existence of a defect in removal procedure which has not been timely asserted by the plaintiff, it is reviewable. See, e.g., *Air-Shields, Inc. v. Fullam*, 891 F.2d 63, 66 (3d Cir. 1989) (remand order based on the presence of a home state defendant). Whether a remand based on a timely asserted defect in removal procedure would be reviewable was, until recently, an open question. See *Shell I*, supra, 932 F.2d at 1520 n.5; *McDermott International, Inc. v. Lloyds Underwriters of London*, 944 F.2d 1199 (5th Cir. 1991). However, in *In re Medscope Marine Limited*, 972 F.2d 107 (5th Cir. 1992), the Fifth Circuit has recently concluded that it was without jurisdiction to vacate an order of remand based on a timely section 1447(c) motion raising a defect in removal procedure. See also, *Hopkins v. Dolphin Titan International, Inc.*, 1992 Westlaw 296564, 1992 LEXIS 26654 (5th Cir. 1992).

## CONCLUSION

Obtaining a federal forum is, in many cases, the single most important step that an attorney can take in his or her client's defense. Because of this fact, every opportunity for removal should be explored. The decisions reviewed in this article suggest that even when a defendant is faced with a case that is technically unremovable, he should not abandon his quest for a federal forum. Under the proper circumstances he can still remove and, with a little luck, get into federal court by following a different path. Δ