

## A Transportation Lawyer's Guide to Removal of Cases to Federal Court

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One of the first questions you should ask when you receive a State court complaint against your transportation client<sup>1</sup> is: "Should this case be removed to federal court?"

There are several potential advantages to proceeding in federal court when removal is available, including the following:

(1) The quality of judging in a case involving a transportation client tends to be better in federal court, since federal judges and their clerks are more likely to have experience in commercial law in general, and in transportation law in particular;

(2) Removing the action to federal court can prevent you from being "home towned" by local counsel who is close to the local judiciary;

(3) If a jury trial is involved, federal court civil cases must be decided by unanimous verdict (*see* Rule 48, F. R. Civ. P.);

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By "transportation client," I mean clients who are engaged in the business of transporting or arranging for the transport of goods, including carriers of all types and in all modes of transport, freight forwarders, motor freight brokers, non-vessel operating common carriers, warehousemen (especially U.S. Customs-licensed warehousemen), and Customs brokers.

(4) The early disclosure provisions of the Federal Rules might enable you to resolve the case quickly and inexpensively;

(5) Discovery rules in federal court are usually enforced more stringently than in State court, and subpoenas in federal court are national in scope, which gives you the ability to take depositions and obtain documents anywhere in the country;

(6) Once the case is removed, you might be able to change venue in the case to a more convenient forum under 28 U.S.C § 1404(a); and

(7) Federal courts have the power to award sanctions for improper conduct against parties and their counsel under both Rule 11 and the “inherent power” of the Court, and they are willing to do so under appropriate circumstances. *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 45-46, 111 S.Ct. 2123, 2132 (1991); *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764-766, 100 S.Ct. 2455, 2463-2464 (1980).

Of course, there can also be *disadvantages* to proceeding in federal court, including the unavailability of certain State court discovery devices (e.g., form interrogatories which are available California State courts), the relatively stringent documentation requirements for motions, case management conferences and pre-trial conferences in federal court, which can be expensive, and possibly calendar congestion. In most cases, however, you will probably conclude that the advantages of proceeding in federal court outweigh the disadvantages.

If you and your client agree that proceeding in federal court is desirable, however, you must act quickly and carefully, since (1) your client has only a thirty day window within which to remove the action under 28 USC §1446(b) and (2) costs and attorneys' fees may be awarded under 28 USC §1447(c) if the Court finds that removal of the action was improper.

In this article, I shall provide an overview of the most common grounds for removing actions against transportation clients to federal court, the procedures involved in removing such cases, and the availability of an appeal or other appellate remedy if the District Court should improperly remand your case to State court.<sup>2</sup>

### **Grounds for Removal of Lawsuits Against Transportation Clients**

The grounds for removal are set forth in 28 USC § 1441, which provides in part as follows:

(a) Except as otherwise expressly provided by Act of Congress, 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 the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. . . .

(b) 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

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The discussion which follows is intended as an overview of the removal option for attorneys who represent transportation clients, not as a comprehensive review of removal law.

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.

(c) Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise nonremovable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.

Emphasis added.

For transportation clients, the principal jurisdictional grounds upon which you might be able to remove an action to federal court are (1) “federal question” jurisdiction under 28 USC § 1331, which provides for original jurisdiction of actions “arising under the Constitution, laws or treaties of the United States;” and (2) diversity of citizenship under 28 USC § 1332, which provides for jurisdiction of all civil actions where the action is between citizens of different states or citizens of a state and citizens of a foreign state, provided the amount in controversy is in excess of \$75,000. Although some cases could be removable on other grounds, such as cases which fall into the admiralty and maritime jurisdiction of the federal court under 28 USC § 1333 and cases which arise under a law affecting commerce under 28 USC § 1337, these grounds will rarely be available for the reasons discussed below.

## **General Principles For Determining Whether Subject Matter**

### **Jurisdiction Exists**

Since federal courts are courts of limited jurisdiction, the burden of establishing

subject matter jurisdiction in the federal court is on the removing party. *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377, 114 S. Ct. 1673; 128 L. Ed. 2d 391 (1994); *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 97 (1921).<sup>3</sup>

In considering whether or not removal is appropriate, the federal courts will strictly construe the removal statute against removal jurisdiction. *Boggs v. Lewis*, 863 F.2d 662, 663 (9th Cir. 1988); *Takeda v. Northwestern Nat'l Life Ins. Co.*, 765 F.2d 815, 818 (9th Cir. 1985). Federal jurisdiction must be rejected if there is any doubt as to the right of removal in the first instance. *Libhart v. Santa Monica Dairy Co.*, 592 F.2d 1062, 1064 (9th Cir. 1979).

### **Federal Question Removal**

If the complaint in the action you are called upon to defend asserts a claim which *explicitly* alleges a violation of federal law, such as the Fair Labor Standards Act (FLSA), you should be able to remove the case, with some exceptions.

If counsel for the plaintiff has been careful to assert *State law-based claims* only, however, your task will be more difficult, since federal courts are normally required to determine whether the action may be removed under the “well pleaded complaint” rule. Under this rule, the

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The right to remove an action can be waived. Accordingly, if your client has signed a contract by which it has agreed that the action shall be heard in a State forum, you may not remove the action. *See Regis Associates v. Rank Hotels (Management), Ltd.*, 894 F.2d 193, 195 (6<sup>th</sup> Cir. 1990).

Court must determine whether the action is removable based upon the allegations “on the face of the Complaint,” since the plaintiff “is master to decide what law he will rely upon.” *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987). Thus, if the Complaint properly pleads State law claims only, the action may **not** be removed, even if federal law provides a complete defense to the State law claims asserted, and even if the parties agree that the federal law defense is the only question truly at issue in the case. See *Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust for Southern Cal.*, 463 U.S. 1, 14, 77 L. Ed. 2d 420, 103 S. Ct. 2841 (1983); *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 808 (1986).

Under the “artful pleading” doctrine, however, a court may look behind a complaint to determine whether the plaintiff is attempting to conceal the *federal law-based* nature of its claim by fraud or obfuscation, since courts “will not permit plaintiff to use artful pleading to close off defendant's right to a federal forum . . . [and] occasionally the removal court will seek to determine whether the real nature of the claim is federal, regardless of plaintiff's characterization.” 14 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 3722, pp. 564-566 (1976) (cited with approval in *Federated Dep't Stores v. Moitie*, 452 U.S. 394, 397, 101 S. Ct. 2424; 69 L. Ed. 2d 103 (1981)).

There are at least two ways to establish that a complaint which has “artfully pled” only State law claims actually states a removable, federal law-based claim:

(1) establish that the State law-based claims asserted by the plaintiff are “completely pre-empted” by federal law (*see Metropolitan Life Ins. Co.*, 481 U.S. 58, 65-66 (1987))

(upholding removal based on the preemptive effect of § 502(a)(1)(B) of the Employee Retirement Income Security Act); *Avco Corp. v. Machinists*, 390 U.S. 557, 560 (1968) (upholding removal based on the preemptive effect of § 301 of the Labor Management Relations Act); or

(2) show that resolution of the State law-based claims necessarily depend upon the resolution of a substantial question of federal law (*see Merrill Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 807 n. 2 (1986); *Franchise Tax Board v. Constr. Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 27-28 (1983)).<sup>4</sup>

The United States Supreme Court has thus far identified only three federal statutes that “completely pre-empt” State law claims: (1) Section 301 of the Labor-Management Relations Act, 29 USC. § 185 (*Avco Corp. v. Machinists, supra*, 390 U.S. at p. 560); (2) § 502 of the Employee Retirement Income Security Act of 1974, 29 USC § 1132 (*Metropolitan Life Ins. Co., supra*, 481 U.S. at p. 65-66) ; and (3) the usury provisions of the National Bank Act, 12 USC §§ 85, 86. *Beneficial Nat'l Bank v Anderson*, 539 U.S. 1, 7-8 (2003).

As is discussed in greater detail below, most Circuit Courts of Appeal have found that the Carmack Amendment (49 USC §§ 11706 and 14706) “completely pre-empts” claims arising from the loss of or damage to goods in the motor or rail carriage of goods, while some have found

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As is discussed in *Grable & Sons Metal Prods, Inc v Darue Eng'g & Mfg, supra*, 545 U.S. 308 (2005), this showing can rarely be satisfied. *See, e.g., In re NSA Telcomms. Records Order Litig.*, 483 F. Supp. 2d 934, 942 (N.D. Cal. 2007) (removal found proper because lawsuit involved the state secrets privilege).

that the Montreal and Warsaw Conventions “completely pre-empt” claims for loss of or damage to goods and personal injury.

Although a few courts have found removal to be proper under other statutes, *without* also finding that the federal law in issue “completely pre-empts” State law claims, these cases should be viewed with caution.

## **Federal Question Removal of Certain Types of Transportation Cases**

### **Claims Covered by the Carmack Amendment**

If the claim in issue arises out of the loss of or damage to goods in the course of interstate transport by rail or motor carrier and the amount in controversy exceeds \$10,000.00 per bill of lading,<sup>5</sup> the action may be removed.

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28 USC § 1445(b) establishes a special jurisdictional limitation for Carmack Amendment cases as follows:

(b) A civil action in any State court against a carrier or its receivers or trustees to recover damages for delay, loss, or injury of shipments, arising under section 11706 or 14706 of title 49, may not be removed to any district court of the United States unless the matter in controversy exceeds \$ 10,000, exclusive of interest and costs.

This limitation does *not* prevent motor carriers from filing lawsuits for recovery of freight charges in federal court, for which jurisdiction lies under 28 USC § 1337(a), *not* the Carmack Amendment. *See Old Dominion Freight Line v. Allou Distributors, Inc.*, 86 F. Supp. 2d 92, 93-94 (E.D.N.Y. 2000).

The Carmack Amendment is unquestionably the *exclusive* cause of action for claims alleging loss or damage to property in the course of interstate carriage by motor carrier. *See Georgia, F. & A. R. Co. v. Blish Milling Co.*, 241 U.S. 190, 195, 60 L. Ed. 948, 36 S. Ct. 541 (1916); *Adams Express Co. v. Croninger*, 226 U.S. 491, 505-06, 33 S. Ct. 148, 57 L. Ed. 314 (1913); *Georgia, Fl. & Ala. Railroad Co. v. Blish Milling Co.*, 241 U.S. 190, 196, 60 L. Ed. 948, 36 S. Ct. 541 (1916)(holding that the Carmack Amendment embraces “all losses resulting from any failure to discharge a carrier’s duty as to any part of the agreed transportation”).

Every Court of Appeals which has considered the issue has held that the Carmack Amendment *completely pre-empts* any and all State law-based claims against a carrier arising out of the loss of or damage to the goods being carried or the claims process, including claims for delay or fraud in the inducement. *See Hall v. N. Am. Van Lines, Inc.*, 476 F.3d 683, 688 (9<sup>th</sup> Cir. 2007); *Hoskins v. Bekins Van Lines*, 343 F.3d 769, 778 (5<sup>th</sup> Cir. 2003); *Shao v. Link Cargo (Taiwan), Ltd.*, 986 F.2d 700, 704, 706 (4<sup>th</sup> Cir. 1993); *Hughes Aircraft Co. v. North American Van Lines*, 970 F.2d 609, 613 (9<sup>th</sup> Cir. 1992) (“It is clear that the Carmack Amendment established a uniform national liability policy for interstate carriers” which “preempts any state common law action against [a carrier] acting solely as a common carrier”); *Underwriters at Lloyds of London v. North American Van Lines*, 890 F.2d 1112, 1121 (10<sup>th</sup> Cir. 1989) (“The Carmack Amendment preempts state common law remedies against common carriers for negligent loss or damage to goods shipped under a lawful bill of lading”); *Intech, Inc. v. Consolidated Freightways, Inc.*, 836 F.2d 672, 677 (1<sup>st</sup> Cir. 1987) (“The Carmack Amendment provides the exclusive remedy” for “an action for damages against the delivering carrier”); *Hughes v. United Van Lines*, 829 F.2d 1407, 1415 (7<sup>th</sup> Cir. 1987), *cert. denied*, 485 U.S. 913, 99 L. Ed. 2d 248, 108 S. Ct. 1068 (1988); *Hopper Furs, Inc. v. Emery*

*Air Freight Corp.*, 749 F.2d 1261, 1264 (8th Cir. 1984); *Air Products & Chemicals, Inc. v. Illinois Cent. Gulf R.R. Co.*, 721 F.2d 483, 487 (5th Cir. 1983) (“Congress intended by the Carmack Amendment to provide a uniform national remedy against carriers for breach of the contract of carriage, including a liability for default in any common-law duty as a common carrier”), *cert. denied*, 469 U.S. 832, 83 L. Ed. 2d 64, 105 S. Ct. 122 (1984); *W.D. Lawson & Co. v. Penn Cent. Co.*, 456 F.2d 419, 421 (6th Cir. 1972) *Underwriters at Lloyds of London v. North American Van Lines*, 890 F.2d 1112, 1121 (10th Cir. 1989).

The only exception to this rule, at least in the First and Seventh Circuits, is when the plaintiff alleges liability arising from a *separate harm*, apart from loss of or damage to the goods. *Gordon v. United Van Lines, Inc.*, 130 F.3d 282, 288-89 (7th Cir. 1997)( a claim for intentional infliction of emotional distress *not pre-empted*); *Rini v. United Van Lines, Inc.*, 104 F.3d 502, 506 (1st Cir.), *cert. denied*, 139 L. Ed. 2d 16, 118 S. Ct. 51 (1997)(although claims arising from the claims-handling process are pre-empted, claims for assault by a carrier’s employee, or a claim for intentional infliction of emotional distress, would not); *Ducham v. Reebie Allied Moving & Storage, Inc.*, 372 F. Supp. 2d 1076 (N.D. Ill. 2005)(claim for extortion based upon the demand of moving company for a 75% increase over the “guaranteed price pledge” found not removable).

## Claims Covered by the Warsaw and Montreal Conventions

The cases are in conflict as to whether the Warsaw and Montreal Conventions “completely pre-empt” State law-based claims. *See, e.g., Nipponkoa Ins. Co. v. GlobeGround Servs.*, 2006 U.S. Dist. LEXIS 76227, 2006 WL 2861126 at \*3 (N.D. Ill. 2006) (finding no complete pre-emption); *Singh v. North American Airlines*, 426 F. Supp.2d 38, 48 (E.D. N.Y. 2006) (denying remand because “the Warsaw convention completely preempts those claims that fall within its scope”); *Knowlton v. Am. Airlines, Inc.*, 2007 U.S. Dist. LEXIS 6882, 2007 WL 273794 (D. Md. 2007) (finding complete pre-emption); *Rogers v. American Airlines, Inc.*, 192 F. Supp. 2d 661, 664-72 (N.D. Tex. 2001) (no complete pre-emption of claim for delay); *Pennington v. British Airways*, 275 F. Supp. 2d 601, 603 (E.D. Pa. 2003) (no complete pre-emption of personal injury claim); *Dorazio v. UAL Corp.*, 2002 U.S. Dist. LEXIS 18809, 2002 WL 31236290 at \* 2-3 (N.D. Ill. Oct. 2, 2002)(same); *Husmann v. Trans World Airlines. Inc.*, 169 F.3d 1151, 1152-53 (8th Cir. 1999) (complete pre-emption found).

The decisions that the Warsaw and Montreal Conventions *do* “completely preempt” claims for loss of, damage to, or delay in delivery of goods and for personal injury, to the extent that such claims are covered by these treaties, are more persuasive, since this is the only holding which is consistent with the holding of the United States Supreme Court in *El Al Isr. Airlines v. Tsui Yuan Tseng*, 525 U.S. 155, 162, 119 S. Ct. 662; 142 L. Ed. 2d 576 (1999), wherein the Court held that (1) the Warsaw Convention provides an *exclusive* remedy for personal injury suffered on board an aircraft or in the course of any of the operations of embarking or disembarking,” and (2) if the Warsaw Convention does *not* provide for relief, no relief is available.

Since the *Tseng* decision, several Circuit Courts of Appeal have issued decisions which emphasize the *unavailability* of a remedy if the claim alleged falls within the parameters set forth in the Warsaw and Montreal Conventions. See *Husmann v. TWA*, 169 F.3d 1151, 1152 (8<sup>th</sup> Cir. 1999)(injury suffered while tripping over a bag in the course of boarding); *Carey v. United Airlines*, 255 F.3d 1044 (9<sup>th</sup> Cir. 2001) (claim of emotional distress arising from wilful misconduct of flight attendant); *Magan v. Lufthansa German Airlines*, 339 F.3d 158, 161 (2d Cir. 2003) (“A passenger whose injuries fall within the scope of the Warsaw Convention is either entitled to recovery under the Convention or not at all”); *King v. American Airlines, Inc.*, 284 F.3d 352 (2d Cir. 2002) (claim for discriminatory bumping); *Marotte v. Am. Airlines, Inc.*, 296 F.3d 1255 (11<sup>th</sup> Cir. 2002).

Accordingly, at least in the absence of binding precedent from the Circuit Court of Appeals in which the District Court is located, a claim which clearly falls *within the scope* of the Warsaw or Montreal Conventions should be removable on “federal question” grounds, even if the claims are asserted in the form of State-based causes of action. However, the pre-emptive scope of the Warsaw and Montreal Conventions is not nearly so broad as that of the Carmack Amendment, which has been held to pre-empt claims for fraud in inducement, claims handling, and so forth, as is discussed above.

Consequently, if the claim in issue does not arise *directly* out of the loss of or damage to goods, or personal injury suffered “on board an aircraft or in the course of any of the operations of embarking or disembarking,” you must carefully examine precedent to determine whether or not there is authority to support an allegation that the *particular* claim asserted is pre-empted.

## Claims Involving Domestic Air Carriage

If the claim you are seeking to remove arises from loss of or damage to goods or personal injury in the course of domestic carriage by air, the action is *not* removable on “federal question” grounds. *See American Airlines, Inc. v. Wolens*, 513 U.S. 219, 115 S. Ct. 817, 130 L. Ed. 2d 715 (1995) (State court remedies for breach of contract remained available, despite preemption of state law with respect to rates, routes and services); *In re Air Crash at Lexington*, 486 F. Supp. 2d 640 (E.D. Ky 2007); *see also Abdullah v. American Airlines, Inc.*, 181 F.3d 363, 375 (3d Cir. 1999) (although federal law establishes the applicable standards of care in the field of air safety, plaintiffs may recover damages under state and territorial remedial schemes); *Bieneman v. City of Chicago*, 864 F.2d 463, 471 (7th Cir. 1988) (the Federal Aviation Act does not expressly preempt state damages remedies); *Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259, 1261 (9th Cir. 1998) (en banc) (passengers’ run-of-the-mill personal injury claims held not pre-empted); *Drake v. Laboratory Corporation of America*, 458 F.3d 48, 58 (2d Cir. 2006) (the Federal Aviation Act’s remedies are not intended to be exclusive); *Hodges v. Delta Airlines, Inc.*, 44 F.3d 334, 338 (5th Cir. 1995) (neither the ADA nor its legislative history support a finding that Congress intended to displace the application of state tort law to personal physical injury inflicted by aircraft operations); *Musson Theatrical, Inc. v. Federal Express Corp.*, 89 F.3d 1244 (6th Cir. 1996) (federal courts do not have exclusive subject matter jurisdiction over the preemption defenses to state law claims against air carriers); *Vorhees v. Naper Aero Club, Inc.*, 272 F.3d 398, 403 (7th Cir. 2001).

**Claims Subject to COGSA, the Harter Act, the Jones Act  
or Which Fall Within the Court’s Maritime Jurisdiction**

Although the District Court has original jurisdiction of maritime claims under 28 USC § 1333 and of claims asserted under the Carriage of Goods by Sea Act (commonly referred to as “COGSA,” now printed following 46 USC § 30704) and the Harter Act (46 USC § 30704), under either 28 USC § 1331 (federal question) or 28 USC § 1337 (actions arising under federal laws regulating commerce), any case which does not involve an *in rem* proceeding will be remanded upon the timely filing of a motion to remand pursuant to 28 USC § 1333(a) (the “savings to suitors clause) or 28 USC § 1445(2) (non-removable actions).

However, if there is no authority in the Circuit or District to which the action is removed which holds that original jurisdiction is lacking in the first place, the action will probably *not* be remanded if the plaintiff *fails* to bring a timely motion to remand.

There is substantial disagreement among the Courts on the question of whether an action which falls within the scope of COGSA<sup>6</sup> or the Harter Act is removable in the first instance. Several courts have held that a case arising under COGSA is *not* removable. *Hemphill v. Transfresh Corp.*, 1998 U.S. Dist. LEXIS 8889 (N.D. Cal. 1998) (no removal jurisdiction); *In re Chimenti*,

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Since jurisdiction cannot be conferred upon the federal courts by contract, the discussion in the text does *not* apply to the removal of a case involving carriage to which COGSA applies by contract, e.g., when an ocean bill of lading extends the provisions of COGSA to the inland transport of goods.

79 F.3d 534 (6<sup>th</sup> Cir. 1966). On the other hand, several courts have held that an action arising under COGSA or the Harter Act is removable. *Joe Boxer Corp. v. Fritz Transp. Int'l*, 33 F. Supp. 2d 851, 854 (C.D. Cal. 1998); *National Automotive Publications, Inc. v. United States Lines, Inc.*, 486 F. Supp. 1094 (S.D.N.Y. 1980); *B.F. McKernin & Co., Inc. v. United States Lines, Inc.*, 416 F. Supp. 1068 (S.D.N.Y. 1976); *The Crispin Co. v. Lykes Bros. Steamship Co., Inc.*, 134 F. Supp. 704, 706 (S.D.Tex. 1955); *Uncle Ben's Int'l Div. of Uncle Ben's, Inc. v. Hapag-Lloyd Aktiengesellschaft*, 855 F.2d 215, 216 (5th Cir. 1988) (finding removal proper under 28 USC § 1337 because the Harter Act was involved); *Puerto Rico v. Sea-Land Serv., Inc.*, 349 F. Supp. 964, 975 (D.P.R. 1970) (permitting removal because COGSA, among other statutes, created independent grounds of jurisdiction). Although not always expressed in these terms, the Courts which find that the action is removable apparently believe that COGSA or the Harter Act “completely pre-empts” State law-based claims when the claim falls within the scope of the Act. *See also Talatala v. Nippon Yusen Kaisha Corp.*, 974 F. Supp. 1321, 1324 n.1 (D.Haw. 1997); *Polo Ralph Lauren, L.P. v. Tropical Shipping & Constr. Co.*, 215 F.3d 1217, 1220 (11<sup>th</sup> Cir. 2000) (COGSA “completely pre-empts” any State law based claim when applicable).

However, *even if* District Courts would have had original jurisdiction of the action under either COGSA or the Harter Act, the action will be remanded to State court if the plaintiff brings a timely motion to remand under 28 USC § 1337 (c) (the “savings to suitors” clause), which explicitly gives plaintiff the right to bring and maintain their action in State court. *See Baris v. Sulpicio Lines, Inc.*, 932 F.2d 1540, 1543 (5th Cir. 1991); *Pierpoint v. Barnes*, 94 F.3d 813, 816 (2d Cir. 1996); *Zoila-Ortego v. B J-Titan Servs. Co.*, 751 F. Supp. 633, 637 (1990).

If the claim asserted in the State court complaint arises under the Jones Act (46 USC § 30104), the action is non-removable under 28 USC 1445(a), since the Jones Act incorporates provisions of the Federal Employee Liability Act. *See Pate v. Standard Dredging Corp.*, 193 F.2d 498, 500-501 (5<sup>th</sup> Cir. 1952). Thus, once again, if the plaintiff brings a timely motion to remand, the action will be remanded.

In all three cases, however, the plaintiff can *waive* its right to have its claim heard in State court either by joining their non-removable claim with a removable claim or by failing to bring a timely motion to remand after the action has been removed. *See Jacobson v. Chicago, M., St. P. & P. R. Co.*, 66 F.2d 688, 694 (8<sup>th</sup> Cir. 1933) (plaintiff waived right to have case heard in State court by joining his FELA claim with a separate, removable claim); *Lirette v. N.L. Sperry Sun, Inc.*, 820 F.2d 116 (5<sup>th</sup> Cir. 1987) (plaintiff waived the right to object to the removal of his Jones Act claim by failing to file a motion to remand within 30 days of removal); *Petty v. Ideco, Div. of Dresser Industries, Inc.*, 761 F.2d 1146, 1149 n. 1 (5<sup>th</sup> Cir. 1985); *Baris v. Sulpicio Lines, Inc.*, 932 F.2d 1540, 1544-1545 (5<sup>th</sup> Cir. 1991).

### **Removal on Diversity Grounds**

With few exceptions,<sup>7</sup> if the action you have been asked to defend is between citizens

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28 USC § 1445 provides that the following actions are not removable at all: (a) civil action in any State court against a railroad or its receivers or trustees, arising under sections 1-4 and 5-10 of the Act of April 22, 1908, (b) A civil action in any State court against a carrier or its receivers or trustees to recover damages for delay, loss, or injury of shipments, arising under section 11706 or 14706 of title 49 . . . unless the matter in controversy exceeds \$ 10,000, exclusive of

of different states, neither your client nor any of the other properly named defendants is a citizen of the state in which the action is brought,<sup>8</sup> there is “complete diversity” between all defendants and all plaintiffs,<sup>9</sup> and the amount in controversy exceeds \$75,000,<sup>10</sup> you can remove the action under 28 USC § 1332.

However, the action may *not* be removed if any properly joined defendant is a citizen of the state in which the action is brought. *See 28 USC § 1441(b)*. Thus, subject to the misjoinder

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interest and costs, (c) a civil action in any State court arising under the workmen's compensation laws of such State, and (d) a civil action in any State court arising under section 40302 of the Violence Against Women Act of 1994.

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As is discussed below, however, this is a procedural, not a jurisdictional, requirement. Consequently, if a defendant who is a citizen of the forum state removes the action and the plaintiff does not file a Motion to Remand on this grounds within 30 days, the action may not properly be remanded.

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“Complete” diversity means that no plaintiff may be a “citizen” of the same State as any of the properly joined defendants. *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 373-374 (1978).

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In cargo loss and damage and property damage cases, the amount of damage is usually alleged, which makes it easy to determine whether or not the amount in controversy requirement is satisfied.

In personal injury cases, however, the damages sought are often not alleged and may not be known, which can make it difficult to determine whether or not amount in controversy requirement can be satisfied.

If the amount in controversy is not determinable at the outset, you might be able to remove the action later under 28 USC § 1446(b), which provides both that a notice of removal may be filed within 30 days after receipt 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.” Discovery answers and even demand letters can be used to establish the jurisdictional amount. *Lien v. H.E.R.C. Products, Inc.*, 8 F.Supp.2d 531 (E.D. Va. 1998); *Polk v. Sentry Ins.*, 129 F.Supp. 2d 975 (S.D. Miss. 2000).

and fraudulent joinder rules discussed below, a plaintiff who wants to avoid removal on diversity grounds may do so by joining a defendant who is a citizen of the forum State.

In order to determine whether or not “complete diversity” exists, you must ascertain the “citizenship” of each plaintiff and defendant. The “citizenship” of the parties is determined according to the following rules:

(1) An individual is a citizen of in the place of his domicile, which is the place where he has “his true fixed home and principal establishment, and to which, whenever he is absent, he has the intention of returning.” *Linardos v. Fortuna*, 157 F.3d 945, 948 (2d Cir. 1998) (quoting from 13B C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3612, at 526 (2d ed. 1984). United States citizens who are domiciled abroad “are neither are neither citizens of any state of the United States nor citizens or subjects of a foreign state” for the purpose of removal, so Section 1332 does not provide for jurisdiction when such a person is a party to the action. *Cresswell v. Sullivan & Cromwell*, 922 F.2d 60, 68 (2d Cir. 1990).

(2) A corporation is “citizen” of the State in which it is incorporated and of the State in which it has its principal place of business. 28 USC § 1332(c)(1).

(3) A partnership, whether general or limited, has the citizenship of each of its partners. See *Carden v. Arkoma Assoc.*, 494 U.S. 185, 192-95 (1990) (general partnerships), and *Carden v. Arkoma Assoc.*, 494 U.S. 185, 163-169 (2000) (limited partnerships)).

If the plaintiff has added a defendant for the sole purpose of avoiding removal, you may still remove the case if you can establish either “fraudulent joinder” or “misjoinder.”

Although the actual making of fraudulent jurisdictional allegations would provide grounds for finding “fraudulent joinder,” the term usually refers to a situation where removing defendant has been able to show that the complaint includes a frivolous or otherwise illegitimate claim against a non-diverse defendant; the removing party does *not* have to make a showing of actual “fraudulent” intent.” See *Simpson v. Union Pac. R.R. Co.*, 282 F. Supp. 2d 1151 , 1154 (N.D. Cal. 2003). To establish “fraudulent joinder,” however, you must show that there is *no possibility* that the plaintiff would be able to establish a cause of action against the fraudulently joined defendant. *Burden v. General Dynamics Corp.*, 60 F.3d 213, 217 (5th Cir. 1995); *Poulos v. Naas Foods, Inc.*, 959 F.2d 69, 73 (7th Cir. 1992).

“Misjoinder” refer to a situation where the plaintiff has named a defendant who has no real connection with the main controversy. Consequently, you must examine the allegations of the complaint to determine whether the claims plaintiff has asserted against the non-diverse defendant (1) allege joint, several or alternative liability arising from the same transaction or occurrence and (2) a common question of law or fact. If not, the Court should sever the claim and permit removal of the action. *Tapscott v. MS Dealer Service Corp.*, 77 F.3d 1353, 1360 (11th Cir. 1996).

## **Procedure for Removal**

In order to remove an action to federal court, you must “file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.” 28 USC § 1446(a).

The Notice of Removal must be filed “within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.” 28 USC § 1446(b).

If the claims asserted in the initial pleading are not removable, “a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except 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.” 28 USC § 1446(b).

You must also give written notice of the removal to all adverse parties and file a copy of the notice with the clerk of the State court. 28 USC § 1446(b).

## **Commencement of the Thirty Day Period for Filing the Notice of Removal**

For decades, the Circuit Courts of Appeal disagreed on the issue of precisely when the 30 day period for removal commenced.

In *Murphy Brothers, Inc. v. Michelli Pipe Stringing, Inc.*, 526 U.S. 344 (1999), however, the United States Supreme Court held that the 30 day period for removal does not commence until both a summons *and* complaint which discloses the grounds for removal is actually *served* on the defendant, thereby overruling all cases which had held that the 30 day period commenced when the complaint was merely *received*, but not *served*.

In *Murphy*, the plaintiff asserted that the Notice of Removal was untimely because the defendant did not file its Notice of Removal until 44 days after its Vice President had received a copy of the Complaint via facsimile. In holding that the 30 day period to remove the action did not commence until after the summons and complaint had been formally served, the Supreme Court stated that “Service of process, under longstanding tradition in our system of justice, is fundamental to any procedural imposition on a named defendant,” and that “Unless a named defendant agrees to waive service, the summons continues to function as the *sine qua non* directing an individual or entity to participate in a civil action or forgo procedural or substantive rights.”

Of course, if the Complaint served does not provide grounds for removal, the 30 day period does not commence until receipt by the defendant of “an amended pleading, motion, order or other paper from which it may first be ascertained that the action is removable” pursuant to 28 USC §1446(b). Thus, if the Complaint does not assert a federal claim at the outset, but later adds such a claim, you have 30 days from receipt of the document from which it may be ascertained that such an action is being asserted.<sup>11</sup>

If the grounds upon which removal is based is diversity, however, your right to remove the action will expire within one year under 28 USC § 1446(b), which provides that “a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title (i.e., diversity) more than 1 year after commencement of the action.”

The one year period is probably not jurisdictional. Thus, if the plaintiff does not bring a motion to remand within 30 days of the removal, or if the evidence shows that the plaintiff manipulated his case (e.g., by dropping a non-diverse defendant immediately after expiration of the one year period), the action *might* be removable. *See Tedford v. Warner-Lambert Co.*, 327 F.3d 423, 428 (5th Cir. 2003)(1 year period is not jurisdictional and may be waived by plaintiff’s conduct); *but see Burns v. Windsor Ins. Co.*, 31 F.3d 1092, 1097 n.12 (11th Cir. 1994)(1 year period held to be jurisdictional).

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It is not clear whether the claim must be asserted in a document filed with the Court. *See* 14C Wright, Miller and Cooper, *Federal Practice and Procedure*, Jurisdiction 3d § 1337 (1998).

## The First Served Rule vs. the Last Served Rule

When multiple defendants are involved, there is a split in authority regarding when the 30 day period for removal ends. In some cases, the Courts have held that the 30 day period commences *for all defendants* when the *first* defendant is served, while in others the Courts have held that *each* defendant has its own 30 day period to remove the action.

The seminal case on the first served rule is *Brown v. Demco, Inc.*, 792 F.2d 478, 481 (5th Cir. 1986), in which the Court held that a defendant who was served *four years* after the commencement of the action could not remove under what it described as the “first served rule,” i.e., the rule that “if the first served defendant abstains from seeking removal or does not effect a timely removal, subsequently served defendants cannot remove . . . due to the rule of unanimity among defendants which is required for removal.” However, the Court qualified its endorsement of the so-called first-served rule by stating that the 30 day time limit was subject to *waiver* by the plaintiff or for other, equitable reasons. *Id.* The “first served” rule has often been described as the “majority rule” on the subject.

Since the Supreme Court’s decision in *Murphy Bros.*, however, at least two Circuit Courts of Appeal and several District Courts have held that the so-called “first served defendant” rule is no longer good law, and that each defendant has its own, separate 30 day period to remove an action, subject of course to the rule of “unanimity,” i.e., the requirement that all named defendants must “consent” to or join in the removal. See *Marano Enterprises of Kansas v. Z-Teca Restaurants*, 254 F.3d 753, 754 (8th Cir. 2001); *Briefly v. Aliases Flexible Packaging, Inc.*, 184 F.3d

527, 533 (6th Cir. 1999); *Myer v. Nitetrain Coach Co., Inc.*, 459 F.Supp. 2d 1074, 1079 (W.D. Wash. 2006); *Piacente v. State Univ. of N.Y. at Buffalo*, 362 F. Supp. 2d 383, 389-90 (W.D.N.Y. 2004); *Bonner v. Fuji Photo Film*, 461 F. Supp. 2d 1112, 1117-1118 (N.D. Cal. 2006); *Coleman v. Assurant, Inc.*, 463 F. Supp. 2d 1164 (D. Nev. 2006); *Egan v. Bechtel Corp.*, 2004 U.S. Dist. LEXIS 23400 \*3 (D. Mass. 2004); *Glatzer v. Hanley*, 2007 U.S. Dist. LEXIS 34487 \*9 (S.D.N.Y. 2007); *Harper v. Westfield Apts.*, 2005 U.S. Dist. LEXIS 5311 \*4 (E.D. Pa. 2005).

If your case has been filed in Circuit which has implicitly or explicitly adopted the “first served” rule, you should consider the risk and cost of filing a Notice of Removal carefully, since it may be impossible to persuade the District Court to depart from the “first served” rule. *See, e.g., Ford v. Balt. City Dep't of Soc. Servs.*, 2006 U.S. Dist. LEXIS 83239 \*6 (D. Md. 2006); *KLN Steel Prods. Co. v. CNA Ins. Cos.*, 2006 U.S. Dist. LEXIS 80879 \*5 n. 2 (W.D. Tex. 2006).

### **The Rule of Unanimity**

Although the removal statute, on its face, specifies only that “[a] defendant or defendants desiring to remove any civil action . . . shall file . . . a notice of removal,” the Courts have uniformly adopted the “rule of unanimity,” which requires that *all* defendants who have been served or otherwise properly joined in the action must either join in the removal or file a written consent to the removal. *See Chicago, R. I. & P. Ry. Co. v. Martin*, 178 U.S. 245, 247, 20 S. Ct. 854, 44 L. Ed. 1055 (1900); *Loftis v. UPS*, 342 F.3d 509, 516 (6<sup>th</sup> Cir. 2003); *Marano Enters. of Kan. v. Z-Teca Rests., L.P.*, 254 F.3d 753, 754 (8<sup>th</sup> Cir. 2001); *Balazik v. County of Dauphin*, 44 F.3d 209, 213 (3<sup>d</sup> Cir. 1995); *Doe v. Kerwood*, 969 F.2d 165, 167 (5<sup>th</sup> Cir. 1992); *Hewitt v. City of Stanton*, 798 F.2d

1230, 1232 (9th Cir. 1986); *N. Ill. Gas Co. v. Airco Indus. Gases*, 676 F.2d 270, 272-73 (7th Cir. 1982); *Cornwall v. Robinson*, 654 F.2d 685, 686 (10th Cir. 1981).

The unanimity rule may be disregarded where: (1) a non-joining defendant is an unknown or nominal party; or (2) where a defendant has been fraudulently joined, or where a non-resident defendant has not been served at the time of the filing of the petition. *McManus v. Glassman's Wynnefield, Inc.*, 710 F. Supp. 1043, 1045, n.5 (E.D.Pa. 1989); *Lewis v. Rego Co.*, 757 F.2d 66, 69 (3d Cir. 1985).

### **Required Content of the Notice of Removal**

In order to remove an action to federal court, you must “file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal.”

In a case based upon federal question jurisdiction, this means that the Notice of Removal should include specific allegations of *fact* concerning the claim being asserted, including any facts which are necessary to establish the jurisdictional basis for removal upon which you are relying, and assert that the claim “arises under” the federal law or treaty cited.

For example, if you are seeking removal under 28 USC § 1331 on the grounds that the claim “arises under” the 49 USC § 14706 (the “Carmack Amendment”), you should describe the factual allegations of the Complaint which show that the claim arises out a claim for recovery of monetary damages arising from the loss of or damage to goods while in the course of interstate motor carriage against an alleged motor carrier or against an alleged freight forwarder which has assumed liability as a carrier, then assert that the action may be removed under 28 USC 1331 because the claim “arises under 49 USC § 14706.”

If the action is being removed on the grounds of diversity, or in any other case in which there is a jurisdictional minimum, you must include factual allegations concerning (1) the amount in controversy (to show that the matter in controversy exceeds the \$75,000.00 minimum) and (2) the States of citizenship of all plaintiffs and defendants. In the case of corporations, this means that the Notice of Removal should specifically allege both the State of incorporation and the State in which the corporation’s principal office is located. *See Firemen's Ins. Co. of Newark, N.J. v. Robbins Coal Co., Inc.*, 288 F.2d 349 (5th Cir. 1961); *Hendrix v. New Amsterdam Casualty Co.*, 390 F.2d 299 (10th Cir. 1968); *Eubanks v. Krispy Kreme Donut Co.*, 208 F. Supp. 479, 483 (E.D. Tenn. 1961).

The Notice of Removal should either be signed by all parties (or their counsel) who have been named as defendants in the action and who have been served with process in the action or accompanied by individual Consents to or Joinders in the Removal.<sup>12</sup>

If defendants are named but have *not* been served, or if you assert that defendants named and served should be disregarded for any of the reasons discussed above, the Notice of Removal should include allegations of fact concerning these matters.

The Notice of Removal should include factual allegations and legal citations regarding *all* grounds upon which removal might be properly based, since the Courts will generally not permit a removing party to assert a new grounds for removal after the 30 day period for filing a Notice of Removal has expired. *See Jacobs v. District Director of Internal Revenue*, 217 F. Supp. 104, 105-106 (S.D.N.Y. 1963).

### **Documents to be Attached**

The Notice of Removal must be filed along with “a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.” 28 USC § 1446(a).

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If the Notice of Removal is not actually signed by counsel for all defendants, however, you run the risk that the Court will remand the action *sua sponte* before the Consents or Joinders are filed, even though the Courts of Appeal have thus far all agreed that the District Courts are not authorized to issue *sua sponte* orders of remand for procedural defects.

There is substantial disagreement among the Courts with regard to the scope of this requirement. *See, e.g., Usatorres v Marina Mercante Nicaraguenses, S.A.*, 768 F.2d 1285, 3 FR Serv 3d 740 (11<sup>th</sup> Cir. (1985) (removing party is not required to file a motion to dismiss which was filed in the State court, but which was not served upon it, along with its Notice of Removal); *Covington v. Indemnity Ins. Co.*, 251 F.2d 930, 933 (5<sup>th</sup> Cir. 1958) (the failure to attach required documents is may be cured at any time, especially in light of 28 USC § 1447(b) provides the District Courts with the power to “require the petitioner to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to such State court”); *but see Carrothers Constr. Co. v. USA Slide*, 1998 U.S. Dist. LEXIS 8311 (D. Kan. 1998)(District Court Rule requires filing of entire State Court record within 20 days after filing of Notice of Removal).

If the documents filed do not satisfy the standard which is applied in the District Court to which the action is removed, however, the Court may remand the action upon the filing of a timely motion to remand. *See Yellow Transp., Inc. v. Apex Digital, Inc.*, 406 F. Supp. 2d 1213, 1218-1219 (D.Kan. 2005).

Accordingly, when filing a Notice of Removal, you should attach *every document* which has been filed or served in the State court action if you are able to do so.

## Ability to Cure Defects in the Notice of Removal

Most courts and commentators take the view that procedural defects are not jurisdictional and may be cured, so long as the case is removable. *See Barrow Development Co. v. Fulton Ins. Co.*, 418 F.2d 316, 317-318 (9<sup>th</sup> Cir. 1969); *Covington v. Indemnity Ins. Co. of North America*, 251 F.2d 930, 932-33 (5th Cir.1958); *Hendrix v. New Amsterdam Casualty Co.*, 390 F.2d 299 (10th Cir. 1968); *Peterson v. BMI Refractories*, 124 F.3d 1386, 1394 (11th Cir. 1997) (citing *Covington* and holding that allegedly insufficient notice of removal to state courts did not defeat district court's jurisdiction but noting that court nevertheless might be justified in granting a timely motion to remand on that ground).

However, some District Courts have held that procedural defects in the Notice of Removal may *not* be cured (*see, e.g., Evans-Hailey Co. v. Crane Co.*, 207 F. Supp. 193, 198 (E.D. Tenn. 1962)), while others hold that the District Court has the *discretion* to permit amendment of defects in the Notice of Removal (*Yellow Transp., Inc. v. Apex Digital, Inc.*, 406 F. Supp. 2d 1213, 1218-1219 (D.Kan. 2005)).

## Motion to Remand

Under 28 USC § 1447 (c), a motion to remand the action on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal. If the plaintiff does *not* bring a motion to remand within 30 days after the filing of the Notice of Removal, however, it *waives* the right to object to procedural defects in removal,

including those based upon the “non-removable” provisions of 28 USC § 1445 and the “savings to suitor clause” of 28 USC § 1333(1).

If the District Court lacks *subject matter* jurisdiction over the matter, however, the defect may *not* be waived, and a motion for remand may be brought at *any* time by any party or by the Court. *Ins. Corp. of Ir. v. Compagnie Des Bauxites De Guinee*, 456 U.S. 694, 702, 102 S. Ct. 2099; 72 L. Ed. 2d 492 (1982) (parties cannot confer subject matter jurisdiction on federal court; a federal court which sees a defect in jurisdiction is required to bring its own motion to resolve the matter).

### **Limited Right to Relief from Erroneous Order of Remand**

If the Court issues an order remanding an action in response to a motion to remand, whether for procedural defects in response to a Motion to Remand, or for lack of subject matter jurisdiction, its order of remand is not subject to review “on appeal or otherwise.” 28 USC § 1447(d).

However, the United States Supreme Court has held that the § 1447(d) is *not* a complete bar to appellate review, and that “only remands based on grounds specified in § 1447(c) are immune from review under § 1447(d).” *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 714-15, 135 L. Ed. 2d 1, 116 S. Ct. 1712 (1996) (citing *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 127-28, 133 L. Ed. 2d 461, 116 S. Ct. 494 (1995) and *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 345-46, 46 L. Ed. 2d 542, 96 S. Ct. 584 (1976)). Consequently, if the remand order did

*not* fall within the authority conferred upon the District Court by § 1447(c), appellate review is available.

Most Circuit Courts of Appeal have held that remand orders are “final” orders which may be reviewed on *appeal*, and that mandamus is therefore unnecessary and unavailable. *See Nelson v. Medtronic Inc. (In re FMC Corp. Packaging Sys. Div.)*, 208 F.3d 445, 449 (3d Cir. 2000); *Long v. Bando Mfg. of Am., Inc.*, 201 F.3d 754, 758 n.3 (6th Cir. 2000); *Benson v. SI Handling Sys., Inc.*, 188 F.3d 780, 782 (7th Cir. 1999); *Ariail Drug Co. v. Recomm Int'l Display, Inc.*, 122 F.3d 930, 933 (11th Cir. 1997); *Eastus v. Blue Bell Creameries, L.P.*, 97 F.3d 100, 103-04 (5th Cir. 1996); *Gaming Corp. of Am. v. Dorsey & Whitney*, 88 F.3d 536, 542 (8th Cir. 1996). The Fifth Circuit Court of Appeals has held that relief from an erroneous order of remand may be sought either by writ of mandate *or* on appeal (*see Borneman v. United States*, 213 F.3d 819, 826 (4th Cir. 2000).

Before seeking relief from the Court of Appeals, you should consider seeking relief from the Court which *issued* the erroneous order of remand on a motion for reconsideration. Although some courts have refused to consider an order of remand on the grounds that they do not have “jurisdiction” to do so, this is clearly incorrect when the order from which relief is sought is itself reviewable by the Circuit Court of Appeals. *See Hudson United Bank v. LiTenda Mort. Corp.*, 142 F.3d 151, 159 (3d Cir. 1998); *In re Digicon Marine Inc.*, 966 F.2d 158, 160-61 (5th Cir. 1992) (holding that the District court retains jurisdiction over the matter when its original order remanding the action is reviewable). If the District Court is inclined to reconsider its order, obtaining relief will be much faster and far less expensive.

Thus far, at least seven Circuit Courts of Appeal have held that issuance of a *sua sponte* order remanding an action for purported *procedural* defects is erroneous and may be reversed on appeal. See *Kelton Arms Condominium Owners Association, Inc. v. Homestead Insurance Company*, 346 F.3d 1190 (9th Cir. 2003); *Whole Health Chiropractic & Wellness, Inc. v. Humana Med. Plan, Inc.*, 254 F.3d 1317 (11th Cir. 2001); *In re FMC Corp. Packaging Sys. Div.*, 208 F.3d 445 (3d Cir. 2000); *Page v. City of Southfield*, 45 F.3d 128 (6th Cir. 1995); *Schexnayder v. Entergy La., Inc.*, 394 F.3d 280 (5<sup>th</sup> Cir. 1994); *In re Cont'l. Cas. Co.*, 29 F.3d 292 (7th Cir. 1994); *In re Allstate Ins.*, 8 F.3d 219 (5th Cir. 1993).

At least nine Courts of Appeal also agree that, if a defendant is a citizen of the forum state, and the plaintiff does *not* file a Motion to Remand on this grounds within the 30 days required, an order remanding the action may be reversed on appeal, since the defect is procedural in nature. See *Lively v. Wild Oats Mkts., Inc.*, 456 F.3d 933 (9th Cir. 2006), *Handelsman v. Bedford Vill. Assocs. Ltd. P'ship*, 213 F.3d 48, 50 n.2 (2d Cir. 2000); *Hurley v. Motor Coach Indus.*, 222 F.3d 377, 380 (7th Cir. 2000); *Blackburn v. UPS*, 179 F.3d 81, 90 n.3 (3d Cir. 1999); *De Perez v. AT&T Co.*, 139 F.3d 1368, 1372 n.4 (11th Cir. 1998); *In re Shell Oil Co.*, 932 F.2d 1518, 1523 (5th Cir. 1991); *Farm Constr. Servs. v. Fudge*, 831 F.2d 18, 22 (1st Cir. 1987); *Am. Oil Co. v. McMullin*, 433 F.2d 1091, 1095 (10th Cir. 1970); *Handley-Mack Co. v. Godchaux Sugar Co.*, 2 F.2d 435, 437 (6th Cir. 1924).

Appellate review may also be sought when the District Court bases its remand order on grounds *other than* 28 USC § 1447. See *Green v. Ameritrade, Inc.*, 279 F.3d 590, 595 (8th Cir. 2002) (remand based upon 28 USC § 1367(c), which gives the District Court the authority to decline

the exercise of supplemental jurisdiction under certain circumstances); *Regis Associates v. Rank Hotels (Management), Ltd.*, 894 F.2d 193, 195 (6<sup>th</sup> Cir. 1990) (review of District Court order remanding action based upon a forum selection clause).

### **Conclusion**

Under some circumstances, removal of an action filed against a transportation client can substantially improve your chances of success on the merits of the claim. If you and your client agree that the action should be removed, however, you must keep in mind that the District Court will not hesitate to remand your action to the State court if there if it believes, even mistakenly, that there is any basis for doing so.

Although relief from improper remand orders is available under very limited circumstances, the appellate process is expensive and time consuming. Accordingly, you must do your best to ensure that your Notice of Removal includes all necessary allegations, that the required documents are attached, and that all other required procedures are followed in order to give your client the best chance of keeping the removed action in federal court.