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# Removal and Remand - Beyond the Supplements

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# Removal and Remand – Beyond the Supplements

Joan Steinman\*

For many years I have prepared the annual Pocket Parts and Supplements for volumes 14B and C of WRIGHT, MILLER, COOPER & STEINMAN, FEDERAL PRACTICE & PROCEDURE, which address the law of removal and remand of cases from state to federal court and back. As the number of cases in this and many other areas of federal practice and procedure has exploded, the publishers of the treatise have decided that the treatise should be increasingly selective in describing new case developments. In order to further assist lawyers, judges, and professors in their research of the law of removal and remand, I have decided to electronically publish a compilation of cases and law review articles that either are not included at all in the volume 14B and C Pocket Parts or are cited there for different propositions than are reflected in this electronic publication.

The cases that are included in this electronic compilation came to my attention between mid-October, 2012, and mid-October, 2013. The cases that came to my attention during that same time period and that I deemed sufficiently noteworthy to include in volumes 14B and C of FEDERAL PRACTICE & PROCEDURE will appear in the 2014 Pocket Parts.

## I. Removal, In General

### Rooker-Feldman Doctrine

*Reyna v. Deutsche Bank Nat. Trust Co.*, 892 F.Supp.2d 829 (W.D.Tex. 2012) (denying remand, noting that the Rooker–Feldman doctrine applies only to cases brought by state-court losers who complain of injuries caused by a state-court judgment that was rendered before the federal district court proceedings commenced and who invite district court review and rejection of those judgments, and holding that a home equity foreclosure order entered by a Texas state court did not constitute a final state court judgment, and thus Rooker–Feldman did not bar the federal district court from asserting diversity jurisdiction over a borrower’s removed action to restrain its lender from evicting him from the property). With that obstacle eliminated, the court had jurisdiction, upon removal.

*Baker v. Residential Funding Co., LLC*, 886 F.Supp.2d 591 (E.D.Mich. 2012) (remanding a removed case to state court on other grounds, but holding that the Rooker–Feldman doctrine applies to removed actions as the logic underlying the doctrine, that federal district

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\* © 2014 Joan E. Steinman. Joan E. Steinman, Distinguished Professor of Law, Chicago-Kent College of Law, Illinois Institute of Technology (A.B. 1969, University of Rochester; J.D. 1983 Harvard University), is a co-author of WRIGHT AND MILLER’S FEDERAL PRACTICE AND PROCEDURE, published by Thomson Reuters. For more information about the latter publication, please visit [www.legalsolutions.thomreuters.com](http://www.legalsolutions.thomreuters.com).

courts lack jurisdiction to review state court judgments, applies equally in the context of removed actions, but holding that borrowers' action against the assignee of their mortgage and a law firm that represented the assignee in foreclosure proceedings was not barred by Rooker–Feldman, where the borrowers did not seek review of any state court judgment, and the source of their alleged injury was not the state court judgments entered in foreclosure proceedings, but rather defendants' allegedly improper actions in foreclosing without a valid assignment of the mortgage and in seeking to evict borrowers from their home).

### **Sovereign Immunity**

*Kozaczek v. N.Y. Higher Educ. Servs. Corp.*, 503 Fed.Appx. 60 (2d Cir. 2012) (remanding to state court, holding that the New York Higher Education Services Corporation (HESC) did not waive its Eleventh Amendment immunity in an action removed to federal court where HESC had not been properly served at the time a co-defendant removed the case, and therefore did not consent to removal, nor did it waive its immunity by filing motions to dismiss).

### **Waiver of the Right to Remove**

*Fastmetrix, Inc. v. ITT Corp.*, 924 F.Supp.2d 668 (E.D.Va. 2013) (remanding to state court, holding in the alternative that the parties' forum selection clause rested jurisdiction exclusively in the courts of Virginia, and that defendant waived its right to remove by agreeing to that provision).

### **Waiver of the Right to Remand**

*Johnson v. USAA Cas. Ins. Co.*, 900 F.Supp.2d 1310 (M.D.Fla. 2012) (remanding to state court, holding in part that defendant failed to carry its burden to establish that the plaintiff insureds waived their right to seek remand to state court of their breach of contract action against their insurer, where the insureds filed a case management report in federal court, sought mediation, and requested the identity of the insurer's corporate representative in order to depose him, as the insureds filed a motion to remand three days after the insurer filed its notice of removal, the case management report was mandated by the court, insureds sought mediation before the notice of removal was filed, and they merely sought to bring their deposition notice to the insurer's corporate representative into conformity with the federal rule governing notice of depositions). The court cited the principle that substantial doubts as to the propriety of the removal should be resolved against federal jurisdiction.

### **No Waiver of Defenses**

*Nat'l Union Fire Ins. v. American Eurocopter Corp.*, 692 F.3d 405 (5th Cir. 2012) (noting that district court granted a motion to dismiss for lack of personal jurisdiction, after removal).

*Ballew v. Roundpoint Mortgage Servicing Corp.*, 491 Fed.Appx. 25 (11th Cir. 2012) (upholding dismissal of removed suit for failure of plaintiff to perfect service of process, reasoning in part that district court was not required to determine its subject-matter jurisdiction

over removed suit prior to ruling on whether suit should be dismissed because of plaintiffs' failure to perfect service of process, where valid service was a prerequisite to federal court's assertion of personal jurisdiction over the defendants).

In re Facebook, Inc., IPO Securities and Derivative Litig., 922 F.Supp.2d 445 (S.D.N.Y. 2013) (denying motions to remand as moot and dismissing complaints after removal, based on improper venue by virtue of a forum-selection clause, lack of standing and claims not being ripe, matters that the court decided before addressing plaintiffs' motion to remand for lack of subject-matter jurisdiction in removed case, noting that the court had discretion to dismiss a case on the basis of such threshold issues before resolving questions of subject-matter jurisdiction, and concluding that convenience, efficiency and judicial economy warranted prior consideration of the identified threshold issues because they would have had to be adjudicated even in state court, on remand, and deciding the issues in the multi-district litigation avoided duplication and potentially conflicting rulings). The action also illustrated transfer after removal, as the case had been transferred for pre-trial pursuant to 28 U.S.C.A. § 1407.

Brinkman v. Bank of America, N.A., 914 F.Supp.2d 984 (D. Minn. 2012) (denying remand to state court, holding in part that prior-exclusive-jurisdiction doctrine did not bar the federal district court's exercise of jurisdiction over a homeowners' action against mortgage loan servicers, seeking to challenge the validity of mortgages in an effort to prevent foreclosures, as the servicers' Minnesota state court eviction actions were in personam, rather than in rem, actions).

Marx Industries, Inc. v. Chestnut Ridge Foam, Inc., 903 F.Supp.2d 358 (W.D.N.C. 2012) (entertaining, but rejecting, post-removal challenge to personal jurisdiction).

Rissman Hendricks & Oliverio, LLP v. MIV Therapeutics Inc., 901 F.Supp.2d 255 (D.Mass. 2012) (denying remand, holding that defendant was subject to personal jurisdiction in the forum state and that service effected on former corporate client's former officer was sufficient, in removed action seeking recovery of unpaid legal fees, where plaintiff served officer by mail service, which was accepted and signed for at his last known address in Canada, and by e-mail with receipt confirmation, pursuant to a state-court order obtained prior to removal).

Molex Co., LLC v. Andres, 887 F.Supp.2d 1189 (N.D.Ala. 2012) (denying remand of a removed action alleging violation of the Alabama Trade Secrets Act and breach of fiduciary duty; entertaining defendant's contentions that the federal court lacked personal jurisdiction over him and that service of the complaint and summons were improper, but rejecting those contentions).

Karnatcheva v. JPMorgan Chase Bank, N.A., 871 F.Supp.2d 834 (D. Minn. 2012) (upholding removal and dismissing suit, holding in part that removal divested the state court of in rem or quasi in rem jurisdiction over property, and thus the federal district court did not lack jurisdiction over a removed action challenging foreclosure proceedings simply because the case originated in state court; also, an eviction action against one mortgagor in state court was commenced after the action challenging foreclosure proceedings was filed and removed to federal court, and thus the eviction action was not a basis for prior exclusive jurisdiction in state

court).

Samson Tug and Barge Co., Inc. v. Koziol, 869 F.Supp.2d 1001 (D.Alaska 2012) (entertaining, but rejecting, defendant's post-removal motions to dismiss for lack of personal jurisdiction and improper venue, and refusing to transfer to a different federal district court).

McCoy v. Norfolk Southern Ry. Co., 858 F.Supp.2d 639, 652 (S.D.W.Va. 2012) (denying remand to state court of landowner's action against railroad, seeking declaratory and injunctive relief with respect to alleged easement-by-implication and easement-by-necessity, concluding that court had diversity jurisdiction; also entertaining and upholding defendant railroad's objection to service of process, holding that, under West Virginia law, landowner's service of process on agent of railroad's subsidiary did not constitute valid service of process on railroad, where railroad had not been authorized to transact business within West Virginia, and parent had not exercised sufficient degree of control over subsidiary, **citing 4A Wright & Miller** for state law governing proper effectuation of pre-removal service of process).

## **Compare**

McPhearson v. Anderson, 874 F.Supp.2d 573 (E.D.Va. 2012) (post-removal, directing judgment in favor of Anderson, holding that while the court would entertain a post-removal motion to dismiss for lack of personal jurisdiction, the federal district court had personal jurisdiction over a county police officer in an arrestee's action alleging false imprisonment under § 1983 and Virginia law, even though the officer had not yet been properly served with process, as the 120-day time period to effectuate service under the relevant federal civil rule had not yet passed, and prior to removing case, officer had effectively waived his right to contest personal jurisdiction or service under Virginia law by asserting a defense in the special plea that he filed with the Virginia court; further holding that while the court would entertain a post-removal motion to dismiss for lack of proper venue, the removal statute, rather than the general venue statute, determined whether venue was proper in federal district court following removal of this action from Virginia state court suit, and since defendant removed to the district court embracing the state court where the action was filed, venue was proper).

With respect to matters that relate to removal generally, *see*:

Cottone, Michael A., *Here Comes Celotex ... McDonnell Douglas: The New Tennessee Summary Judgment Standard and Removal Considerations for Organizational Clients*, 14 TRANSACTIONS 253 (2013).

## **II. Removal Based on Federal Question Jurisdiction**

### **In general**

Allstate Ins. Co. v. Nowakowski, 861 F.Supp.2d 866 (W.D.Mich. 2012) (remanding to state court, holding that no-fault auto insurer's claim against insured motorist, seeking declaratory judgment that it was not obligated to indemnify insured against liability for claim

asserted by insured's primary health plan, did not seek declaratory relief on a matter for which the insured could bring a coercive action arising under federal law against the insurer, and thus removal of action was not permitted, even if insurer's contractual obligations were contingent on the validity of the plan administrator's subrogation lien, where the contingency had been unlikely to occur, quoting 10B Wright, Miller & Kane).

*Pacheco v. St. Luke's Emergency Associates, P.C.*, 879 F.Supp.2d 136 (D.Mass. 2012) (denying remand to state court, holding that a case in which plaintiff asserted claims arising under the federal Fair Labor Standards Act and state law claims within the federal courts' supplemental jurisdiction was properly removed to federal court; the former employee's FLSA claims against a hospital were not derived from his employment agreement, did not depend on his employment contract, nor did the resolution of plaintiff's FLSA claims relate to interpretation of his employment contract, and therefore they were not governed by the forum-selection clause - - choosing certain state courts - in his employment agreement; finally, even if the forum-selection clause had applied, such a clause does not deprive a court of subject-matter jurisdiction over a case). The court rejected the contention that the state law claims should be remanded as separate and independent from the federal question claims and saw no reason to decline to exercise its supplemental jurisdiction over them.

*May v. Apache Corp.*, 870 F.Supp.2d 454 (S.D.Tex. 2012) (denying remand to state court of plaintiff's federal question claim in property owners' action against oil and gas company, alleging that company's drilling activities violated Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), a federal statute, but remanding plaintiff's state law claims, in the exercise of the court's discretion under the supplemental jurisdiction statute, despite the court's exclusive jurisdiction over the CERCLA claim).

## **Compare**

*Gardiner v. St. Croix Dist. Governing Bd. of Directors*, 859 F.Supp.2d 728 (D.Virgin Islands 2012) (remanding to state court, holding in part that doctor's claim under Virgin Islands law that revocation of his medical privileges by hospital and various officials breached their implied covenant of good faith and fair dealing by failing to provide him with the process stated in hospital by-laws did not raise a federal question, despite defendants' contentions that the claim asserted Fourteenth Amendment due process violations; the claim was based solely on Virgin Islands law and made no reference to federal law).

*In re Halo Wireless, Inc.*, 872 F.Supp.2d 558 (W.D.Tex. 2012) (remanding to state court, holding that district court lacked federal-question jurisdiction under the Federal Telecommunications Act (FTA) over a removed dispute between incumbent local exchange carriers and a purported commercial-radio-service carrier, regarding interconnection agreements, absent a prior determination by the state public utility commission, as - with respect to interconnection agreements -- federal-question jurisdiction is limited under the FTA to the review of state commission rulings).

*Sheehan v. Broadband Access Services, Inc.*, 889 F.Supp.2d 284 (D.R.I. 2012)

(remanding to state court, holding that employee’s claim under Rhode Island statute regulating employer drug testing did not arise under federal law; the Federal Employee Omnibus Transportation Employee Testing Act (FOTETA) did not provide a private remedy for the employee, and its invocation by the defendant employer did not raise a substantial federal question; a federal defense does not confer “arising under” jurisdiction).

*Mostofi v. Capital One, N.A.*, 925 F.Supp.2d 747 (D.Md. 2013) (remanding to state court, holding that, under state law, plaintiff’s third amended complaint was effective when it was filed in Maryland trial court although plaintiffs did not file a red-lined copy of the amended complaint in which the stricken material and new material were properly identified, and that the third amended complaint – which contained no claims arising under federal law – was operative at the time of removal where the removal notice was filed about three hours after the third amended complaint was filed). Thus, the federal court lacked subject-matter jurisdiction over the case.

## **Federal Issues Held Insufficient to Ground Removal**

### **Fifth Circuit**

*Hearn v. Reynolds*, 876 F.Supp.2d 798 (S.D.Miss. 2012) (remanding to state court, holding that patient’s invocation of HIPAA in complaint alleging that doctor published documents that had been filed under seal in a prior state-court proceeding did not give rise to federal question jurisdiction upon removal, since HIPAA had not created a private right of action, the complaint’s allusion to HIPAA had been in a fleeting observation rather than by way of an attempt to state a claim, and the patient had mentioned HIPAA in the complaint only because it had been the source of his allegedly reasonable expectation that the documents would be kept private).

### **Ninth Circuit**

*Boxer v. Accuray Inc.*, 906 F.Supp.2d 1012 (N.D.Cal. 2012) (remanding to state court, holding that federal district court lacked federal question jurisdiction over a removed class action asserting breach of fiduciary duty by a corporation’s board members in connection with shareholder proposals relating to executive compensation and a proposed increase in total authorized shares of stock, neither of which, plaintiff claimed, were adequately described in the corporation’s proxy statement, where there was no showing that a violation of the Dodd–Frank Act with respect to disclosures in a proxy statement was a prerequisite to a finding of materiality or to a board member’s breach of fiduciary duty under Delaware law, and no federal law controlled the challenge to the disclosures pertaining to increased stock shares).

*Wanamaker v. Lawson*, 871 F.Supp.2d 735 (E.D.Tenn. 2012) (remanding to state court, holding that plaintiffs’ contract and tort claims against insurance agency and agent related to crop losses did not involve substantial questions of federal law).

*Finley v. Kondaur Capital Corp.*, 909 F.Supp.2d 969 (W.D.Tenn. 2012) (remanding to

state court, holding that mortgagee's unlawful detainer lawsuit, filed in state court against mortgagor, was based entirely on Tennessee law, unlike mortgagor's lawsuit that was pending in federal district court against the mortgagee for alleged violation of federal and state law, thus precluding removal of the unlawful detainer lawsuit, which lacked a substantial federal question; the fact that the same property that the mortgagor allegedly unlawfully detained was subject to proceedings in federal court did not cause this suit to "arise under" federal law; one suit could not be supplemental to another).

### **The Effect of Plaintiff's Choice of Theories and Remedies**

Noel v. J.P. Morgan Chase Bank N.A., 918 F.Supp.2d 123 (E.D.N.Y. 2013) (remanding to state court, holding that court lacked federal-question jurisdiction over this action, removed from New York state court, in which an employee asserted state-law claims against his employer for gender discrimination and retaliation, reasoning that even if the retaliation claim was based on the employer's response to the employee's filing of a gender discrimination complaint with the federal Equal Employment Opportunity Commission (EEOC), Title VII did not preempt state anti-discrimination law and the EEOC complaint opposed a practice forbidden by state as well as federal law, thus the retaliation claim that did not require resolution of any federal question). The court noted that where a plaintiff's claim potentially involves both a federal ground and a state ground, the plaintiff is free to pitch his claim solely on the state ground, except when federal law completely preempts an entire field or when the plaintiff omits a federal question essential to resolution of his claim. The court invited plaintiff to seek costs and attorney's fees under 28 U.S.C.A. § 1447(c).

Praschak v. Kmart Corp., 922 F.Supp.2d 710 (N.D. Ill. 2013) (remanding to state court, holding that court lacked federal question jurisdiction over customer's suit, alleging that retailer and construction company were negligent in failing to comply with public accommodation provisions of the federal Americans with disabilities Act (ADA) and in performing construction work that blocked-off handicapped-accessible parking spaces, where the customer had no remedy for damages under the ADA, the complaint's reference to the ADA was only an alternative basis for liability as the customer also alleged that defendants owed her a duty of reasonable care arising from Illinois common law, and recognition of federal jurisdiction would lead to the shift of a great number of cases into federal court).

Gardiner v. St. Croix Dist. Governing Bd. of Directors, 859 F.Supp.2d 728 (D.Virgin Islands 2012) (remanding to state court, holding in part that violation of plaintiff's Fourteenth Amendment due process rights and breach of implied covenant of good faith and fair dealing were independent theories of recovery under federal and Virgin Islands law, respectively, in support of one claim, and therefore, doctor's claim of wrongful termination under Virgin Islands law, asserted against hospital and various officials, did not provide a basis for federal question jurisdiction, as doctor could prevail on the claim under the Virgin Islands theory for reasons completely unrelated to the alleged constitutional violation).

### **Supplemental jurisdiction**

## **Fourth Circuit**

*Sansotta v. Town of Nags Head*, 863 F.Supp.2d 495 (E.D.N.C. 2012) (declining to exercise supplemental jurisdiction over state law claims brought by owners of oceanfront cottages against town, arising from town's efforts to demolish cottages following storm, where court had either granted summary judgment on or dismissed all federal claims, the case involved important and potentially far-reaching state-law issues as to which little precedent existed, and the remaining claims concerned land-use regulations, which state court had more experience resolving).

## **Fifth Circuit**

*Oliver v. Lewis*, 891 F.Supp.2d 839 (S.D.Tex. Aug 2012) (remanding to state court candidate's action against State political party officials, seeking a declaratory judgment that the political party's rules did not permit the party officials to refuse to place candidate's name on the general election ballot, reasoning that the action was properly removed by virtue of the court's federal question jurisdiction because the action, at removal, asserted voters' claims that the refusal violated their federal constitutional rights, but that because plaintiff's voluntarily dismissed the voters' claims after removal and no basis for federal question jurisdiction existed – as the candidate's claims did not necessarily depend on the resolution of any federal issue – the court had discretion to remand the state law claims and would do so as the case raised novel state-law issues, and few federal judicial resources had been devoted to the suit).

*May v. Apache Corp.*, 870 F.Supp.2d 454 (S.D.Tex. 2012) (denying remand to state court of plaintiff's federal question claim in property owners' action against oil and gas company, alleging that company's drilling activities violated Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), a federal statute, where that claim was ripe, but remanding plaintiff's state law claims, in the exercise of the court's discretion under the supplemental jurisdiction statute, despite the court's exclusive jurisdiction over the CERCLA claim, where CERCLA was a strict liability statute with straightforward issues tried to the bench, owners were entitled to jury trial on the state law claims, state law claims involved plethora of issues unrelated to CERCLA liability, action was originally filed in state court, and CERCLA claim was not shown to be substantial in relation to the state law claims).

## **Sixth Circuit**

*Allstate Ins. Co. v. Nowakowski*, 861 F.Supp.2d 866, 872 (W.D.Mich. 2012) (remanding to state court, holding that no-fault auto insurer's claim against insured motorist, seeking declaratory judgment that it was not obligated to indemnify insured against liability for claim asserted by insured's primary health plan, did not seek declaratory relief on a matter for which the insured could bring coercive action arising under federal law against the insurer, and thus removal of action was not permitted; further, that district court lacked supplemental jurisdiction over the no-fault automobile insurer's removed declaratory judgment claim against the insured motorist, using defendant's third-party claim as the anchor claim; the latter could not support federal question jurisdiction and hence could not anchor supplemental jurisdiction).

## **Seventh Circuit**

*Piekosz-Murphy v. Board of Educ. of Community High School Dist. No. 230*, 858 F.Supp.2d 952 (N.D.Ill. 2012) (remanding to state court high school student's request for a writ of common law certiorari under Illinois law for the purpose of reviewing the school's disciplinary decision against him, where student's action had been removed solely on the basis of federal question jurisdiction, the student's constitutional claims had been dismissed, and the only remaining count from the complaint was the state law claim).

## **D.C. Circuit**

*Alraee v. Board of Trustees of University of Dist. of Columbia*, 889 F.Supp.2d 73 (D.D.C. 2012) (having dismissed former university professor's sole federal claim, declining to exercise supplemental jurisdiction over his breach of contract and tort claims because they raised novel or complex issues of D.C. law, and remanding those claims to the Superior Court from which they had been removed).

*D.C. Professional Taxicab Drivers Ass'n v. District of Columbia*, 880 F.Supp.2d 67 (D.D.C. 2012) (having dismissed all federal claims over which it had original jurisdiction – one by virtue of voluntary dismissal by plaintiff and the other as moot --, declining to exercise supplemental jurisdiction over remaining claims, which arose under District of Columbia law). However, the court erroneously stated that it was remanding for lack of subject-matter jurisdiction.

*Cannon v. District of Columbia*, 873 F.Supp.2d 272 (D.D.C. 2012) (remanding to District of Columbia Superior Court remaining non-federal claims in removed action where all federal claims had been dismissed, as remaining claims raised novel and complex issues of District law).

## **Compare**

*Finley v. Kondaur Capital Corp.*, 909 F.Supp.2d 969 (W.D.Tenn. 2012) (remanding to state court, holding that mortgagee's unlawful detainer lawsuit, filed in state court against mortgagor, was based entirely on Tennessee law, unlike mortgagor's lawsuit that was pending in federal district court against the mortgagee for alleged violation of federal and state law, thus precluding removal of the unlawful detainer lawsuit, which lacked a substantial federal question; the fact that the same property that the mortgagor allegedly unlawfully detained was subject to proceedings in federal court did not cause this suit to "arise under" federal law; one suit could not be supplemental to another).

With respect to removals based on federal question jurisdiction, *see generally*:

Field, Martha, *Removal Reform : A Solution for Federal Question Jurisdiction, Forum Shopping, and Duplicative State-Federal Litigation*, 88 IND. L. J. 611 (2013).

Wojcicki, Paul E., and Joseph F. Kampherstein, III, “*Make a Federal Case Out of It,*” FOR THE DEFENSE, Dec. 2012, at 16.

## **Cases Whose Removability Depends on Application of the Grable & Sons case**

### **– Cases coming out against jurisdiction**

*Praschak v. Kmart Corp.*, 922 F.Supp.2d 710 (N.D. Ill. 2013) (remanding to state court, holding that court lacked federal question jurisdiction over customer’s suit, alleging that retailer and construction company were negligent in failing to comply with public accommodation provisions of the federal Americans with disabilities Act (ADA) and in performing construction work that blocked-off handicapped-accessible parking spaces, where the customer had no remedy for damages under the ADA, the complaint’s reference to the ADA was only an alternative basis for liability as the customer also alleged that defendants owed her a duty of reasonable care arising from Illinois common law, and recognition of federal jurisdiction would lead to the shift of a great number of cases into federal court).

*CPC Livestock, LLC v. Fifth Third Bank, Inc.*, 495 B.R. 332 (W.D. Ky. 2013) (rejecting federal question jurisdiction and diversity jurisdiction, upholding “related to” bankruptcy jurisdiction over a removed action, but nonetheless remanding to state court under both mandatory and permissive abstention doctrines). The court held that an action by cattle producers and others against a lender and principals for a livestock brokerage company and stockyard did not involve a substantial federal interest, where the bankruptcy trustee was administering claims against company’s bond, required by the agency that administers the federal Packers and Stockyards Act (PSA), and the main federal issue of whether a PSA trust relationship existed merely required interpretation of regulations, and resolution of any PSA issue would not necessarily conclude the action and would be pertinent only to the facts of the instant case. The district court would not risk upsetting the intended balance between federal and state courts by exercising federal question jurisdiction.

*Maitland v. State Farm Fire and Cas. Ins. Co.*, 914 F.Supp.2d 794 (E.D. La. 2012) (remanding to state court, holding that the federal district court lacked federal question jurisdiction over this removed action, which had been brought against an insurance agency and its agents by a former insurance agent’s widow who inherited her husband’s flood-policy business and asserted claims for violation of Louisiana Unfair Trade Practices Act and Louisiana antitrust laws, as well as claims of property interests and breach of contract arising from defendants’ alleged conversion of policies, where the widow asserted only state-law claims, and although the flood policies in question were created and administered by the federal National Flood Insurance Program (NFIP), the central dispute was legal ownership of the policy business, which was a matter of state law). Although federal courts have exclusive subject-matter jurisdiction in cases arising out of policy-holders’ claims under flood insurance policies issued pursuant to the NFIP, this was not such a case and none of the claims required the resolution of a substantial question of federal law.

*Cooper v. Int’l Paper Co.*, 912 F.Supp.2d 1307 (S.D.Ala. 2012) (remanding to state

court, holding that city residents' action against paper mill, alleging that operation of the mill caused the emission of hazardous substances and noxious odors, in violation of federal and state laws, and asserting state-law claims did not raise a substantial issue of federal law sufficient to confer federal question jurisdiction where, although the complaint provided a laundry list of federal statutes and regulations, the claims arose under state law, plaintiffs failed to raise any issue concerning the construction of federal laws and made no showing that the claims turned on any actually disputed or substantial issue of federal law; many of the federal laws listed in the complaint contained savings clauses, preserving parties' state law rights).

*Goffney v. Bank of America, N.A.*, 897 F.Supp.2d 520 (S.D.Tex. 2012) (remanding to state court for lack of federal question jurisdiction, holding that federal law was not necessary to resolve a mortgagor's state law claims against a mortgagee for breach of contract and violations of Texas's Debt Collection Act (TDCA), despite defendant's contention that federal question jurisdiction existed because the mortgagor alleged that the foreclosure and subsequent sale of her home violated the federal Home Affordable Modification Program (HAMP) and Home Affordable Foreclosure Alternative (HAFA) program). Although the mortgagor's claims related to HAMP and HAFA, the claims did not "arise under" federal law because the mortgagor did not allege claims under either HAMP or HAFA and, with respect to the state law claims that plaintiff asserted, any dispute as to whether the foreclosure and subsequent sale of the mortgagor's home violated HAMP and HAFA did not raise a substantial federal question where Congress had decided not to provide a private right of action under HAMP or HAFA, the lack of such a private right of action indicated that Congress did not intend to alter the balance of federal and state judicial responsibilities in mortgage foreclosure litigation, and the federal government did not appear to have a strong interest in resolving this issue between lenders and borrowers).

*Rayburn v. Mississippi Dev. Auth.*, 877 F.Supp.2d 494 (S.D.Miss. 2012) (remanding to state court, holding that property claims by developers and builders that Mississippi Development Authority (MDA) violated the Mississippi Tort Claims Act (MTCA) by arbitrarily and capriciously interpreting MDA and federal regulations related to MDA's programs in partnership with the federal Department of Housing and Urban Development (HUD) failed to present a substantial disputed federal question sufficient to support federal jurisdiction upon removal where the suit was brought under the MTCA and concerned its interpretation, federal regulations were only tangentially relevant, and federal jurisdiction would disturb the balance of federal and state judicial responsibilities).

*Skymont Farms v. North*, 862 F.Supp.2d 755 (E.D.Tenn. 2012) (remanding to state court, holding that insureds' state law claims against an insurance agency and its agents, alleging negligence in failing to properly obtain an insurance policy for insureds' nursery and in failing to obtain the information from the insureds necessary to secure appropriate coverage, did not present a substantial question of federal law; analysis of the state law claims would focus on factual matters, and little, if any, federal law would impact resolution of the case).

*Gardiner v. St. Croix Dist. Governing Bd. of Directors*, 859 F.Supp.2d 728 (D.Virgin Islands 2012) (remanding to state court, holding in part that reference to federal mail and wire fraud statutes, in doctor's claim that hospital and various officials violated the Virgin Islands

Criminally Influenced Corrupt Organizations Act (CICO), was a reference to predicate acts, and claim therefore did not arise under federal law; whether defendants violated federal statutes was in dispute but interpretation of federal statutes was not, and federal criminal laws were incorporated into CICO statute such that federal laws could be used routinely as predicate offenses; relying on the principle that a plaintiff's mere inclusion of federal criminal laws as predicate acts in their state-created RICO claims does not raise substantial questions of federal law; also concluding that to interpret "arising under" to embrace this case would disrupt the congressionally approved balance between the state and federal judiciaries).

With respect to removals based on the theory of *Grable & Sons, Inc.*, *see generally*:

McKuskey, Elizabeth Y., *Clarity and Clarification: Grable Federal Questions in the Eyes of their Beholders*, 91 NEB. L. REV. 387 (2012).

## **The Insufficiency of Federal Defenses as a Basis for Removal**

### **First Circuit**

*Sheehan v. Broadband Access Services, Inc.*, 889 F.Supp.2d 284 (D.R.I. 2012) (remanding to state court, holding that employee's claim under Rhode Island statute regulating employer drug testing did not arise under federal law; the Federal Employee Omnibus Transportation Employee Testing Act (FOTETA) did not provide a private remedy for the employee, and its invocation by the defendant employer did not raise a substantial federal question; a federal defense does not confer "arising under" jurisdiction).

### **Second Circuit**

*Isufi v. Prometal Const., Inc.*, 927 F.Supp.2d 50 (E.D.N.Y. 2013) (ordering remand to state court, holding in part that the fact that the employer could potentially assert that the Davis Bacon Act defensively preempted the employees' claims did not raise a disputed and substantial question of federal law that could ground removal, as federal defenses cannot be grounds for removal under § 1441).

*Speranza v. Leonard*, 925 F.Supp.2d 266 (D.Conn. 2013) (remanding to state court, rejecting defendant's contention that its petition for exoneration from or limitation of liability provided a ground for removal, as it was a response to the complaint, and a responsive pleading cannot create federal subject-matter jurisdiction supporting removal because the federal question must appear on the face of a properly pleaded complaint).

*BGC Partners, Inc. v. Avison Young (Canada), Inc.*, 919 F.Supp.2d 310 (S.D.N.Y. 2013) (remanding to state court, holding in part that a New York brokerage's lawsuit against a Canadian brokerage and its affiliates, asserting various state law claims including tortious interference with contractual relationships and poaching of brokers and business opportunities from a bankrupt brokerage that was purchased by the New York brokerage, did not fall within federal court's jurisdiction by virtue of the Canadian brokerage's ability to assert a defense that

plaintiff's claims were preempted by bankruptcy proceedings nor on the basis that plaintiff's claims related to bankruptcy proceedings; further holding that, if the suit did fall within "related to" bankruptcy jurisdiction, the district court was required to abstain for a combination of reasons).

#### **Fourth Circuit**

Campbell v. Hampton Roads Bankshares, Inc., 925 F.Supp.2d 800 (E.D.Va. 2013) (remanding to state court, holding that employer's argument that it was prohibited by federal regulations from fulfilling its alleged contractual obligation under Virginia law to pay severance to a terminated bank employee could not support removal of the former employee's state law breach of employment contract action; a contrary holding would be inconsistent with the principle that federal jurisdiction cannot rest on a defense).

West Virginia ex rel. McGraw v. Fast Auto Loans, Inc., 918 F.Supp.2d 551 (N.D.W.Va. 2013) (remanding to state court, holding in part that West Virginia attorney general's consumer protection claims against an out-of-state lender who had made automobile title loans to West Virginia consumers did not "arise under federal law" so as to confer federal-question jurisdiction over the lender's removed suit, despite the lender's assertion that the claims were completely preempted by and conflicted with the Commerce Clause and that the case involved extraterritorial application of West Virginia law, because there was no federal controversy: the AG sought only to enforce state statutes regarding collection activities occurring within its borders, the lender's federal defense alone was insufficient to support removal, and any federal question that might have existed had been rendered moot by vacation of a state court injunction).

#### **Removal Based on Complete Preemption**

##### **Completely Preempted Claims as Necessarily Federal**

#### **Eighth Circuit**

Johnson v. MFA Petroleum Co., 701 F.3d 243 (8th Cir. 2012).

#### **Eleventh Circuit**

Karns v. Disability Reinsurance Management Services, Inc., 879 F.Supp.2d 1298 (N.D.Ala. 2012).

##### **Completely Preempted Claims are Re-characterized as Federal**

Karns v. Disability Reinsurance Management Services, Inc., 879 F.Supp.2d 1298 (N.D.Ala. 2012).

#### **ERISA Complete Preemption**

## **Ninth Circuit**

*Poffenbarger v. Hawai'i Management Alliance Ass'n*, 892 F.Supp.2d 1288 (D.Hawai'i 2012) (denying remand to state court, holding that an employee's claims that necessarily referenced an ERISA-governed plan, were expressly preempted, where one claim posed the question whether an insurer was entitled to cancel plaintiff's plan or challenged the manner in which the insurer canceled the plan and another claim alleged insurance bad faith). The court also reasoned that where the existence of an ERISA plan is a critical factor in establishing liability, the claim is expressly preempted, and concluded on this basis that plaintiff's claims for bad faith, breach of fiduciary duty, breach of contract, negligent misrepresentation, and vicarious liability all were expressly preempted because they were based upon interference with attainment of ERISA benefits. Similarly, although plaintiff's negligent infliction of emotional distress claim did not allege damages based on loss of insurance benefits, the plaintiff had to allege the existence of an ERISA-governed plan to state that claim, so it too was expressly preempted. Finally, neither Hawai'i common law governing bad faith, fiduciary duty, contract, misrepresentation, negligent infliction of emotional distress, and vicarious liability, nor state antitrust statutes were specifically directed toward entities engaged in insurance, and thus the claims based on those causes of action were not subject to ERISA's savings clause. The court seemed not to clearly distinguish between express and complete preemption, but its reasoning and conclusion that some of the claims were necessarily federal indicated that it held some of plaintiff's claims to be completely preempted by ERISA.

## **Tenth Circuit**

*Sawyer v. USAA Ins. Co.*, 912 F.Supp.2d 1118 (D.N.M. 2012) (ruling on motion to dismiss for failure to exhaust administrative remedies a case removed as completely preempted by ERISA, reasoning that removing defendants must establish congressional intent to extinguish similar state claims by making a federal cause of action exclusive, and holding that ERISA completely preempted a plan participant's claims against the administrator of an employee benefit plan, asserting breach of contract, insurance bad faith, and violation of the New Mexico Unfair Insurance Practices Act, the participant's claim that her former employer and its Consolidated Omnibus Budget Reconciliation Act (COBRA) administrator negligently misrepresented to plaintiff that premiums she paid were sufficient to allow her health coverage to continue, and her claims arising from the denial of benefits under the employee benefit plan, even though state law permitted awards of consequential and punitive damages, but ERISA did not).

## **Eleventh Circuit**

*Karns v. Disability Reinsurance Management Services, Inc.*, 879 F.Supp.2d 1298 (N.D.Ala. 2012) (denying remand to state court, holding that ERISA completely preempted an insured's breach-of-contract claim against an insurer and claims administrator, arising from their allegedly wrongful termination of plaintiff's long-term disability benefits, where the insured's plan was governed by ERISA, she had standing to sue under the plan, the parties' sole relationship was premised on their respective roles as participant, claims administrator, and

insurer of the plan, the insured sought to recover long-term disability benefits under the plan, and her position as a public school teacher did not defeat complete ERISA preemption).

With respect to removals based upon complete preemption, see generally:

Lindsay, Mark, *Complete Preemption and Copyright: Toward a Successive Analysis*, 20 J. INTELL. PROP. L. 43 (2012).

## **Cases Rejecting the Argument of Complete Preemption by ERISA**

### **Fourth Circuit**

Feldman's Medical Center Pharmacy, Inc. v. CareFirst, Inc., 902 F.Supp.2d 771 (D.Md. 2012) (remanding to state court a specialty pharmacy's suit alleging that a health insurance provider destroyed its business by withholding payments on reimbursement claims, instigating frivolous investigations, spreading false rumors, and encouraging pharmacy customers to fill their prescriptions elsewhere, because these claims were not completely preempted by ERISA, where the pharmacy was not seeking to recover for harm to ERISA plan beneficiaries or participants, and was not seeking benefits under patients' ERISA plans or damages equal to the amount of reimbursement claims submitted under the terms of an ERISA plan).

### **Fifth Circuit**

Nixon v. Vaughn, 904 F.Supp.2d 553 (W.D.La. 2012) (remanding to state court, holding that beneficiary's removed lawsuit, claiming that her co-beneficiary sister fraudulently converted plaintiff's 401(k) funds from an ERISA-governed employee retirement and savings plan and that employer and plan administrator negligently failed to inform plaintiff her sister's actions, was not completely preempted by ERISA, since a claim for benefits under ERISA would not afford plaintiff the relief she requested in her complaint, which asserting negligence claims seeking money damages rather than equitable relief, and since plaintiff did not allege that her employer and the plan administrator refused her request for plan information or that the plan as a whole was compromised by the failure to disclose material information).

### **Seventh Circuit**

Perl v. Laux/Arnold, Inc., 864 F.Supp.2d 731 (N.D.Ind. 2012) (resolving doubts in favor of remand and remanding to state court, holding that removed claims by former employees, alleging that former employer deducted money from their paychecks for vacation, holiday, work clothing, apprenticeship, and training benefits without a valid wage assignment and placed some of those funds into a trust fund administered by the company's benefit program, in violation of Indiana law, could not properly be recharacterized as ERISA claims, regardless of whether the benefit program was a plan covered by ERISA, because the claims were not completely preempted by ERISA, as the employees did not assert that they did not receive benefits to which they were entitled under the ERISA plan or that the deductions from their wages did not comply with ERISA or the terms of the plan, and the claims did not require interpretation of plan

documents; also holding that plaintiffs' removed claims, alleging that their total compensation for certain public-works construction projects fell short of the common construction wages mandated by Indiana statutory law were not completely preempted by ERISA because those claims did not have any connection with ERISA plans and plaintiffs did not assert that they were, in this manner, improperly denied any benefits under an ERISA plan; finally, holding that plaintiffs' removed claim requesting an accounting of the trust fund administered by their former employer's company benefit program was not completely preempted by ERISA, where the claim was a tool to trace wages allegedly deducted from plaintiffs' paychecks without authorization, in violation of Indiana law, and no interpretation of plan documents was necessary to decision).

### **Ninth Circuit**

*Borreani v. Kaiser Foundation Hospitals*, 875 F.Supp.2d 1050 (N.D.Cal. 2012) (remanding to state court, holding that there was no need to construe ERISA plan language or determine the breadth of the plan's terms in a removed action by relatives of a deceased participant, against a provider of medical services, where plaintiffs asserted misrepresentation, fraud, and negligent failure to warn regarding a prescription, and therefore the claims were not completely preempted by ERISA, where the relatives did not seek to recover benefits or enforce ERISA rights, but merely asserted tort claims arising from alleged negligence in maintaining drug formularies and in educating physicians; the relatives' claims also involved decisions made in the course of treatment, rather than decisions made in the course of administering the plan, and therefore, the claims were not expressly preempted by ERISA, where the relatives alleged that the provider was reckless in its distribution of medication and overall treatment of the participant, but not that it failed to provide promised benefits).

### **Tenth Circuit**

*Potts v. CitiFinancial, Inc.*, 863 F.Supp.2d 1121 (D.Colo. 2012) (remanding to state court, holding that former employee lacked standing to pursue ERISA claims, precluding removal on the basis of complete preemption of his action against his former employer and the administrator of its medical insurance plan, alleging that, although the employer deducted amounts from plaintiff's paycheck to cover medical insurance premiums, it failed to purchase insurance on plaintiff's behalf, and asserting claims for breach of contract, bad faith breach of insurance contract, breach of fiduciary duty, and conversion; plaintiff could not seek to enforce rights under the plan because he was not a participant in the plan and therefore had no such rights). Further, former employees have standing to sue under ERISA only if they either have a reasonable expectation of returning to covered employment or have a colorable claim to vested benefits under the plan, and plaintiff fell into neither of those categories.

### **Eleventh Circuit**

*Mitchell-Hollingsworth Nursing & Rehab., Ctr. v. Blue Cross & Blue Shield of Mich.*, 919 F.Supp.2d 1209 (N.D.Ala. 2013) (remanding to state court, holding that a healthcare provider's claims of negligent misrepresentation and estoppel based on oral misrepresentations were not ERISA claims because they did not arise from the plan or its terms; further holding that

a skilled nursing facility's claims against insurers for breach of implied contract, negligence, fraud, promissory fraud, estoppel, quantum meruit, unjust enrichment, conspiracy, and conversion did not require the court to determine plaintiff's right to payment under an ERISA benefits plan and thus the claims were not completely preempted by ERISA; even though the beneficiary executed an assignment of benefits in favor of one of the insurers, the claims were not based upon the original agreement between an insurer and the beneficiary, but rather called upon the court to determine whether either insurer misrepresented the extent of the beneficiary's benefits or breached an independent agreement with the facility to provide coverage for the beneficiary's care). Mere mention of "covered services" in a the claim against an insurer for breach of express contract regarding care rendered to an ERISA plan participant did not render the claim completely preempted where the claim was based on some independent agreement between the facility and the insurer, not upon an ERISA plan.

### **Cases Rejecting the Argument of Complete Preemption in Other contexts**

#### **Comprehensive Omnibus Budget Reconciliation Act (COBRA)**

Weil v. Process Equipment Co. of Tipp City, 879 F.Supp.2d 745 (S.D.Ohio 2012) (remanding to state court, holding that former chief executive officer (CEO)'s claim that his employer breached his employment agreement by failing to provide post-separation COBRA coverage under his compensation plan did not assert a claim to recover damages based on the employer's failure to issue a mandatory COBRA notice, but rather alleged only a state law breach of contract claim, and thus was not completely preempted by federal COBRA, where the CEO sought to recover severance pay, vacation pay, and reimbursement for his expenses, in addition to COBRA benefits, and did not seek relief based on any COBRA violation).

#### **Federal Crop Insurance Act**

Wanamaker v. Lawson, 871 F.Supp.2d 735 (E.D.Tenn. 2012) (remanding to state court, holding that Federal Crop Insurance Act (FCIA) did not completely preempt plaintiffs' removed contract and tort claims against an insurance agency and agent, related to crop losses, where the sole federal jurisdictional grants in the FCIA applied only to lawsuits filed against the Secretary of Agriculture and the Federal Crop Insurance Corporation, there was no jurisdictional grant as to private insurance companies issuing reinsured policies, their local agencies or agents, and the provision of FCIA addressing state law invoked preemption only in case of conflicting state law).

Skymont Farms v. North, 862 F.Supp.2d 755 (E.D.Tenn. 2012) (remanding to state court, holding that the Federal Crop Insurance Act (FCIA) did not completely preempt the field of crop insurance and thus provided no basis for federal question jurisdiction over a removed suit in which insureds asserted state law contract and tort claims against a non-diverse local insurance agency and its agents).

#### **Federal Omnibus Transportation Employee Testing Act**

Sheehan v. Broadband Access Services, Inc., 889 F.Supp.2d 284 (D.R.I. 2012)

(remanding to state court, holding that employee's claim under Rhode Island statute regulating employer drug testing could not be re-characterized as a federal claim where the Federal Employee Omnibus Transportation Employee Testing Act (FOTETA) did not expressly preempt the state law claim, nor did FOTETA completely preempt the field).

### **Interstate Commerce Commission Termination Act**

*B & S Holdings, LLC v. BNSF Ry. Co.*, 889 F.Supp.2d 1252 (E.D.Wash. 2012) (denying remand to state court, holding that former adjacent landowner's removed state law adverse possession claim against railroad was completely preempted by the Interstate Commerce Commission Termination Act (ICCTA), as it would interfere with railroad operations and divest the railroad of the very property on which it conducted its operations).

### **Labor Management Relations Act**

#### **First Circuit**

*Flores-Flores v. Horizon Lines of Puerto Rico, Inc.*, 875 F.Supp.2d 90 (D.Puerto Rico 2012) (remanding to state court, holding that unionized employee's claim, alleging that his employer's refusal to provide him with meal periods violated Puerto Rico's "Law 379," was not completely preempted by the LMRA, where at the time, meal period regulation formed no part of the collective bargaining agreement (CBA), resolution of the claim did not depend on the CBA, and a Puerto Rico statute expressly proscribed modification of the CBA orally or by subsequent dealings).

#### **Eighth Circuit**

*Johnson v. Auto Handling Corp.*, 857 F.Supp.2d 848 (E.D.Mo. 2012) (remanding to state court, holding that adjudication of worker's action against truck manufacturer and company that serviced truck, asserting strict liability and negligence leading to injury allegedly sustained while securing automobiles on truck, did not require interpretation of collective bargaining agreement (CBA) between employee's union and his employer, and therefore claims were not completely preempted by the LMRA; truck manufacturer and service company were not party to the agreement and had no duties imposed by it; rather, duty to manufacture a safe product was independent of the CBA and owed to the public at large).

### **Removals Based on Separate and Independent Federal Claims**

*Cohn v. Charles*, 857 F.Supp.2d 544 (D.Md. 2012) (remanding to state court, holding in part that mortgagor's counterclaim against substitute trustees in state court foreclosure action and third-party claims against mortgagee for alleged violation of federal TILA and RESPA could not reasonably be separate and independent claims, as required for removal of claims arising under federal law that were joined to trustees' otherwise non-removable claims for foreclosure, since the trustees represented interests of the third-party mortgagee in the foreclosure action, so the trustees and mortgagee were effectively the same).

### **III. Removal Based on Diversity of Citizenship and Alienage Jurisdiction**

#### **The Need for Diversity or Alienage Jurisdiction under 28 U.S.C.A. § 1332(a)**

##### **Second Circuit**

*Mills 2011 LLC v. Synovus Bank*, 921 F.Supp.2d 219 (S.D.N.Y. 2013) (before the court would allow jurisdictional discovery, requiring amendment of the notice of removal to allege a good-faith basis for diversity jurisdiction and a letter brief stating the facts underlying defendant's belief in diversity jurisdiction; noting that the citizenship of a limited liability company (LLC) is determined for purposes of diversity jurisdiction by the citizenship of natural persons who are members of the LLC and by the place of incorporation and principal place of business of any corporate entities that are members of the LLC, and that citizenship of a trust is determined by the citizenship of both the trustees and the beneficiaries; concluding that the notice of removal failed to adequately allege complete diversity of citizenship, as required for removal of this breach-of-contract action against the seller of secured loans, by an LLC that bought the loans, as the citizenship of the trust that was the LLC's sole member apparently destroyed diversity because the trust beneficiary and the seller both were citizens of Georgia).

##### **Fourth Circuit**

*Dooley v. Hartford Acc. and Indem. Co.*, 892 F.Supp.2d 762 (W.D.Va. 2012) (denying remand to state court, holding that although the insured and the driver of the other vehicle involved in an accident both were "residents" of Virginia, the other driver's citizenship was irrelevant for purposes of determining diversity of citizenship and the propriety of the removal of the insured's action against his insurer, seeking a declaration that his auto insurance policy afforded him \$200,000 in under-insured motorist coverage in connection with the accident, where the insured did not assert any claim against the other driver or request relief from him).

*Heller v. TriEnergy, Inc.*, 877 F.Supp.2d 414 (N.D.W.Va. 2012) (denying remand to state court and granting motion to compel arbitration, holding in part that the assignee of an energy company's rights, pursuant to an oil and gas lease agreement with property owners, did not have a real interest in the owners' action against the company and its assignees, – which favored finding the assignee to be a nominal party – where the assignee no longer had any rights under the lease, as it had assigned away all of its rights under the lease, prior to commencement of the action in state court; further holding that the property owners had no possible claim against the assignee where plaintiffs' sole claim against the assignee asserted that it breached a covenant to diligently and reasonably explore, develop, produce, and market leaseholds but the covenant allegedly was implied in the lease, but without an alleged breach of an express covenant claim, the claim was not viable under West Virginia law). This too favored finding the assignee to be a nominal party, as did the fact that entering judgment in the absence of the assignee would not be unfair to the property owners, as a subsequent assignee had agreed to pay any judgment on behalf of itself and the assignee in question, in the event either entity was found liable. The issue whether the assignee was merely a nominal party arose on the property owners' motion to

remand the action to state court. The suit alleged breach of covenant, bad faith, fraudulent inducement, fraud, trespass, tort of outrage, and civil conspiracy.

### **Fifth Circuit**

DTND Sierra Investments LLC v. Bank of America, N.A., 871 F.Supp.2d567 (W.D. Tex. 2012) (upholding removal, examining its jurisdiction sua sponte, holding that a non-diverse trustee was a nominal party whose citizenship could be disregarded for purposes of diversity jurisdiction in the high bidder's removed action against the foreclosing mortgagee, trustee, and others, seeking an order quieting title and alleging wrongful foreclosure under Texas law, where the complaint contained no factual allegations against the trustee and sought no relief against the trustee, the trustee had been named only in his capacity as trustee under a deed of trust, and solely to enjoin foreclosure).

### **Sixth Circuit**

YA Landholdings, LLC v. Sunshine Energy, KY I, LLC, 871 F.Supp.2d 650 (E.D.Ky. 2012) (remanding to state court, holding in part that sub-tenant, a limited liability company (LLC) organized under Kentucky law, was not a citizen of Kentucky, as would preclude removal of forcible detainer actions brought in Kentucky courts by the lessor of commercial gas stations, alleging that the sub-tenant was in default of the leases, where its sole member was a Kansas LLC whose sole member was a Florida citizen; for purposes of diversity jurisdiction, a limited liability company has the citizenship of each of its members; however, the sub-tenant failed to show that the amount in controversy exceeded \$75,000).

### **Eleventh Circuit**

St. Joseph Hosp. v. Health Management Associates, Inc., 705 F.3d 1289 (11th Cir. 2013) (noting that the case was removed based on diversity jurisdiction where defendant was a Delaware corporation with principal place of business in Florida and plaintiff was incorporated and had its principal place of business in Georgia).

Auto-Owners Ins .C. v. Great Am. Ins. Co., 479 Fed.Appx. 228 (11th Cir. 2012) (affirming denial of remand and decisions on the merits, holding that suit brought in Florida state court by the insurer that had issued an executive umbrella policy covering a driver involved in a collision, against the insurer that insured the vehicle owner under an excess liability policy, after the excess insurer refused to contribute to a settlement with an injured motorcyclist, was removable to federal court based on diversity of citizenship, where the excess insurer was incorporated and had its principal place of business in Ohio, and the umbrella insurer was incorporated and had its principal place of business in Michigan, despite umbrella insurer's argument that because neither insurer was a Florida citizen, neither party would have suffered local prejudice in state court; further, suit was not a "direct action" under the statutory provision rendering liability insurers citizens of any state of which their insured was a citizen for purposes of determining diversity in a direct action against a liability insurer, as the liability could not be imposed on the insured).

Porter v. Crumpton & Associates, LLC, 862 F.Supp.2d 1303 (M.D.Ala. 2012) (denying remand to state court, holding in part that a judgment debtor's professional liability insurer was not deemed a citizen of the same state as the debtor, as would defeat diversity jurisdiction in judgment creditors' removed action, seeking insurance proceeds to satisfy their \$250,000 judgment, where the creditors had obtained a state court judgment against the debtor before filing their action under an Alabama collection statute, and the interests of the creditors and the debtor were aligned in that they both wanted the insurer to pay the judgment; further holding that, although the judgment debtor's professional liability insurer failed to allege the citizenship of all the debtor's members, as required to show the citizenship of the limited liability company-debtor, the insurer's failure did not warrant remand of the collection action, as the insurer was entitled to amend its pleadings to cure the defect).

### **Upon removal, No Properly Joined and Served Defendant May be a Citizen of the Forum State**

Noatex Corp. v. King Const. of Houston, LLC, 864 F.Supp.2d 478 (N.D.Miss. 2012) (remanding to state court, holding that district court lacked jurisdiction over project owner's removed interpleader action concerning funds it owed to a general contractor that were "bound" by a subcontractor pursuant to Mississippi statutory procedure, where the parties were not completely diverse, and the subcontractor was a Mississippi citizen, a citizen of the state where the action was brought).

### **Removability to be Determined from the Record at Removal**

B & S Holdings, LLC v. BNSF Ry. Co., 889 F.Supp.2d 1252 (E.D.Wash. 2012) (denying remand to state court, looking to facts presented in the removal notice and summary judgment-type evidence relevant to the amount in controversy at the time of removal, and holding that the amount in controversy exceeded \$75,000, at least from B & S's perspective, in a former landowner's adverse possession action against a railroad, where a contract for the former landowner's sale of its property had a holdback provision of \$100,000 so as to provide an incentive for the former landowner to quiet title for the benefit of its successor in interest). Looking to the diminution in value that would result from the taking, the court concluded that the value to BNSF could be even greater.

Miller v. Volkswagen of America, Inc., 889 F.Supp.2d 980 (N.D. Ohio 2012) (remanding to state court, reasoning that claims present when a suit is removed but that subsequently are dismissed from the case – in this case, as time-barred – must be considered in determining whether the amount-in-controversy requirement for CAFA diversity jurisdiction is satisfied, but holding nonetheless that defendant vehicle manufacturer did not establish by a preponderance of the evidence that the amount-in-controversy requirement of CAFA was satisfied in a class action by purchasers who alleged violations of the Ohio Consumer Sales Practices Act (OCSPA), breach of warranties, and fraud by concealment in relation to a front bumper assembly, where approximately 1.5% of potential class members responded to the class notice, the class notice period had closed, damages were estimated between \$850 and \$1,500 per class member, the total damages faced by the manufacturer were \$284,750 to \$502,500, well below CAFA's \$5 million

threshold, prior to removal the parties had discussed a settlement that would total \$2.9 million if calculated based upon the total potential number of class members, rather than based on those who responded to the class notice, and there was no evidence that attorneys' fees available under OCSPA would put the amount in controversy over \$5 million).

*Yasmin & Yaz (Drospirenone) Mktg, Sales Practices & Prod. Liab Litig.*, 870 F.Supp.2d 587 (S.D.Ill. 2012) (denying remand to state court, holding in part that district court would not consider consumer's post removal amendments to her complaint, in assessing whether pharmacy had been fraudulently joined and in deciding consumer's motion to remand her action for damages, allegedly resulting from the consumer's use of a prescription drug sold by defendant pharmacy; the only relevant allegations were those contained in the consumer's complaint at the time of removal).

### **The Voluntary-Involuntary Distinction**

*Arthur Glick Truck Sales, Inc. v. Stuphen East Corp.*, 914 F.Supp.2d 529 (S.D.N.Y. 2012) (approving removal where, by stipulation, plaintiff voluntarily dismissed the sole non-diverse defendant, thereby creating complete diversity among the remaining parties).

### **Court Discretion to Allow or Dis-Allow Post-Removal Joinder of Non-Diverse Parties**

#### **First Circuit**

*Erickson v. Johnson Controls, Inc.*, 912 F.Supp.2d 1 (D.Mass. 2012) (denying remand and dismissing claims against a non-diverse general contractor and contractor's subsidiary who were joined as defendants post-removal in a construction worker's negligence suit against a manufacturer, where the nondiverse defendants were "dispensable" because they were potential joint tortfeasors whose concurrent negligent actions allegedly contributed to plaintiff's personal injury, dismissal would not substantially prejudice any of the parties, the litigation was in an early stage, and the non-diverse general contractor and its subsidiary would remain in the action as third party defendants). The court reasoned that if, following removal, a nondiverse defendant that has been added is dispensable, the court may either remand the case to state court or restore diversity jurisdiction by dismissing that defendant and, in choosing, the court must consider whether dismissal will prejudice any of the parties.

#### **Second Circuit**

*Vanderzalm v. Sechrist Industries, Inc.*, 875 F.Supp.2d 179 (E.D.N.Y. 2012) (remanding to state court, holding that joinder of a hyperbaric oxygen chamber technician and his hospital employer as additional defendants in a patient's products liability suit against the manufacturer of the device was permissible, even though the patient was asserting different legal claims against the additional defendants than he asserted against the original defendants, where all claims – products liability, negligence, and medical malpractice – arose out of the same incident in which patient was injured, and any resulting trial would involve many common issues of law and fact). The court further considered that the original defendants had removed before separate suits could

be consolidated, the patient moved to join the new defendants only six days after removal and moved to remand the case only four days after that, remand of the case at this early stage would not prejudice defendants, upon remand the case could be consolidated with related state court litigation, and the patient's motive in adding non-diverse defendants post-removal was not primarily to circumvent federal jurisdiction, but rather to avoid multiple litigation.

### **Fifth Circuit**

*Anzures v. Prologis Texas I LLC*, 886 F.Supp.2d 555 (W.D.Tex. 2012) (in a removed case, denying plaintiff's motion for leave to amend to add a non-diverse party whose inclusion would destroy diversity jurisdiction, noting that such a motion is governed by 28 U.S.C.A. § 1447(e), rather than by the federal Civil rule governing motions for leave to amend; reasoning that the district court should consider: (1) whether the primary purpose of the amendment is to defeat diversity jurisdiction, (2) whether the plaintiff was diligent in seeking to amend, (3) whether the plaintiff would be prejudiced if the amendment were denied, and (4) any other factors bearing on the equities; and concluding that, in this case, the primary purpose of the proposed amendment to the complaint to join plaintiff's employer in a negligence action arising out of a construction worker's fall through a roof skylight was to defeat diversity jurisdiction, that the plaintiff employee knew of the facts allegedly supporting a claim against the employer well before discovery commenced and before the existing defendant building owner sought leave to designate the employer a responsible third party, that the eight-month delay in moving to amend constituted lack of diligence by plaintiff, and that plaintiff would not be prejudiced by denial of his motion to amend, where plaintiff already was pursuing claims against his employer in state court and therefore still would be able to obtain complete relief).

*Wuellner Oil & Gas, Inc v. EnCana Oil & Gas (USA) Inc.*, 861 F.Supp.2d 775 (W.D.La. 2012) (denying post-removal motion for leave to file a supplemental and amended petition to join a non-diverse defendant, holding that – although the court had no direct evidence that plaintiffs' purpose was to destroy diversity jurisdiction and the motion was filed within the deadline to join parties – plaintiffs were not entitled to post-removal joinder of a non-diverse defendant in a breach of contract action, absent any colorable claims against that party, as plaintiffs would not be significantly injured by remaining in federal court).

### **Seventh Circuit**

*McIntosh v. HSBC Bank USA, N.A.*, 891 F.Supp.2d 985 (N.D.Ill. 2012) (permitting post-removal joinder of a non-diverse defendant and remanding to state court, reasoning in part that, to permit joinder of a non-diverse party after removal, it is not necessary that the non-diverse party be indispensable to just adjudication of the lawsuit and further that the non-diverse property manager was not fraudulently joined in a tenant's action against her landlord for allegedly failing to maintain heat or hot water at the premises, as there was a reasonable possibility that the tenant could recover from the property manager for negligence under Illinois law; in permitting the amendment to the complaint, the court took into account that the tenant promptly requested permission to amend the complaint to join the manager after discovering the manager's role in maintaining the building, that the tenant would be prejudiced by a denial of

joinder of the manager because it could result in inconsistent results by requiring a separate state court proceeding against the manager, and that the landlord would not be prejudiced by proceeding in Illinois state court).

### **Eleventh Circuit**

*Small v. Ford Motor Co.*, 923 F.Supp.2d 1354 (S.D. Fla. 2013) (denying leave to file an amended complaint and a motion to remand to state court, holding it inappropriate to grant, to the guardian of a passenger who was ejected from a vehicle in a rollover car accident, leave to amend her products liability complaint against a vehicle manufacturer and the manufacturer of the vehicle's seatbelt system to add a non-diverse party, the company that allegedly sold the car; reasoning that the timing and substance of the proposed amendment strongly suggested motivation to destroy diversity jurisdiction where the accident occurred much earlier, and no discovery had prompted the proposed amendment; moreover, the guardian would not be significantly prejudiced by disallowance of the amendment as it had sued a fully solvent defendant, and the balance of equities weighed against allowing the amendment as it seemed unlikely that plaintiff actually would pursue a state law claim against the car seller).

### **Propriety of Realignment before Diversity Jurisdiction is Decided**

*Porter v. Crumpton & Associates, LLC*, 862 F.Supp.2d 1303 (M.D.Ala. 2012) (denying remand to state court, holding in part that the court would realign a judgment debtor as a plaintiff in a judgment creditors' action against a debtor and its professional liability insurer, seeking insurance proceeds to satisfy their \$250,000 judgment, where the judgment creditors' interests aligned directly with those of the debtor, because they both wanted the insurer to pay the judgment that the creditors had obtained against the debtor, and realignment would not result in a direct action against the insurer; as a result, the court had diversity jurisdiction over the removed action).

### **The Treatment of Nominal parties**

*Dooley v. Hartford Acc. and Indem. Co.*, 892 F.Supp.2d 762 (W.D.Va. 2012) (denying remand to state court, holding that although the insured and the driver of the other vehicle involved in an accident both were "residents" of Virginia, the other driver's citizenship was irrelevant for purposes of determining diversity of citizenship and the propriety of the removal of the insured's action against his insurer, seeking a declaration that his auto insurance policy afforded him \$200,000 in under-insured motorist coverage in connection with the accident, where the insured did not assert any claim against the other driver or request relief from him).

### **Determining Whether Non-Diverse Parties were Fraudulently (or Improperly) Joined**

#### **Fourth Circuit**

*Heller v. TriEnergy, Inc.*, 877 F.Supp.2d 414 (N.D.W.Va. 2012) (denying remand to state court and granting a motion to compel arbitration, holding in part that a notary public was

fraudulently joined in a property owners' removed action against an energy company and the assignees of the company's rights pursuant to an oil and gas lease agreement with the property owners, and thus the notary's citizenship would be disregarded for diversity jurisdiction purposes, despite the owners' contention that the notary breached his duties under a West Virginia statute by acknowledging the owners' signature on a lease without having witnessed the signing, where the owners had no possible claim against the notary under West Virginia law, for damages proximately caused by the notary's misconduct, as the owners admitted that they signed the lease).

*McCoy v. Norfolk Southern Ry. Co.*, 858 F.Supp.2d 639 (S.D.W.Va. 2012) (denying remand to state court, holding in part that a landowner had no possibility of recovery in a state court against a non-diverse railroad employee, and thus the employee was fraudulently joined as a defendant in the landowner's removed action against a railroad, seeking declaratory and injunctive relief with respect to an alleged easement-by-implication and easement-by-necessity, and asserting claims for breach of contract and negligence, where the non-diverse employee had not been party to the alleged agreement transferring ownership of disputed property from the railroad to the landowner, the employee had no interest in the disputed property, and the employee owed no duty to the landowner).

### **Fifth Circuit**

*Benavides v. EMC Mortgage Corp.*, 916 F.Supp.2d 776 (S.D.Tex. 2013) (upholding removal of case and dismissing for failure to state a claim against an in-state law firm, where the firm's threatened foreclosure on the mortgagors' home did not constitute "threatening to take an action prohibited by law," within the meaning of the Texas Debt Collection Act (TDCA), and thus there was no reasonable basis to predict that the mortgagors could prevail on their TDCA claim against the law firm; further, in-state foreclosure counsel's alleged failure to provide the payoff amount to the mortgagors did not constitute "misrepresenting the character, extent or amount of consumer debt" within the meaning of the TDCA's prohibition on misrepresentations in an attempt to collect a debt, and thus, there was no reasonable basis to predict that the mortgagors could prevail on their TDCA claim against counsel where the mortgagors did not allege that counsel made any false or misleading representations; in-state foreclosure counsel had no claim in its own right to the mortgagors' home, and the mortgagors did not allege that their own title was superior, as required to state a claim against counsel in a suit to quiet title; the law firm was improperly joined in an action challenging foreclosure).

*Johnson v. Rimes*, 890 F.Supp.2d 743 (S.D.Miss. 2012) (denying remand to state court by virtue of the fraudulent joinder of a non-diverse insurance adjuster). Under Mississippi law, an insurance adjuster may be held independently liable for its work on a claim only if its acts amount to gross negligence or certain other types of conduct. That defendant insurance adjusters failure to seek a medical authorization from the insured and to have her undergo a medical examination under oath, to determine the nature and extent of her injuries following an accident, did not amount to gross negligence and, thus, the adjusters could not be held liable for the auto insurer's allegedly wrongful denial of plaintiff's uninsured motorist claim.

Moreno Energy, Inc. v. Marathon Oil Co., 884 F.Supp.2d 577 (S.D.Tex. 2012) (denying remand to state court of action alleging that oil company and its affiliates deprived plaintiff of substantial royalties from overseas property, applying principles that a contention of fraudulent joinder in a removed action must be pleaded with particularity and supported by clear and convincing evidence and that an improperly joined, non-diverse defendant can remove a case by arguing improper joinder, and ordering Marathon to file an amended removal notice and to provide evidence of two co-defendants' citizenships, to both allege and establish that they were formed under the laws of the Cayman Islands).

Keen v. Wausau Business Ins. Co., 875 F.Supp.2d 682 (S.D.Tex. 2012) (denying remand to state court, holding that the plaintiff worker made no specific and individualized factual allegations against his workers' compensation insurer's adjuster, as required to give rise to individual liability, and thus the adjuster was improperly joined in this removed action also against the insurer for alleged mishandling of the workers' compensation claim, where the worker alleged only generally that both the insurer and the adjuster failed to conduct a reasonable investigation of his claim; further reasoning that when an adjuster's actions can be accomplished by the insurer through an agent, and when the claims against the adjuster are identical to those against the insurer, the adjuster's actions are indistinguishable from the insurer's and hence are insufficient to support a claim against the adjuster).

Henry v. O' Charleys Inc., 861 F.Supp.2d 767 (W.D.La. 2012) (denying remand to state court, holding in part that a non-diverse restaurant manager, on duty on the date of a patron's alleged slip and fall accident, was improperly joined to defeat diversity jurisdiction in the restaurant patron's removed action to recover damages for injuries she allegedly sustained when she slipped and fell at the restaurant, where the patron could not maintain a claim under Louisiana law against the manager for breaching any duty to supervise and/or train restaurant employees to exercise reasonable care, because he neither caused the spill that led to her accident, nor had personal knowledge of the spill; under these circumstances, the manager had no personal duty to the plaintiff, the breach of which specifically caused plaintiff's damages; similarly, a non-diverse Louisiana corporation was improperly joined, as the patron could not maintain a claim under Louisiana law against the corporation, which did not own or operate the restaurant).

## **Sixth Circuit**

Lyons v. Trott & Trott, 905 F.Supp.2d 768 (E.D.Mich. 2012) (upholding removal, over a Michigan borrower's lawsuit, alleging wrongful foreclosure and seeking to enjoin a sheriff's sale of the borrower's foreclosed home, holding that the borrower had no colorable claim against a Michigan law firm that represented the North Carolina lender and loan servicer, as local counsel, and thus removing defendants established fraudulent joinder of the law firm, warranting denial of plaintiff's motion to remand for lack of complete diversity). The law firm was merely an agent of the diverse defendants, from whom the borrower could obtain no direct relief, and since the firm was not a foreclosing party under Michigan law, its citizenship was properly disregarded for purposes of determining diversity jurisdiction.

## **Seventh Circuit**

Yasmin & Yaz (Drospirenone) Mktg, Sales Practices & Prod. Liab Litig., 870 F.Supp.2d 587 (S.D.Ill. 2012) (denying remand to state court, holding in part that the pharmacy that sold prescription drugs that allegedly caused a consumer's injuries was fraudulently joined in this removed action, as the consumer had no reasonable chance of succeeding against the pharmacy on a breach of express warranty claim since she failed to allege any representation made by the pharmacy that would serve as a basis for that claim, and the consumer also could not succeed on a failure to warn or Alabama Extended Manufacturer's Liability Doctrine claim against the pharmacy, which was protected by the learned-intermediary doctrine and because plaintiff failed to allege any action by the pharmacy that contributed to the harm alleged).

## **Eighth Circuit**

Wages v. Johnson Regional Med. Ctr., 916 F.Supp.2d 900 (W.D.Ark. 2013) (denying remand to state court, holding that hospital, a citizen of Arkansas, was fraudulently joined to defeat removal of Arkansas patient's action asserting claims arising out of surgical implantation of a mesh medical device into plaintiff patient, where the patient's claims against the hospital flowed entirely from "medical injury" within the meaning of the Arkansas Medical Malpractice Act, for which the two-year statute of limitations had run, so there was no reasonable basis for predicting that Arkansas law might impose liability on the hospital).

Shepherd v. Baptist Health, 916 F.Supp.2d 891 (E.D.Ark. 2012) (denying remand, holding that a medical center was fraudulently joined in a removed product liability action based on an alleged defect in a pelvic mesh medical device implanted in plaintiff patient, where – in light of the applicable statute of limitations – there was no reasonable basis for predicting that Arkansas law might impose liability on the medical center).

Brinkman v. Bank of America, N.A., 914 F.Supp.2d 984 (D. Minn. 2012) (denying remand to state court, holding in part that homeowners fraudulently joined a law firm that represented defendant mortgage loan servicers and that, like the homeowners, was a citizen of Minnesota, in a removed suit against the firm and that loan servicers to challenge the validity of home mortgages in an effort to prevent foreclosures; thus, the district court could disregard the firm and its citizenship and exercise diversity jurisdiction over the remaining claims). The court reasoned that, under Minnesota law, the homeowners had no colorable cause of action against the firm, for reasons detailed in the opinion.

Gurley v. FedEx Ground Package Systems, Inc., 874 F.Supp.2d 803 (S.D.Iowa 2012) (denying remand to state court, holding that non-diverse co-workers were fraudulently joined to defeat removal based on diversity in a former employee's action claiming discrimination by his employer and coworkers, in violation of the Iowa Civil Rights Act, since the claims against the co-workers were time-barred and such claims provided no reasonable basis for predicting liability of the co-workers).

Karnatcheva v. JPMorgan Chase Bank, N.A., 871 F.Supp.2d 834 (D. Minn. 2012) (upholding removal and dismissing suit, holding that a non-diverse law firm which represented parties seeking to foreclose on homes was fraudulently joined as a defendant in mortgagors' action challenging those proceedings where the mortgagors failed to assert a "colorable" claim under state law against the firm, and thus removal of the mortgagors' action to federal court was appropriate). Under Minnesota law, a law firm that represented parties seeking to foreclose on homes was immune from liability for actions it took with respect to foreclosure proceedings.

### **Ninth Circuit**

Villains, Inc. v. Am Econ. Ins. Co., 870 F.Supp.2d 792 (N.D.Cal. 2012) (denying remand to state court, reasoning that an accounting company and certified public accountant (CPA), hired by insurers to determine insureds' loss from fire that damaged insured property and interrupted insureds' businesses, were fraudulently joined in insureds' removed action claiming that the insurers breached their contract and that the accounting company and CPA aided and abetted the insurers, in violation of California law, because the aiding and abetting claim was not viable under the "agency immunity rule," as the company and CPA were the insurers' agents, and the insureds' allegations did not implicate the exception to the immunity rule for agent conduct undertaken in pursuit of personal interest and not solely on behalf of the principal, as the accountants' financial advantage derived entirely from the agency relationship).

### **Eleventh Circuit**

De Varona v. Discount Auto Parts, LLC, 860 F.Supp.2d 1344 (S.D. Fla. 2012) (denying remand to state court, holding in part that unauthenticated pictures of a parking lot did not establish that a store manager breached any duty under Florida law to a patron, as required for the patron to have a reasonable basis for negligence claims against the manager based on a slip and fall on a foreign substance in the parking lot, and therefore, the manager was fraudulently joined in this removed action; the pictures were not dated, it was not apparent that they were taken at the store where the incident occurred, and they did not show the location of the manager's office in relation to the substance, to establish the manager's knowledge).

### **Remand where Complete Diversity is Lacking**

#### **Second Circuit**

BGC Partners, Inc. v. Avison Young (Canada), Inc., 919 F.Supp.2d 310 (S.D.N.Y. 2013) (remanding to state court, holding in part that a Canadian brokerage and its affiliates failed to establish that recovery against a New York affiliate was precluded; therefore, complete diversity did not exist in a New York brokerage's action against the Canadian brokerage and its affiliates, alleging various claims).

#### **Third Circuit**

In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Products Liability Litigation, 905 F.Supp.2d 644 (E.D.Pa. 2012) (remanding to state court for lack of diversity

jurisdiction, holding that a diet drug distributor, a non-diverse defendant in plaintiff diet drug users' action against a distributor and diet drug manufacturer, alleging strict products liability, negligence, breach of warranty, deceit by concealment, and violations of consumer protection statutes, was not fraudulently joined to defeat removal, where the users pleaded colorable state law claims against the distributor; it did not matter that distributor contended that the claims were preempted by federal law).

### **Fifth Circuit**

*Coffman v. Dole Fresh Fruit Co.*, 927 F.Supp.2d 427 (E.D.Tex. 2013) (ordering remand to state court, holding in part that a Texas plaintiff's incorrect pleading of a Texas firm as a co-defendant in its negligence action was not "fraudulent joinder" where the plaintiff was merely mistaken as to which one of a defendant's subsidiaries was the proper co-defendant in this action, and did not attempt to conceal the citizenship of the Texas co-defendant; actual fraud in the allegation of jurisdictional facts of a kind that will defeat a plaintiff's motion to remand requires more than a mistake in the pleadings). Thus, the absence of consent to removal, from the non-diverse party, rendered the removal procedurally defective.

*Andrews v. AMERCO*, 920 F.Supp.2d 696 (E.D.La. 2013) (remanding to state court, holding – in a personal injury action against the lessor of trailers, its agents, and its subsidiaries -- that a non-diverse subsidiary had not been fraudulently or improperly joined where it was facially plausible that the defendant could have liability with respect to the leased trailer that had allegedly caused an accident that resulted in the plaintiff motorists' injuries; thus, the district court was precluded from exercising diversity jurisdiction over the removed action since complete diversity did not exist).

*J.O.B Investments, LLC v. Gootee Services, LLC*, 908 F.Supp.2d 771 (E.D.La. 2012) (remanding to state court, holding that the owner of apartment complex did not egregiously mis-join non-diverse contractors as defendants under Louisiana joinder law, and thus the federal district court lacked diversity jurisdiction over a removed action against the contractors that allegedly performed faulty work on the complex's air conditioning system and against property insurers that allegedly failed to timely pay insurance claims, in bad faith; the factual overlap in the claims rendered the joinder proper, where the owner alleged that damage to the air conditioning was caused by the contractors' negligence, and the insurers contended the damage was due to corrosion that was excluded from policy coverage).

*Fairley v. ESPN, Inc.*, 879 F.Supp.2d 552 (S.D.Miss. 2012) (remanding to state court, holding that defendants in a removed Mississippi defamation action failed to establish that the resident defendant, the source of some of the alleged defamatory statements, was improperly joined in this action by plaintiff, a citizen of Mississippi, where Mississippi law was uncertain as to whether, or under what specific circumstances, a source of an alleged defamation might be liable for rebroadcast of his statements, and thus as to whether such a rebroadcast commences the statute of limitations anew; as a result, the court would not conclude that plaintiff had no reasonable possibility of establishing that his claim against the resident defendant was timely-filed).

Conner v. Kraemer-Shows Oilfield Servs., LLC, 876 F.Supp.2d 750 (W.D.La. 2012) (remanding to state court, holding that a Louisiana employer was not improperly joined in a Louisiana employee's state court personal injury lawsuit where the employee sufficiently alleged an intentional tort claim against the employer under an exception to the Louisiana Workers' Compensation Act that prohibited an employee from suing his employer for tort damages and limited the employee to workers' compensation for work-related injuries unless the employee's injury resulted from his employer's intentional act; defendant did not carry its heavy burden of demonstrating improper joinder).

### **Sixth Circuit**

CPC Livestock, LLC v. Fifth Third Bank, Inc., 495 B.R. 332 (W.D. Ky. 2013) (rejecting federal question jurisdiction and diversity jurisdiction, upholding "related to" bankruptcy jurisdiction over a removed action, but nonetheless remanding to state court under both mandatory and permissive abstention doctrines). The court held that under Kentucky law, a two-year limitations period arguably applied to make timely a claim asserted against the principal of a livestock brokerage company which arguably sought damages for injury to personal property under a statute codifying negligence per se, and therefore the removing defendants failed to establish that the principal was fraudulently joined to defeat diversity jurisdiction).

Baker v. Residential Funding Co., LLC, 886 F.Supp.2d 591 (E.D.Mich. 2012) (remanding a removed case to state court, holding that borrowers stated a colorable cause of action against a non-diverse law firm that represented the assignee of their mortgage in foreclosure proceedings, and, thus, the non-diverse law firm was not fraudulently joined in borrowers' removed action seeking to prevent eviction following a foreclosure sale, reasoning that although the law firm's responsibility to conduct a reasonable investigation prior to bringing suit did not give rise to any duty of care owed to the borrowers – and, under Michigan law, an opposing party cannot pursue a claim against foreclosure counsel under a negligence theory based on an alleged injury suffered as a result of foreclosure proceedings --, the law firm allegedly violated the Michigan Collection Practices Act, which prohibited regulated persons from making misleading statements in communications to collect a debt).

### **Ninth Circuit**

Hernandez v. Ignite Restaurant Group, Inc., 917 F.Supp.2d 1086 (E.D. Cal. 2013) (remanding to state court, holding that defendant supervisor was not a sham defendant, fraudulently joined to defeat diversity jurisdiction in an employee's removed action against her employer and supervisor, where the employee asserted viable claims against the supervisor for defamation and invasion of privacy in violation of state law; as it was not clear that the manager's privilege under California law applied outside of claims for intentional interference with contract, and even if applicable, whether the privilege was absolute or conditional; thus, court lacked diversity jurisdiction).

IDS Property Cas. Ins. Co. v. Gambrell, 913 F.Supp.2d 748 (D.Ariz. 2012) (remanding to state court, holding that Arizona law was unclear with respect to whether an in-house claim

adjuster for an insurer could be held liable for breach of the duty of good faith and fair dealing, and thus the adjuster was not fraudulently joined by the plaintiff insured; the consequent lack of diversity jurisdiction warranted remand to state court).

Huber v. Tower Group, Inc., 881 F.Supp.2d 1195 (E.D.Cal. 2012) (remanding to state court, holding that joinder of a non-diverse insurance adjuster as a defendant in a lawsuit brought by insureds, under their homeowners' policy, against their insurer, was not fraudulent since insureds stated a viable negligence claim against the adjuster where they alleged not only that they should have received a higher monetary payout under their policy, following damage suffered during severe weather, but also that the adjuster's authorization and oversight of emergency repairs resulted in damage to the property; thus, complete diversity was lacking and remand was required). The court imposed on the removing party the burden to prove by clear and convincing evidence that joinder was fraudulent, and stated that, if there is a non-frivolous possibility that the plaintiffs can state a claim against the non-diverse defendant, the district court must remand.

### **Tenth Circuit**

Von Dowmun v. Synthes, 908 F.Supp.2d 1179 (N.D.Okla. 2012) (remanding to state court for lack of diversity jurisdiction, holding that although patient's strict liability claim against a non-diverse hospital, for the hospital's distribution of an allegedly defective medical device that was surgically implanted in plaintiff at the hospital, was not cognizable under Oklahoma law, where the hospital was primarily in the business of rendering health care services, and was not part of the device manufacturer's marketing chain, defendants failed to show that the hospital was fraudulently joined so as to allow removal of the action, where it was possible that the patient could allege facts sufficient to state a plausible negligence claim against the hospital).

### **Preference for Challenge of Alleged Mis-joinders in State Court**

In re Darvocet, Darvon and Propoxyphene Products Liability Litigation, 889 F.Supp.2d 931 (E.D.Ky. 2012) (remanding to state court, refusing to sever consumers' products liability claims against pharmaceutical companies from their product liability claims against a distributor, where severing and remanding half of the consumers' claims would not promote efficiency, and there was nothing improper in the joinder of parties).

### **Misjoinder of plaintiffs**

Fenner v. Wyeth, 912 F.Supp.2d 795 (E.D.Mo. 2012) (reconsidering orders, issued by the Judicial Panel on Multidistrict Litigation, denying remand to state courts of consumers' action against multiple hormone replacement therapy (HRT) drug manufacturers and retailers, and remanding to state court, holding that a previous order involuntarily dismissing non-diverse plaintiffs did not cure the lack of complete diversity at the time the case was filed, as an involuntary dismissal of a non-diverse party cannot render a previously unremovable case removable, and that the consumers' alleged misjoinder of claims against manufacturers of HRT

drugs was not so egregious as to constitute fraudulent misjoinder; thus remand to state court was warranted).

## **Compare**

Reeves v. Prizer, In., 880 F.Supp.2d 926 (S.D.Ill. 2012) (granting motion to remand removed suit to state court, holding in part that fraudulent misjoinder of plaintiffs was not a valid basis of federal diversity jurisdiction).

With respect to removals based on diversity jurisdiction, see generally:

Deskins, Sara, and Kathryn Isted, *A Waivable Defect? Current Application of the Forum Defendant Rule*, FOR THE DEFENSE, Nov. 2012, at 50.

Gray, John Merrill III, *Motions – Refining the Standard in Motions Alleging Fraudulent Joinder* (Walker v. Philip Morris USA, Inc., 443 F. App'x 946, 2011), 36 AM. J. TRIAL ADVOC. 225 (2012).

Miller, *Article III and Removal Jurisdiction: The Demise of the Complete Diversity Rule and a Proposed Return to Minimal Diversity*, 64 OKLA. L. REV. 269 (2012).

Student article (Pratt, Kevin L.), *Twombly, Iqbal, and the Rise of Fraudulent Joinder Litigation*, 6 CHARLESTON L. REV. 729 (2012).

Note (Lennon, Nathan A.), *Two Steps Forward, One Step Back: Congress has Codified the Tedford Exception, But Will Inconsistent Applications of "Bad Faith" Swallow the Rule?* (Tedford v. Warner-Lambert Co., 327 F.3d 423, 2003), 40 N. KY. L. REV. 233 (2013).

## **IV. Removal Based on the Class Action Fairness Act**

### **Burden of Proof**

Berniard v. Dow Chem. Co., 481 Fed.Appx. 859 (5th Cir. 2010) (affirming remand to state court, holding that chemical manufacturers' speculations were insufficient to plausibly establish the likely number of persons affected by manufacturers' sudden release of a potentially noxious chemical or the severity of harm to those affected, as required to satisfy consolidated class actions' amount-in-controversy requirements for jurisdiction under CAFA; the likelihood of class members' recovery equaling or exceeding \$5 million was not facially apparent from plaintiffs' pleadings, given the nature, timing, and geographical extent of the release, the number of affected people, and the nature of damage allegedly caused by an isolated, quickly controlled, and geographically limited release).

Bonnel v. Best Buy Stores, L.P., 881 F.Supp.2d 1164 (N.D. Cal. 2012) (remanding to state court an action purportedly removed pursuant to CAFA, reasoning in part that where plaintiff employee specifically alleged damages in an amount less than \$5,000,000, absent proof

of bad faith by plaintiff, the defendant employer had the burden to prove, by a legal certainty, that the actual amount of damages in controversy would exceed CAFA's \$5,000,000 threshold, in this putative class action alleging violations of California labor laws; holding that the employer failed to prove by a legal certainty that the actual amount in controversy exceeded \$5,000,000, where the district court was left to speculate as to whether class members qualified for penalty wages, and as to the amount of unpaid wages that the employer owed). The court stated that the legal certainty standard for removal under CAFA at the very least requires defendant to provide enough concrete evidence to estimate that the actual amount in controversy is over \$5,000,000. The District Court took judicial notice of documents from a previous class action against the employer, insofar as they related to the employer's contention of bad faith and to its estimate of the amount in controversy, where they came from sources whose accuracy could not reasonably be questioned, as they were filed in the Eastern District of California and were a matter of public record, but the documents did not show the amount in controversy to a legal certainty because the complaint in the previous action was based on a different and longer time period. Moreover, even if plaintiff employee here excluded certain allegations that had been included in the complaint in the previous class action in order to avoid federal jurisdiction, such a pleading was not itself bad faith, as would relieve the employer of the burden of proving, by a legal certainty, that CAFA's amount-in-controversy requirement was satisfied, where the complaint in the previous action also did not allege a particular amount of damages, and it asserted more claims than did this plaintiff employee and claims that related to a longer time period.

*Valdez v. Metropolitan Property & Cas. Ins. Co.*, 867 F.Supp.2d 1143 (D.N.M. 2012) (denying remand to state court, holding in part that, although insureds did not seek any monetary damages, there was a monetary benefit to them and a corresponding monetary detriment to automobile insurers from the equitable relief that insureds sought; defendants proved by a preponderance of the evidence that the amount-in-controversy requirement of CAFA was satisfied in a removed class action alleging that automobile insurers violated the New Mexico Unfair Trade Practices Act by failing to provide class members with adequate information about their legal options when buying uninsured motorist (UM) coverage; the injunction and declaratory judgment that insureds sought would retroactively reform the putative class' insurance policies to ensure that their UM coverage was equal to the limits of the policy and would extend their coverage, and insurers would be providing coverage without receiving the payment to which they ordinarily were entitled and would incur administrative costs of complying with the requested relief). The court adopted the "either viewpoint" rule in appraising the amount in controversy, consistently with circuit precedent and CAFA's legislative history. Defendant carried its burden and plaintiffs failed to demonstrate to a legal certainty that less than \$5 million was in controversy.

### **Local controversy exception**

*Richins v. Hofstra University*, 908 F.Supp.2d 358 (E.D.N.Y. 2012) (remanding to state court, noting that when jurisdiction is premised on CAFA, the party seeking remand bears the burden of proving that a CAFA exception applies, and holding that plaintiff law school alumni showed, by a preponderance of the evidence, that greater than two-thirds of the members of the proposed plaintiff class were citizens of New York, as required for mandatory remand under

CAFA, in an action alleging that the defendant law school published misleading and deceptive information regarding graduate employment rates and salaries; concluding that, although the address information submitted by the alumni, from the law school's own databases, probably did not reflect with perfect accuracy the current domicile and intent to remain in New York of every class member as of date the lawsuit was filed, the information was highly probative of class members' state citizenship).

*Bey v. Solarworld Industries Am., Inc.*, 904 F.Supp.2d 1103 (D.Or. 2012) (remanding to state court, holding that employee's putative class action against his employer and related entities, asserting claims under Oregon law to recover unpaid wages, overtime wages, and penalty wages was a purely local controversy, and district court therefore was required to decline jurisdiction pursuant to CAFA's local controversy and home-state controversy exceptions, where the alleged injury took place in Oregon at the worksite of the employer, an Oregon corporation, more than 90% of the plaintiff class was Oregon citizens, the complaint alleged violations of Oregon law only, and the employer raised issues on which the Oregon appellate courts had not yet spoken).

*Valdez v. Metropolitan Property & Cas. Ins. Co.*, 867 F.Supp.2d 1143 (D.N.M. 2012) (denying remand to state court, holding in part that, because New Mexico insureds failed to establish that a non-diverse insurance agent was a defendant from whom significant relief was sought and whose alleged conduct formed a significant basis for the claims asserted in insureds' removed class action alleging that automobile insurers violated the New Mexico Unfair Trade Practices Act by failing to provide class members with adequate information about their legal options, when buying uninsured motorist coverage, plaintiffs failed to carry their burden to establish that the local controversy exception to CAFA applied; the policies that the non-diverse agent sold were not its own, the agent had no policies that could be retroactively reformed and provided no coverage that could be increased, the agent appeared to be an "isolated role player" who acted for only one of the six insurer defendants and who had little control over the content of the policies actually sold, and thus was not a defendant whose conduct formed a significant basis for the conduct alleged in the complaint and from whom significant relief was sought).

## **Mass actions**

## **Compare**

*Abrahamsen v. ConocoPhillips Co.*, 503 Fed.Appx. 157 (3rd Cir. 2012) (directing remand to state court of removed actions brought against an oil company by Norwegian former employees and contractors, holding that the suits were not "mass actions" under CAFA and that the district court thus lacked jurisdiction under CAFA, where the suits sought recovery for injuries that employees and contractors sustained while working on rigs, platforms, and vessels in the North Sea, but each action included fewer than 100 plaintiffs). The court further held that, absent intervention by the Norwegian government, the actions did not implicate foreign relations, so as to give rise to federal question jurisdiction, notwithstanding Norway's sovereignty over petroleum-based activities in its territorial waters and on its continental shelf.

## **Parens Patriae Actions**

Hawai'i ex rel. Louie v. JP Morgan Chase & Co., 907 F.Supp.2d 1188 (D.Hawai'i 2012) (denying remand on other grounds, but holding that court did not have jurisdiction under CAFA of a removed action brought by the state attorney general against financial institutions, seeking penalties and injunctive relief based on violations of Hawai'i's unfair or deceptive acts or practices law, because the parens patriae suit was brought pursuant to the attorney general's civil enforcement authority to protect the state's consumers, asserted only state law claims, and expressly disclaimed any class action).

## **Appealability of Remands or Denials of Remand in Cases Purportedly Removed under CAFA**

### **Fifth Circuit**

Mississippi ex rel. Hood v. AU Optronics Corp., 701 F.3d 796 (5th Cir. 2012) (reviewing de novo a remand pursuant to CAFA, and reversing the grant of the Attorney General's motion to remand, holding in part that the case was a removable "mass action" within CAFA).

With respect to cases removed on the basis of CAFA, see generally:

Lemos, Margaret H., *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 HARV. L. REV. 486 (2012).

Schaerer, Enrique, *A Rose by any Other Name: Why a Parens Patriae Action Can Be a "Mass Action" under the Class Action Fairness Act*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 39 (2013).

Twenty-Fourth Annual Corporate Law Symposium, *The Principles of Aggregate Litigation: CAFA, PSLRA, and Beyond*, 80 U. CIN. L. REV. 239 (2011).

Comment (Killian, Ryan S.), *An Illusion of Sacrifice: The Incompatibility of Binding Stipulations in CAFA Cases*, 40 PEPP. L. REV. 111 (2012).

Comment (Tamm, Kevin), *The Class Action Fairness Act and Colorable Reasons for Separate Class Actions* (Freeman v. Blue Ridge Paper Prods., Inc., 551 F.3d 405, 2008), 81 U. CIN. L. REV. 313 (2012).

Note (Jaeger, Michael), *Should They Star or Should They Go: Can State Attorneys General Avoid Removal of Parens Patriae Suits to Federal Court under the Class Action Fairness Act?*, 46 LOY. L.A. L. REV. 327 (2012).

## **V. Amount in Controversy in Removed Actions**

### **Need for More than \$75,000 in Controversy in Diversity Cases**

## **Eleventh Circuit**

*De Varona v. Discount Auto Parts, LLC*, 860 F.Supp.2d 1344 (S.D. Fla. 2012) (denying remand to state court, holding in part that the defendant store established the requisite amount in controversy in patron's negligence action following slip and fall in store parking lot and satisfied the diversity requirement for removal to federal court, where the store asserted that the patron lost approximately \$67,800 in wages and had accumulated more than \$13,000 in medical expenses and the patron offered no evidence other than conclusory allegations in support of her assertions that store's numbers were incorrect).

## **Punitive damages**

### **Third Circuit**

*Hamm v. Allstate Property & Cas. Ins. Co.*, 908 F.Supp.2d 656 (W.D.Pa. 2012) (upholding removal of action by insured homeowners against the insurer on their homeowner's policy, alleging breach of contract and bad faith in connection with the denial of their insurance claim for damage to their home, because the district court could not say to a legal certainty that the insureds could not recover more than \$75,000 where, although the claimed damages for breach of contract were for repair costs of only \$22,080, plaintiffs could recover punitive damages on their bad faith claim under Pennsylvania's insurance statute, and an award of punitive damages just over two times the claimed compensatory damages would put the amount in controversy over the jurisdictional threshold).

### **Eighth Circuit**

*Hurst v. Nissan North America, Inc.*, 511 Fed.Appx. 584 (8th Cir. 2013) (remanding to state court, holding that defendant automobile manufacturer's removal of case, seven days after auto owner proposed punitive damages instruction in his state court class action alleging defective dashboards, was timely where the owner's state court petitions had sought only compensatory damages that did not exceed the jurisdictional threshold set by CAFA and plaintiff had made no motion to amend the petition to add punitive damages, but remanding because, under Missouri law, punitive damages not sought in a state court class action petition were not recoverable, despite the proposed jury instructions for punitive damages). The court noted, however, that if the state court permitted the jury to consider punitive damages, immediate removal would be timely and almost certainly proper.

### **Eleventh Circuit**

*Molex Co., LLC v. Andres*, 887 F.Supp.2d 1189 (N.D.Ala. 2012) (denying remand of a removed action alleging violation of the Alabama Trade Secrets Act and breach of fiduciary duty, concluding that the removing defendant established, by a preponderance of the evidence, that the requirements of diversity jurisdiction were satisfied where evidence of business lost by the plaintiff as a result of defendant's alleged misuse of trade secrets, along with evidence of profits and other benefits defendant may have received, as well as potential exemplary damages and

attorneys' fees allowed by the Act, supported defendant's contention that the amount in controversy exceeded \$75,000).

### **Attorneys' fees**

#### **Ninth Circuit**

Reames v. AB Car Rental Services, Inc., 899 F.Supp.2d 1012 (D.Or. 2012) (ordering remand to state court for lack of the requisite amount in controversy, holding that: attorneys' fees anticipated to be incurred after the date of removal, or, at the latest, after the date a party's motion for remand is decided, are not properly included in the calculation of the amount in controversy for purposes of diversity jurisdiction; the defendant former employers made no showing that the former employee's reasonably anticipated attorneys' fees following removal exceeded the amount required to push the amount in controversy over \$75,000 and thus, even if such unaccrued attorneys' fees could be counted, remand to Oregon state court was warranted; the amount of attorneys' fees already incurred by the former employee plaintiff did not clearly exceed the amount required to push the amount in controversy over \$75,000 in his suit against his former employers for employment discrimination in violation of state law, where the employers made no showing regarding the amount of attorneys' fees that the employee incurred prior to removal; and the possibility that plaintiff would amend his complaint to increase his damages prayer did not affect the analysis of whether the amount in controversy exceeded the jurisdictional threshold). Finally, plaintiff had no obligation to stipulate to a cap on his recovery, and his refusal to enter such a stipulation had no effect on the amount in controversy.

#### **Eleventh Circuit**

Molex Co., LLC v. Andres, 887 F.Supp.2d 1189 (N.D.Ala. 2012) (denying remand of a removed action alleging violation of the Alabama Trade Secrets Act and breach of fiduciary duty, concluding that the removing defendant established, by a preponderance of the evidence, that requirements of diversity jurisdiction were satisfied where evidence of business lost by the plaintiff as a result of defendant's alleged misuse of trade secrets, along with evidence of profits and other benefits defendant may have received, as well as potential exemplary damages and attorneys' fees allowed by the Act, supported defendant's contention that the amount in controversy exceeded \$75,000).

#### **Amount in Controversy when the Removal Notice is Filed**

Yasmin & Yaz (Drospirenone) Mktg, Sales Practices & Prod. Liab Litig., 870 F.Supp.2d 587 (S.D.Ill. 2012) (denying remand to state court, holding in part that consumer's claims made clear that she was seeking to recover in excess of the \$75,000 required for diversity jurisdiction in her removed products liability action against a pharmacy for injuries allegedly sustained from use of prescription drugs she purchased from the pharmacy, where she alleged that she suffered severe and permanent injuries, diminished enjoyment of life, that her injuries would require life-long medical treatment, and she was seeking punitive damages).

## **Based on the State Court Record**

*Ciecka v. Rosen*, 908 F.Supp.2d 545 (D.N.J. 2012) (denying remand to state court, holding that a state court suit between two personal injury law firms that had successively represented the same client in the same matter and who disputed the allocation of attorneys' fees following settlement of the client's claims was properly removed on the basis of diversity jurisdiction, even though plaintiff claimed that it would not accept any fee award exceeding \$75,000, since it was reasonably clear that, in the original complaint, plaintiff claimed damages that exceeded the jurisdictional minimum, where plaintiff sought one-third of the \$295,000 gross legal fees generated, as well as damages for alleged tortious interference with a contractual relationship; amendment of the complaint after removal will not destroy federal jurisdiction). Defendants showed by a preponderance of the evidence that the amount in controversy exceeded \$75,000 and plaintiffs failed to show to a legal certainty that they could not recover that much.

## **Complaint as Generally determinative**

*Benson v. Unilever U.S., Inc.*, 884 F.Supp.2d 708 (S.D.Ill. 2012) (remanding to state court on other grounds, noting that, in determining existence of diversity jurisdiction, the amount in controversy stated in plaintiff's complaint controls as long as it is made in good faith, and holding that damages sought by plaintiff in this removed products liability action against a peanut butter manufacturer, the manufacturer's parent, and the retailer to recover for injuries plaintiff allegedly sustained when he bit into a foreign object in the peanut butter, satisfied the amount in controversy requirement, even though it was unlikely that plaintiff would recover the \$200,000 he sought, where plaintiff's attorney filed an affidavit stating that the "amount claimed in the complaint is for a sum in excess of \$200,000.00 for personal and bodily injury and medical and dental expenses," and no legal bar made it impossible for plaintiff to recover that amount).

## **Cases Considering whether the Requisite Amount was in Controversy**

### **The Legal-Certainty Test**

*Marchese v. JPMorgan Chase Bank, N.A.*, 917 F.Supp.2d 452 (D. Md. 2013) (denying remand to state court, holding that district court had jurisdiction over removed action alleging that lender committed mortgage fraud, where complete diversity of citizenship existed, mortgagor's request for trebled damages on a \$50,000 claim proved to a legal certainty that the amount in controversy exceeded \$75,000, and the mortgagor's request for a declaration that the power-of-sale clause in a deed of trust was of no effect placed the value of the mortgage loan in controversy, further exceeding the jurisdictional minimum).

### **The Preponderance-of-the-Evidence Test**

### **Fourth Circuit**

*Bowers v. Bank of Am., N.A.*, 905 F.Supp.2d 697 (D. Md. 2012) (upholding removal, concluding that district court had diversity jurisdiction over removed action, brought by

mortgagor against mortgage servicer, which alleged state-law claims arising from servicer's failure to process mortgage-modification application, where mortgagor was a citizen of Maryland, servicer was a citizen of North Carolina, and although the dollar amount of damages specified by the mortgagor was \$51 less than the jurisdictional threshold, the value of the mortgaged property exceeded the necessary amount in controversy and the mortgagor also sought an unspecified amount of punitive damages; in these circumstances, defendant needed to prove only by a preponderance of the evidence that the amount in controversy exceeded the jurisdictional minimum, and it did so).

*Heller v. TriEnergy, Inc.*, 877 F.Supp.2d 414 (N.D.W.Va. 2012) (denying remand to state court and granting motion to compel arbitration, holding in part that the amount in controversy exceeded \$75,000, as required for diversity jurisdiction, in property owners' removed action against an energy company and assignees to the company's rights pursuant to an oil and gas lease agreement with owners, alleging breach of covenant, bad faith, fraudulent inducement, fraud, notary's breach of statutory duties, trespass, tort of outrage, and civil conspiracy, where the complaint alleged an inducement consisting of a representation from the company that royalty payments that owners would receive would compare to those received by a dairy farmer who was receiving \$50,000 in monthly royalties per well, the complaint contained an apparently good faith claim for punitive damages, and an affidavit attached to the complaint indicated that the owners' counsel made a settlement demand of over \$900,000).

*McCoy v. Norfolk Southern Ry. Co.*, 858 F.Supp.2d 639 (S.D.W.Va. 2012) (denying remand to state court, reasoning in part that a defendant who removes from state court a case in which the damages sought are unspecified, must prove by a preponderance of the evidence that the matter in controversy exceeds the jurisdictional amount for diversity jurisdiction, and here, affidavit of railroad engineer, averring as to costs involved in re-establishing railroad crossing, installing necessary safety apparatuses, and regularly maintaining crossing and apparatuses, established requisite amount in controversy in landowner's action against railroad, seeking declaratory and injunctive relief with respect to alleged easement-by-implication and easement-by-necessity).

## **Fifth Circuit**

*Needbasedapps, LLC v. Robbins*, 926 F.Supp.2d 919 (W.D. Tex. 2013) (denying remand to state court and granting transfer to a different federal district court, holding that the defendant customer of a software developer, who alleged breach of contract and tort in a declaratory judgment action, established by a preponderance of the evidence that the amount in controversy exceeded \$75,000 where the customer claimed to have incurred costs of \$192,000 as a result of the software developer's failure to deliver applications in a timely fashion, and the customer sought to recover \$20,000 that it loaned to the developer to develop those applications). The court also held that a claim under a California statute that authorized a party who had been recorded without his consent to sue for the greater of \$5,000 per violation or three times the amount of actual damages sustained by the plaintiff was too speculative to give rise to potential liability that exceeded \$75,000, although the claimant alleged that the parties had conversed at

least 15 times. The court declined to consider a declaration filed after removal, where the basis for jurisdiction was not ambiguous at the time of removal.

*Borill v. Centennial Wireless, Inc.*, 872 F.Supp.2d 522 (W.D.La. 2012) (denying remand, holding in part that a cell phone retailer that removed a state-court action in which no monetary amount of damages was asserted demonstrated by a preponderance of the evidence that the amount in controversy exceeded the federal jurisdictional minimum in a patron's action seeking damages for injuries allegedly sustained when patron tripped and fell while walking across the showroom floor to view a cell phone display, where the patron alleged that she sustained "severe" injuries to her face, head and spine, and sought recovery for a multitude of past, present, and future damages, patron refused to stipulate that the amount in controversy did not exceed the jurisdictional minimum, failed to allege that her damages were less than the amount required for federal diversity jurisdiction, and failed to argue, in support of her motion to remand, that the amount in controversy was less than the federal minimum).

### **Sixth Circuit**

*YA Landholdings, LLC v. Sunshine Energy, KY I, LLC*, 871 F.Supp.2d 650 (E.D.Ky. 2012) (remanding to state court, holding that sub-tenant failed to show that the amount in controversy exceeded \$75,000 as required for removal of forcible detainer actions brought in Kentucky courts by lessors of commercial gas stations, alleging that the sub-tenant was in default of the leases, where the lessor sought only possession of the property and not monetary damages, there was no basis for evaluating the amount in controversy as the rent due for some arbitrary time period less than the term of the lease, or as back rent, and the sub-tenant failed to submit any evidence regarding its costs in leaving the premises or the change in the lessor's economic position if it obtained possession of the premises).

### **Tenth Circuit**

*Aranda v. Foamex Intern.*, 884 F.Supp.2d 1186 (D.N.M. 2012) (remanding to state court on other grounds, holding that in a removed action against a mattress manufacturer, brought by a temporary employee who was injured when he slipped on hydraulic fluid that had leaked from an improperly repaired forklift, the manufacturer demonstrated by a preponderance of the evidence that the amount in controversy likely exceeded \$75,000, where the employee alleged that he required medical treatment for both knees and surgery on his right knee, sought actual damages for loss of earnings, future loss of earning capacity, past and future medical expenses, and punitive damages). The court looked to post-removal evidence to assist it in ascertaining the amount in controversy when the case was removed.

### **Eleventh Circuit**

*Molex Co., LLC v. Andres*, 887 F.Supp.2d 1189 (N.D.Ala. 2012) (denying remand of a removed action alleging violation of the Alabama Trade Secrets Act and breach of fiduciary duty, concluding that the removing defendant established, by a preponderance of the evidence, that the requirements of diversity jurisdiction were satisfied where evidence of business lost by the plaintiff as a result of defendant's alleged misuse of trade secrets, along with evidence of profits

and other benefits defendant may have received, as well as potential exemplary damages and attorneys' fees allowed by the Act, supported defendant's contention that the amount in controversy exceeded \$75,000). By contrast, the court also concluded that the removing defendant's allegations that he received in excess of \$100,000 while working as a consultant for plaintiff failed to support his contention that the amount in controversy exceeded \$75,000, since those allegations did not relate to the amount of plaintiff's damages. Similarly, the removing defendant's conclusory allegations that plaintiff's product development costs exceeded \$75,000, and that the value of plaintiff's claim was the same as the value of the products themselves, failed to support defendant's amount in controversy contentions, as those amounts failed to take into account the commercial context in which defendant's alleged misappropriation had occurred. Finally, plaintiff's refusal to stipulate to the amount in controversy did not constitute proof that the amount was below the threshold required for diversity jurisdiction.

*Griffith v. Wal-Mart Stores East, L.P.*, 884 F.Supp.2d 1218 (N.D.Ala. 2012) (remanding to state court, holding that where plaintiff made an unspecified demand for damages, removing defendant had to prove by a preponderance of the evidence that the amount in controversy more likely than not exceeded the requisite jurisdictional amount, but failed to do so; the plaintiff customer's denial of defendant discount department store's requests for an admission regarding the amount in controversy did not constitute a statement of fact that could support diversity jurisdiction over the customer's negligence action against the store, and the customer's denial did not establish that an amount in excess of \$75,000 was in dispute).

### **The Inverted Legal-Certainty Test**

*Qader v. Citibank*, 927 F.Supp.2d 86 (S.D.N.Y. 2013) (ordering remand to state court, holding that a consumer's allegations of damages in the amount of \$600,000 were insufficient to show that consumer could recover damages in excess of \$75,000, as required to establish diversity jurisdiction in a removed case against a bank, alleging fraud, consumer abuse, deceptive practices, and other torts, where the consumer did not set forth any plausible facts showing that the bank caused her damages in any amount). The court said that jurisdiction is lacking if it is apparent, to a legal certainty, from the face of the pleadings, that the plaintiff cannot recover the amount claimed.

### **No Standard Articulated**

*Northwest Public Communications Council ex rel. Oregon v. Qwest Corp.*, 877 F.Supp.2d 1004 (D.Or. 2012) (denying remand to state court, holding in part that a removed action for judicial enforcement of a state public utility commission (PUC)'s orders, invoking the district court's statutory authority under state law to penalize non-compliance, was a civil action, rather than an action in the nature of a criminal proceeding, for purposes of diversity jurisdiction, and further that the amount-in-controversy requirement for diversity jurisdiction was satisfied where there were millions of dollars of refunds at stake and up to \$50,000 in civil penalties for each of at least four of the alleged violations of PUC orders; hence suit was removable).

### **Aggregation of Claims, Supplemental Jurisdiction, and Non-Monetary Relief**

## **When Multiple Plaintiffs Sue**

*Andrews v. Medical Excess, LLC*, 863 F.Supp.2d 1137 (M.D.Ala. 2012) (remanding to state court, holding that amount-in-controversy requirement was not satisfied in suit by employees against a health insurer, arising from a theft of data containing the employees' personal information, and claiming breach of fiduciary duty, negligence and wantonness, negligent training, monitoring, and supervision, because the amounts in controversy on the various plaintiffs' claims could not be aggregated, as necessary to avoid remand to state court, as employees' claims were separate and distinct, and employees' each sought, and stipulated to seeking, \$74,999, though each asserted multiple theories in support of that award, and defendant could not prove to a legal certainty that the claims exceeded \$75,000).

## **Valuing the Relief Sought**

*Francis v. Allstate In. Co.*, 869 F.Supp.2d 663 (D.Md. 2012) (denying remand to state court, reasoning in part that, in insured's removed action against insurer, claiming that the latter had a duty to defend a tort action, the amount-in-controversy requirement in declaratory relief action was met if either the direct pecuniary value of the right the plaintiff sought to enforce, or the cost to the defendant of complying with any prospective equitable relief, exceeded the jurisdictional minimum, and that the court should consider all the evidence in the record and specify exactly what relief the plaintiff sought; holding that, even if defendant insurer no longer faced potential indemnity liability because the plaintiff insureds had been granted summary judgment in the underlying litigation, despite the opposing party in that litigation still having an opportunity to appeal, the amount-in-controversy requirement was met at the time of removal because the amount included the attorneys' fees of the plaintiff insureds in the instant suit, brought under the Maryland Uniform Declaratory Judgments Act, which allowed such an award, and those fees exceeded \$75,000).

## **Using the Viewpoint of Either Party**

*B & S Holdings, LLC v. BNSF Ry. Co.*, 889 F.Supp.2d 1252 (E.D.Wash. 2012) (denying remand to state court of quiet title action, looking to facts presented in the removal notice and summary judgment-type evidence relevant to the amount in controversy at the time of removal, and holding that the amount in controversy exceeded \$75,000, at least from B & S's perspective, in a former landowner's adverse possession action against a railroad, where a contract for the former landowner's sale of its property had a holdback provision of \$100,000 so as to provide an incentive for the former landowner to quiet title for the benefit of its successor in interest). Looking to the diminution in value that would result from the taking, the court concluded that the value to BNSF could be even greater.

## **Magnuson-Moss Warranty Act**

*Janis v. Workhorse Custom Chassis, LLC*, 891 F.Supp.2d 970 (N.D.Ill. 2012) (remanding to state court, holding that the alleged seller of a recreational vehicle (RV) who removed a purchaser's action under the Magnuson-Moss Warranty--Federal Trade Commission Improvement Act failed to meet its burden of showing that the requisite amount was in

controversy in light of the \$49,999 limitation the plaintiff imposed on her claim; although the purchaser's proposed jury instructions added, as an alternate way to calculate damages, a revocation-of-acceptance theory under which the damages could have been more than the \$50,000 jurisdictional minimum -- absent a limitation on damages--, it was not clear from the record that, by seeking damages under the alternate theory of recovery, the purchaser abandoned her long-standing limitation on damages).

## **VI. Removal of Cases Against Federal Officers**

### **Who are Federal Officers**

*Banks v. Harrison*, 864 F.Supp.2d 142 (D.D.C. 2012) (granting motion to dismiss action brought against and removed by federal officer who was sued by employee whom defendant supervised; claim was not cognizable under the Federal Tort Claims Act).

### **Exception to the Well-pleaded Complaint Rule**

*Ruppel v. CBS Corp.*, 701 F.3d 1176 (7th Cir. 2012) (reversing remand to state court, noting that a colorable federal defense is what causes cases that are removable under § 1442 to fall within Article III jurisdiction, § 1442 being an exception to the well-pleaded complaint rule).

### **Broad Construction**

*Leite v. Crane Co.*, 868 F.Supp.2d 1020 (D.Hawai'i 2012) (denying remand to state court, holding that manufacturers and sellers of asbestos who had contracted with the Navy to provide the product for use at a shipyard set forth a colorable federal defense, as required for removal under the federal officer removal statute of a Navy machinist's state law failure-to-warn claim, noting that the federal officer removal statute is liberally construed to give full effect to the purposes for which it was enacted).

### **Need for Acting Under Color of Office/ the Direction of a Federal Officer**

#### **Fifth Circuit**

*Najolia v. Northrop Grumman Ship Systems, Inc.*, 883 F.Supp.2d 646 (E.D.La. 2012) (denying remand to state court of a Navy veteran's action against manufacturers, alleging design-defect and failure-to-warn claims arising out of his alleged contraction of malignant pleural mesothelioma from asbestos aboard a vessel, holding that manufacturers of marine turbines used in Navy destroyer vessel acted under the direction of a federal officer in designing and manufacturing the marine turbines, where the Navy had been intimately involved with the turbines' design and manufacture, the Navy had imposed a specific obligation on the manufacturer to use asbestos in manufacturing the turbines and, without the Navy's approval, the manufacturers could not affix asbestos warnings to equipment they manufactured for use aboard naval vessels).

#### **Seventh Circuit**

Ruppel v. CBS Corp., 701 F.3d 1176 (7th Cir. 2012) (reversing remand to state court, holding in part that the defendant government contractor's relationship with plaintiff, who allegedly developed mesothelioma due to his exposure to asbestos in products provided by the government contractor to the United States Navy, derived solely from the contractor's official duties in installing asbestos for the Navy, and therefore the gravamen of plaintiff's complaint occurred while the contractor acted under color of federal authority, as required for the contractor to remove the case pursuant to the federal officer removal statute). Similarly, the injury sustained by plaintiff occurred while the contractor "acted under" a federal officer where the contractor worked hand-in-hand with the federal government, assisting it in building warships.

### **Ninth Circuit**

Cabalce v. VSE Corp., 922 F.Supp.2d 1113 (D. Hawai'i 2013) (remanding to state court, holding that state law claims against a government contractor for negligence, wrongful death, ultrahazardous activity, and premises liability arising from the deaths of workers killed in a fire and explosion while handling government-seized fireworks in or near a storage facility were not removable under the federal officer removal statute where there was no "causal nexus" between plaintiff's claims and actions taken by the contractor pursuant to a federal officer's directions as the contractor was an independent contractor, operating without day-to-day control or supervision by the government of the means and methods of destruction of the fireworks, and thus the contractor was not "acting under" a government officer or agency in its behavior that gave rise to the suit).

### **Extensive Control by Federal Officer**

Najolia v. Northrop Grumman Ship Systems, Inc., 883 F.Supp.2d 646 (E.D.La. 2012) (denying remand to state court of Navy veteran's action against manufacturers, alleging design-defect and failure-to-warn claims arising out of his alleged contraction of malignant pleural mesothelioma from asbestos aboard a vessel, holding that a "causal nexus" existed between the Navy veteran's claims and the acts that the manufacturer performed under color of federal office, and thus removal was warranted under federal officer removal statute, as the design-defect claim arose directly out of the Navy's alleged instructions to manufacturers to use asbestos in marine turbines, and the failure-to-warn claim arose directly out of the Navy's alleged involvement in determining what warnings could be placed on products manufactured for use aboard the vessel).

### **Need for a Colorable Federal Defense**

Najolia v. Northrop Grumman Ship Systems, Inc., 883 F.Supp.2d 646 (E.D.La. 2012) (denying remand to state court of Navy veteran's action against manufacturers, alleging design-defect and failure-to-warn claims arising out of his alleged contraction of malignant pleural mesothelioma from asbestos aboard vessel, holding that manufacturers of marine turbines used in Navy destroyer vessel demonstrated a "colorable federal defense" based on the government contractor immunity, where the Navy had approved reasonably precise specifications that required manufacturers to comply with military specifications as to the composition of turbines for use on vessels, the Navy had exercised discretion in failing to require asbestos-related

warnings on the turbines, and the government had more knowledge than the manufacturers concerning asbestos hazards, at the time the turbines were designed and manufactured).

*Leite v. Crane Co.*, 868 F.Supp.2d 1020 (D.Hawai'i 2012) (denying remand to state court, holding that manufacturers and sellers of asbestos who had contracted with the Navy to provide the product for use at a shipyard set forth a colorable federal defense, as required for removal under the federal officer removal statute, to a Navy machinist's state law failure-to-warn claim, where defendants asserted that they were acting in compliance with precise specifications imposed by the government which had determined which warnings to provide, when the Navy was aware of the health hazards caused by asbestos exposure; the government's exercise of discretion superceded defendants' duty to warn under Hawai'i law).

### **Corporations as "persons"**

*Najolia v. Northrop Grumman Ship Systems, Inc.*, 883 F.Supp.2d 646 (E.D.La. 2012) (denying remand to state court of Navy veteran's action against manufacturers, alleging design-defect and failure-to-warn claims arising out of his alleged contraction of malignant pleural mesothelioma from asbestos aboard vessel, holding that manufacturers of marine turbines used in Navy destroyer vessel were "persons" within the meaning of the federal officer removal statute).

### **Westfall Act certification**

*Jackson v. United States*, 857 F.Supp.2d 158 (D.D.C. 2012) (dismissing removed case on grounds that claims were barred and plaintiff failed to exhaust administrative remedies, but concluding that the Westfall Act certification was conclusive for purposes of removal, though plaintiff could contest the Attorney General's scope-of-employment certification for other purposes; allegations that co-workers' conduct was unethical, unprofessional and unjustified did not undermine the scope-of-employment finding).

## **VII. Proceedings under other Statutes Providing For or Prohibiting Removal**

### **Bankruptcy cases**

#### **First Circuit**

*In re International Home Products Inc.*, 491 B.R. 607 (Bkrcty.D.Puerto Rico 2013) (remanding to state court an action for breach of contract and foreclosure of personal guarantees of a bankrupt debtor's obligations, where the court held that the claims did not arise under the bankruptcy laws and were not related to a Title 11 case because the guarantors had waived their rights to claim against the bankrupt debtors or compete in any bankruptcy, so that resolution of the claims would not affect the administration of the bankruptcy estate).

*Haber v. Massey*, 904 F.Supp.2d 136 (D.Mass. 2012) (remanding to state court a personal injury action against a truck driver and his employer, removed to federal court on the ground of relation to a bankruptcy case after defendant driver filed a petition for bankruptcy, holding it conceivable that the action could have an effect on the bankruptcy proceedings where, even if the

bankruptcy estate successfully established coverage under the driver's or employer's insurance, the estate would be diminished by legal fees expended in the litigation, and the if the employer's insurance policy was unavailable or inadequate, plaintiff would seek recovery from any personal insurance coverage on the drivers's household vehicle).

## **Second Circuit**

*Fried v. Lehman Bros. Real Estate Associates III, L.P.*, 496 B.R. 706 (S.D.N.Y. 2013) (denying motion to dismiss removed action by investors who alleged federal and state law claims that arose out of failed investments in a real estate investment vehicle, holding that plaintiff's post-removal amendment of her complaint to eliminate all federal claims did not require dismissal because the court retained jurisdiction over the matter as "related to" a bankruptcy proceeding; that jurisdiction was based on the facts at the time of removal).

*Lothian Cassidy, LLC v. Lothian Exploration & Development II, L.P.*, 487 B.R. 158 (S.D.N.Y. 2013) (denying remand to state court, holding that federal "arising in" jurisdiction existed over a creditors' removed action against non-debtors, asserting state law claims arising out of an alleged fraudulent conveyance of a debtors' assets, where resolution of the dispute would depend, at least in part, on rights created by the bankruptcy court's order approving sale of the debtor's asset to a non-debtor, the bankruptcy court already had issued a number of rulings covering much of the subject matter at issue, and certain of the creditors' claims required the debtors to be named as defendants). The court also rejected the argument that removal was improper because it was not unanimous, noting that unanimity is not required for removal under 28 U.S.C. § 1452(a).

## **Fourth Circuit**

*Loudin v. J.P. Morgan Trust Co., N.A.*, 481 B.R. 388 (S.D.W.Va. 2012) (remanding to state court, holding that mobile home purchasers' action against a vendor, assignee of loans originated by the vendor, loan servicer, and loan closer, asserting state-law claims concerning the purchase and the loan, was related to purchasers' reopened Chapter 7 bankruptcy cases, providing basis for removal, where the outcome would affect the purchasers' rights and liabilities as debtors because the action was now included in amended bankruptcy schedules as an asset, and a larger recovery from defendants would increase the size of the purchasers' bankruptcy estates; also holding that mobile home purchasers' claims for unconscionable inducement, unauthorized practice of law, and fraud, asserted after reopening of the purchasers' bankruptcy cases, did not arise under the Bankruptcy Code or arise in a case under the Bankruptcy Code, as would except the action from mandatory abstention after removal, where the claims, to the extent they were cognizable, were created by state law; even if mandatory abstention was not required, district court would exercise its discretion to abstain as claims depended only on state law and presented no bankruptcy issues, there was no non-bankruptcy basis for jurisdiction in district court, and the purchasers requested jury trial).

## **Fifth Circuit**

Garner v. BankPlus, 484 B.R. 134 (S.D.Miss. 2012) (granting motion and cross-motion to compel arbitration and dismissing complaint in a proceeding before the district court based on bankruptcy jurisdiction, having held that whether the court had jurisdiction to grant the borrowers' cross-motion to compel arbitration of foreclosure claims asserted by a lender had to be made based on the face of the borrowers' complaint, and did not depend on whether the court would have jurisdiction over the lender's underlying causes of action, which had been remanded to state court).

### **Sixth Circuit**

CPC Livestock, LLC v. Fifth Third Bank, Inc., 495 B.R. 332 (W.D. Ky. 2013) (rejecting federal question jurisdiction and diversity jurisdiction, but upholding "related to" bankruptcy jurisdiction over a removed action, considering plaintiffs' first amended complaint, which was operative at the time of removal, even though the removing defendant filed an amended removal notice after plaintiff filed a second amended complaint; nonetheless remanding to state court under both mandatory and permissive abstention doctrines). The action – by cattle producers, auction markets, and cattle dealers against a stockyard and secured lender and principals for the debtor-livestock brokerage company, -- alleging a variety of torts, was related to the debtor's bankruptcy case, and thus fell within bankruptcy jurisdiction where many plaintiffs had filed proofs of claim against the bankruptcy estate and those claims would be reduced or extinguished to the extent that plaintiffs prevailed in the removed action, and plaintiffs' recovery against the lender would affect the estate's liabilities by increasing the lender's claims for indemnification and contribution. The action, however, was not a "core proceeding." Mandatory abstention and remand to state court was warranted where plaintiffs' claims were based on state law, the action was commenced in a proper state court that could timely adjudicate it. Permissive abstention also was warranted as state-law issues substantially predominated, the case had no bankruptcy issues and presented unsettled questions of state law, and abstention would not affect efficient estate administration, among other factors.

Regions Bank v. JP Realty Partners, Ltd., 912 F.Supp.2d 604 (M.D.Tenn. 2012) (remanding to state court a suit that was removed after a corporate subsidiary filed for bankruptcy, holding that the debtor subsidiary was not a party to a sub-lessor's action against the sub's parent company, seeking to collect for the debtor's default on rent, so as to create subject-matter jurisdiction over the sub-lessor's claims under bankruptcy law, as plaintiff sought no relief from the debtor, the sub-lessor had litigated to judgment a separate lawsuit in which the debtor was a defendant, and before removal the debtor did not respond to the complaints and the parent company specifically represented to the state trial court that the debtor was not a party to the case for discovery purposes).

CH Holding Co. v. Miller Parking Co., 903 F.Supp.2d 551 (E.D.Mich. 2012) (upholding removal, reasoning that judgment creditors' claims against a transferee of assets from the Chapter 7 debtor and the transferee's shareholders related to the debtor's bankruptcy even though the judgment creditors did not name the debtor or its principal as defendants, where the judgment creditors sought to recover the same assets that the trustee sought in the bankruptcy action, and allowing the judgment creditors' claim to continue would disrupt bankruptcy processes).

In re Lunan, 489 B.R. 711 (Bkrcty.E.D.Tenn. 2012) (Where Chapter 7 debtor’s husband commenced a state court action against the trustee and auctioneer, alleging error in liquidating assets that the husband alleged belonged to the husband and children of the debtor, suit was removed to the Bankruptcy Court, and husband moved to remand, court denied remand, holding that the 30–day clock on the Chapter 7 trustee’s removal of a lawsuit did not begin to run until the trustee was formally served with summons and complaint, even if the trustee knew of the suit before he was served; removal therefore was timely; the bankruptcy court had at least “related to” jurisdiction over the removed proceeding as the suit, which sought disgorgement of sales proceeds, plainly was a proceeding that could have an impact on the bankruptcy estate; as a proceeding based on actions taken by the trustee and auctioneer in their official capacities, and which would not have arisen outside bankruptcy, the court had “core” jurisdiction over it; the state court lawsuit violated the Barton doctrine – pursuant to which leave of bankruptcy court must be obtained by any party wishing to institute a cause of action in a state forum against a bankruptcy trustee or his delegees such as court-appointed auctioneers, for acts done in their official capacities and within their authority as officers of the court – notwithstanding the husband’s allegation that the sales orders were obtained by fraud and that the trustee, in carrying out the sales orders, was acting ultra vires; but removal of the suit to the appointing bankruptcy court cured the Barton doctrine violation). Further, it was not appropriate for the bankruptcy court to permissively abstain from hearing the removed state court action, where the state court suit was commenced in violation of the Barton doctrine, so that the state court from which suit was removed did not have jurisdiction over it.

### **Seventh Circuit**

In re Advance Iron Works, Inc., 495 B.R. 404 (S.D. Ill. 2013) (remanding to state court, holding that Chapter 11 debtor that was not a party to a state-court action brought by a customer against the debtor’s vice president and shareholder lacked standing to avail itself of removal procedures under the bankruptcy removal statute to remove the state-court action to bankruptcy court, and consent by the Chapter 11 debtor’s vice president and shareholder to the attempted removal did not cure the problem). The bankruptcy court further held that it was not the proper court to decide whether the state-court action was barred by the automatic stay protecting the debtor, given that remand to state court was required.

Ocwen Loan Servicing, LLC v. AIG Fed. Savings Bank (In re Laddusire), 494 B.R. 383 (Bankr. W.D. Wis. 2013) (remanding to state court a removed foreclosure action that the debtor removed after she filed for bankruptcy, holding in part that the action was a non-core proceeding that was within the bankruptcy court’s “related to” jurisdiction, but that permissive abstention and remand were warranted because remand of the action would have little effect on efficient administration of the bankruptcy estate, whereas the bankruptcy court’s retention of the foreclosure action could delay the bankruptcy proceedings, the bankruptcy court lacked authority to enter a final judgment in the foreclosure case absent the parties’ consent because the foreclosure action was a non-core proceeding, the action was purely a matter of state law, and removal appeared to have been motivated at least in part by a desire to draw-out the foreclosure proceedings).

In re Laddusire v. Auto-Owners Ins. Co., 494 B.R. 373 (Bankr. W.D. Wis. 2013) (remanding to state court a removed action brought by residence owner against her insurer, asserting claims under a homeowners' policy, which action residence owner had removed after she filed for bankruptcy, holding in part that the action was a non-core proceeding that was within the bankruptcy court's "related to" jurisdiction, but that remand was warranted because there appeared to be procedural defects in the removal, the basis for removal was merely the debtor's bankruptcy filing, and the bankruptcy court had determined that permissive abstention was appropriate for a variety of reasons, elaborated in the opinion).

Reeves v. Prizer, In., 880 F.Supp.2d 926 (S.D.Ill. 2012) (granting motion to remand removed suit to state court, holding in part that mandatory abstention of plaintiff's products liability claim against a pharmaceutical manufacturer, pending resolution of plaintiff's bankruptcy case, was warranted where the action could not have been commenced in federal court but for the bankruptcy, the proceeding asserted a state law claim, and the state court could timely adjudicate the action).

### **Compare**

BGC Partners, Inc. v. Avison Young (Canada), Inc., 919 F.Supp.2d 310 (S.D.N.Y. 2013) (remanding to state court, holding in part that a New York brokerage's lawsuit against a Canadian brokerage and its affiliates, asserting various state law claims including tortious interference with contractual relationships and poaching of brokers and business opportunities from a bankrupt brokerage that was purchased by the New York brokerage, did not fall within the federal court's jurisdiction by virtue of the Canadian brokerage's ability to assert a defense that plaintiff's claims were preempted by bankruptcy proceedings nor on the basis that plaintiff's claims related to bankruptcy proceedings; further holding that, if the suit did fall within "related to" bankruptcy jurisdiction, the district court was required to abstain for a combination of reasons).

### **Cases within Admiralty Jurisdiction**

Zerega Ave. Realty Corp. v. Hornbeck Offshore Transp., LLC, 882 F.Supp.2d 496 (S.D.N.Y. 2012) (deciding case on merits after removal of action over which the court found it had admiralty jurisdiction).

### **Cases under Workers' Compensation Laws**

Petri v. Kestrel Oil & Gas Properties, L.P., 878 F.Supp.2d 744 (S.D.Tex. 2012) (disposing of claims on the merits after holding that claims arising under the Texas Workers' Compensation Act may not be removed to federal court, regardless of whether jurisdiction is based on diversity or federal question, and that the Texas Workers' Compensation Act provided the exclusive remedy for claims asserted against an oil rig platform worker's employer, by plaintiff, as administrator of the worker's estate and as guardian of the decedent's sole heir, insofar as those claims were brought under theories of negligence, strict and/or joint and several liability, or inherently hazardous or dangerous activity, and arose from an incident in which the worker was swept off the platform by heavy seas, and killed).

## **Cases Alleging Retaliatory Discharge for Seeking Workers' Compensation**

Shaw v. Ring Power Corp., 917 F.Supp.2d 1221 (N.D.Fla. 2013) (subject to the court's receipt of a memorandum opposing the court's planned action, indicating that the court would sever and remand a non-removable state law workers' compensation retaliation claim that was removed along with a claim that plaintiff was fired in violation of the federal Family and Medical Leave Act, holding that 28 U.S.C.A. § 1445(c) barred the removal of the retaliation claim under circuit precedent, that the objection to the removal was non-waivable under non-precedential circuit case law, and that new § 1441(c) made severance and partial remand the proper response).

Carey v. Bank of America, N.A., 904 F.Supp.2d 617 (N.D.Tex. 2012) (remanding to state court an action alleging age and disability discrimination, harassment, and workers' compensation retaliation in violation of Texas law, holding that the suit was non-removable based on diversity of citizenship, as the general removal statute authorized removal of cases as a whole when they are civil actions within the original jurisdiction of the federal courts but the worker's compensation retaliation claim was non-removable under 28 U.S.C.A. § 1445(c) and was not severable from the other claims; when a claim is not removable, the entire civil action must be remanded).

Belyea v. Florida, Dept. of Revenue, 859 F.Supp.2d 1272 (N.D.Fla. 2012) (ordering that a party who objected to remand of the workers' compensation retaliation claim and retention of the remainder of the case – a federal ADA claim – had to file a memorandum on jurisdiction, and that, if no party filed such a memorandum, the workers' compensation retaliation claim would be remanded and the remainder of the case retained by the federal court, because removal of the workers' compensation retaliation claim was procedurally defective, the objection to its removal was waivable in most of the country but the law in the Eleventh Circuit might be to the contrary, and under the revised – but not yet effective § 1441(c) – the court would sever and remand the non-removable claim).

### **Section 1445(c)'s Trumping Effect \_\_**

#### **But see**

Brown v. K-MAC Enterprises, 897 F.Supp.2d 1098 (N.D.Okla. 2012) (post-removal, severing and remanding to state court plaintiff employee's workers' compensation claim and refusing to reconsider the state court's order granting the employee's motion to vacate the order dismissing her action). The court reasoned that preserving the employer's right to remove claims arising under federal law outweighed competing considerations, and thus severed and remanded to state court the employee's state law claim alleging retaliation for filing a workers' compensation claim, but the federal court retained the employee's federal discrimination claims, which were within the court's jurisdiction and her state law claims for termination in violation of public policy and intentional infliction of emotional distress, which were within the court's supplemental jurisdiction.

## **Cases Arising under the Securities Act**

*Niitsoo v. Alpha Natural Resources, Inc.*, 902 F.Supp.2d 797 (S.D.W.Va. 2012) (remanding to state court, holding that Securities Litigation Uniform Standards Act (SLUSA) prohibited the removal of securities the class actions alleging violations of federal law – here the Securities Act, 15 U.S.C.A. § 77a et seq.).

## **VIII. Removal in Cases Involving Foreign States and State-Owned Entities**

### **Entities Covered by the Act**

*Skanga Energy & Marine Ltd. v. Arevenca S.A.*, 875 F.Supp.2d 264 (S.D.N.Y. 2012) (upholding FSIA jurisdiction after removal of action by Nigerian importer of petroleum products, against Venezuelan government-owned seller and its alleged agent, seeking an \$11 million refund for product never delivered, and denying forum non conveniens dismissal; finding that the case fell under the FSIA’s commercial activity exception).

## **IX. Who May Remove a Case**

### **Plaintiffs Cannot Remove**

*Cohn v. Charles*, 857 F.Supp.2d 544 (D.Md. 2012) (remanding to state court, holding in part that mortgagor’s counterclaim against the substitute trustees in a state court foreclosure action and the third-party complaint against the mortgagee did not create a removable civil action, to which the trustees or mortgagee were “defendants,” within the meaning of the removal statute, even though the mortgagor claimed that the trustees and mortgagee violated federal TILA and RESPA, since the counterclaim and third-party complaint were filed within the trustees’ state court foreclosure action on behalf of the mortgagee that was commenced by a well-pleaded complaint that did not raise issues of federal law).

### **Third-party Defendants Generally Cannot Remove**

*Cohn v. Charles*, 857 F.Supp.2d 544 (D.Md. 2012) (remanding to state court, holding in part that mortgagor’s counterclaim against substitute trustees in state court foreclosure action and third-party complaint against mortgagee did not create a removable civil action, to which trustees or mortgagee were “defendants,” within meaning of removal statute, even though mortgagor claimed that trustees and mortgagee violated federal TILA and RESPA, since counterclaim and third-party complaint were filed within trustees’ state court foreclosure action on behalf of mortgagee that was commenced by well-pleaded complaint that did not raise issue of federal law).

## **The Need for All Properly Joined and Served Defendants to Consent to Removal**

### **Third Circuit**

*Cacoilo v. Sherwin-Williams Co.*, 902 F.Supp.2d 511 (D.N.J. 2012) (remanding to state court, holding that notice of removal filed by benzene product manufacturers and producers in a wrongful death action by parents of a Marine who allegedly died due to exposure to benzene

products was procedurally defective where several other defendants who had been properly served at the time of removal failed to join in, or consent to, the removal; further holding that a notice of consent to removal filed outside the thirty-day period for removal did nothing to cure the defect in removal procedure). Finally, it was not in the interests of justice and judicial economy to allow the benzene product manufacturers and producers an opportunity to cure the defect in removal procedure, if they could, where the federal court had issued no substantive orders, and held no scheduling conference.

### **Fifth Circuit**

*Coffman v. Dole Fresh Fruit Co.*, 927 F.Supp.2d 427 (E.D.Tex. 2013) (ordering remand to state court, holding in part that a co-defendant's filing of an answer to plaintiff's negligence complaint and opposing plaintiff's motion to remand to state court were insufficient to establish that the co-defendant consented to removal of the action). Opposition to the remand, which was filed outside the 30-day period for removal, was untimely, in any event.

*Tilley v. Tisdale*, 914 F.Supp.2d 846 (E.D. Tex. 2012) (remanding to state court, holding that removal was defective under the rule requiring all properly joined and served defendants to join in or otherwise timely consent to removal; a co-defendant's silence did not constitute consent to removal, and no exceptional circumstances relieved the removing defendants from the unanimous consent requirement where, instead of alerting the court to their unsuccessful attempts to obtain consent from the co-defendant, the removing defendants waited until they filed their response to plaintiff's motion to remand, well after the thirty-day period for the co-defendant to consent, to explain that the co-defendant had been unresponsive to counsel's e-mails).

### **District of Columbia Circuit**

*Hurt v. District of Columbia*, 869 F.Supp.2d 84 (D.D.C 2012) (remanding to state court, holding that a nightclub's failure to consent to removal warranted remand of a patron's action against the District of Columbia, nightclub, and police officers, alleging assault and battery, intentional infliction of emotional distress, and violation of plaintiff's constitutional rights, where the District and nightclub both had been served, but the nightclub did not consent or request an extension of time to file consent to removal; the remand motion was timely filed because the period for filing the motion to remand was extended by virtue of the ordinary time to file falling on a weekend and federal holiday; failure by defendants to unanimously consent to removal in a timely fashion is not a curable defect if the plaintiff makes a timely objection to the removal).

### **Courts to Ignore Unserved Defendants**

*Hernandez v. Ignite Restaurant Group, Inc.*, 917 F.Supp.2d 1086 (E.D. Cal. 2013) (remanding to state court on other grounds, but holding that defendant supervisor's consent to removal was not required in employee's action against her employer and supervisor, asserting claims for wrongful termination and employment discrimination, where there was no indication in the record that the supervisor had been served by the employee prior to removal).

## **Court to Disregard Nominal parties**

Hernandez v. Ferris, 917 F.Supp.2d 1224 (M.D. Fla. 2012) (denying remand to state court, holding that financial institution defendants were nominal parties whose consent to removal was not required in an action brought by a guardian of the property for an elderly account holder against the institutions and a joint owner who allegedly used her relationship of trust and confidence with the account holder to coerce or unduly influence the account holder to change ownership of her accounts to reflect joint ownership with rights of survivorship; the action sought appointment of a legal guardian for the account holder and an ex parte injunction freezing the accounts held by the defendant institutions; the financial institutions had no legal interest in the outcome of the dispute, and the complaint was devoid of any allegations of wrongdoing or liability against the institutions).

## **Compare**

Cacoilo v. Sherwin-Williams Co., 902 F.Supp.2d 511 (D.N.J. 2012) (remanding to state court, holding that the notice of removal filed by benzene product manufacturers and producers in a wrongful death action by the parents of a Marine who allegedly died due to exposure to benzene products was procedurally defective where several other defendants who had been properly served at the time of removal failed to join in, or consent to, the removal; moreover, the benzene product manufacturers and producers who removed the action failed to demonstrate that the other defendants were nominal parties, as required to warrant disregard of those defendants for purposes of the unanimity requirement for removal, where there was a reasonable basis to predict that the other defendants could be held liable based on their alleged involvement in the manufacture of benzene-containing products).

## **Courts to Disregard Improperly joined parties**

Yasmin & Yaz (Drospirenone) Mktg, Sales Practices & Prod. Liab Litig., 870 F.Supp.2d 587 (S.D.Ill. 2012) (denying remand to state court, holding in part that because the pharmacy that sold prescription drugs that allegedly caused a consumer's injuries was fraudulently joined in this removed action, its consent to removal was not required).

Henry v. O'Charleys Inc., 861 F.Supp.2d 767 (W.D.La. 2012) (denying remand to state court, holding in part that the failure of a non-diverse restaurant manager and non-diverse corporation to join the removal notice did not render the removal procedurally defective where the court had held that they were improperly joined to defeat diversity jurisdiction; the rule of unanimity, requiring all properly served defendants to timely join in or consent to removal, does not apply to improperly joined defendants).

With respect to who may remove, *see generally*:

Ressler, Jayne S., *Removing Removal's Unanimity Rule*, 50 HOUS. L. REV. 1391 (2013).

## **X. Time to Remove**

## **Measuring from the Initial Pleading**

*Mendez v. Jarden Corp.*, 503 Fed.Appx. 930 (11th Cir. 2013) (denying remand, holding removal timely where defendant in a products liability action did not know that plaintiff was a citizen of Florida at the time she served the complaint, so as to trigger the 30-day period for removal; defendant's knowledge that plaintiff lived in Florida at the time of the accident, years before the suit was filed, was insufficient to render the case removable upon service of the complaint).

*Froehlich v. CACH, LLC*, 289 F.R.D. 454 (S.D.Ohio 2013) (denying remand to state court, holding removal timely, reasoning that civil Federal Rule making federal civil procedural rules applicable to an action that has been removed to federal court does not preclude use of the civil federal procedural rule governing time computation to extend the 30-day time limit for removing actions from state court, and concluding that the federal time computation rule extended the 30-day removal deadline to the next business day).

## **Service upon an Authorized Agent**

*Aranda v. Foamex Intern.*, 884 F.Supp.2d 1186 (D.N.M. 2012) (remanding to state court removed action against mattress manufacturer, brought by temporary employee who was injured when he slipped on hydraulic fluid that had leaked from an improperly repaired forklift, holding that 30-day period for manufacturer to file its notice of removal commenced on the date it received service of process through its registered agent, even though the complaint misstated the business relationship between the manufacturer and the entity that was named as defendant, where the manufacturer was named in the caption of the complaint, the agent knew it had been served with a summons and complaint meant for this manufacturer, and the complaint set forth allegations that satisfied the amount-in-controversy requirement for diversity jurisdiction, making the case ascertainably removable).

## **Determinations of the Timeliness of Removal**

*Cameron v. Teeberry Logistics, LLC*, 920 F.Supp.2d 1309 (N.D.Ga. 2013) (denying remand to state court, holding that driver's supplementation of answers to discovery requests by truck driver and owner, which indicated medical expenses of \$62,432.45 and that plaintiff had been out of work for half a year, did not provide unambiguous notice of removability under diversity jurisdiction of driver's action to recover for injuries sustained in an accident with the truck, where the driver did not state the amount of lost wages she was seeking and her medical bills did not exceed \$75,000, nor did driver's orthopedic consult statement recommending and scheduling surgery but not the estimated cost of the surgery or discovery supplementation indicating medical expenses of \$91,413.75 provide unambiguous notice of removability where the complaint explicitly stated that damages would not exceed \$50,000, but driver's demand letter, seeking a settlement of \$575,000, did provide unambiguous notice of removability under diversity jurisdiction). Measuring from defendant's receipt of that letter, removal was filed within 30 days of the notice of removability, as required by § 1446(b)(3).

## **Other Papers Triggering Removal Rights**

## **Fifth Circuit**

Borill v. Centennial Wireless, Inc., 872 F.Supp.2d 522 (W.D.La. 2012) (denying remand, holding that thirty-day period for a cell phone retailer to remove a patron's state-court personal injury action ran from the date defendant received an "other paper" from which it first could ascertain that case was removable, rather than from the date of the patron's initial pleading, where the initial pleading had not affirmatively revealed that the patron sought damages in excess of the jurisdictional minimum).

## **Seventh Circuit**

Janis v. Workhorse Custom Chassis, LLC, 891 F.Supp.2d 970 (N.D.Ill. 2012) (remanding to state court, concluding that proposed jury instructions were an "other paper" for purposes of the rule extending the time for filing a notice of removal in a matter that initially was not removable but became removable, and that removable therefore was timely, but holding that the alleged seller of a recreational vehicle (RV) that removed a purchaser's action under the Magnuson-Moss Warranty--Federal Trade Commission Improvement Act failed to meet its burden of showing that the requisite amount was in controversy in light of the \$49,999 limitation the plaintiff imposed on her claim; although the purchaser's proposed jury instructions added, as an alternate way to calculate damages, a revocation-of-acceptance theory under which the damages could have been more than the \$50,000 jurisdictional minimum -- absent a limitation on damages--, it was not clear from the record that, by seeking damages under the alternate theory of recovery, the purchaser abandoned her long-standing limitation on damages).

## **Interrogatory answers**

Lambertson v. Go Fit, LLC, 918 F.Supp.2d 1283 (S.D.Fla. 2013) (denying remand to state court, holding that plaintiff consumer's response to defendant fitness equipment manufacturer's request for admissions in a products liability action served as notice of the claim's value so as to trigger the 30-day period for removal of the action to federal court -- and that the removal therefore was timely --, where the initial complaint stated only that the amount in controversy exceeded \$15,000 and the court was unwilling to tie defendant's time to remove to a pre-suit demand letter from Lambertson, seeking over \$900,000 in damages for serious permanent physical injuries, including nearly complete blindness in one eye and partial vision loss in the other eye).

## **Correspondence**

Cameron v. Teeberry Logistics, LLC, 920 F.Supp.2d 1309 (N.D.Ga. 2013) (denying remand to state court, holding that driver's supplementation of answers to discovery requests by truck driver and owner, which indicated medical expenses of \$62,432.45 and that plaintiff had been out of work for half a year, did not provide unambiguous notice of removability under diversity jurisdiction of the driver's action to recover for injuries sustained in an accident with the truck, where the driver did not state the amount of lost wages she was seeking and her medical bills did not exceed \$75,000, nor did driver's orthopedic consult statement recommending and scheduling surgery but not the estimated cost of the surgery or discovery

supplementation indicating medical expenses of \$91,413.75 provide unambiguous notice of removability where the complaint explicitly stated that damages would not exceed \$50,000, but driver's demand letter, seeking a settlement of \$575,000, did provide unambiguous notice of removability under diversity jurisdiction). Measuring from defendant's receipt of that letter, removal was filed within 30 days of the notice of removability, as required by § 1446(b)(3).

*Ackerberg v. Citicorp USA, Inc.*, 887 F.Supp.2d 934 (N.D.Cal. 2012) (denying remand to state court of a credit card holder's action against the card issuers, holding in part that the removal was timely where the fact that the amount in controversy exceeded \$75,000 did not become apparent until the card holder sent to the issuers a settlement letter, offering to settle the dispute for \$200,000, where defendants filed the removal notice within 30 days of receiving the settlement letter and the card holder's complaint did not explicitly state the amount in controversy).

### **Rejections of the First-Served-Defendant Rule**

*Roche v. Morgan Collection, Inc.*, 882 F.Supp.2d 247 (D.Mass. 2012) (denying remand, noting that although the thirty-day limit for filing the notice of removal is not jurisdictional, it is to be strictly applied, but holding that even if the time to remove the plaintiff employee's action against her employer and employer's officers for unpaid wages began to run the day after the employee mailed copies of the summons and complaint to both the employer and its officers, the removal was timely, notwithstanding defendants' contention that they did not "receive" the initial pleading until the employee had complied with all procedural requirements of New York law). The court refused to apply what it found to be ministerial requirements of New York law that had little connection to receipt of the initial pleading as that term is used in 28 U.S.C.A. § 1446. The court also relied on the principle that the date of service on the last-served defendant triggers the removal clock.

### **Cases following 2011 Statutory Amendments**

*Andrews v. AMERCO*, 920 F.Supp.2d 696 (E.D.La. 2013) (remanding to state court, holding that the thirty-day periods to file notices of removal were triggered by multiple defendants' individual service dates, and where services of summons had been completed at different times, earlier-served defendants could not rely on later-served the defendants' service dates to meet the 30-day window, but could consent to removal initiated by later-served defendants within their own, later, 30-day removal periods). The removal was untimely as each diverse defendant's 30-day window to remove had elapsed.

*Roche v. Morgan Collection, Inc.*, 882 F.Supp.2d 247 (D.Mass. 2012) (denying remand, noting that, although the thirty-day time limit for filing of the notice of removal is not jurisdictional, it is to be strictly applied, but holding that, even if the time to remove the plaintiff employee's action against her employer and employer's officers for unpaid wages began to run the day after the employee mailed copies of the summons and complaint to both the employer and its officers, the removal was timely, notwithstanding defendants' contention that they did not "receive" the initial pleading until the employee had complied with all procedural requirements of New York law). The court refused to apply what it found to be ministerial requirements of

New York law that had little connection to receipt of the initial pleading as that term is used in 28 U.S.C.A. § 1446. The court also relied on the principle that the date of service on the last-served defendant triggers the removal clock.

### **The One-Year Limit on Removal of Diversity Cases**

*Moultrop v. GEICO General Ins. Co.*, 858 F.Supp.2d 1342 (S.D.Fla. 2012) (remanding case to state court, holding that insureds' filing of an amended complaint adding a bad faith claim – which arguably was the first paper from which defendant could have ascertained that the case had become removable -- did not operate to commence a new and separate claim so as to avoid the one-year time limit on removing suits within diversity jurisdiction; thus, removal of the action was untimely). The court reasoned that the commonly understanding of “commencement of the action” is when the original complaint is filed that sets in motion the resolution of all claims, even though an action may come to include new claims and parties. The court also noted that the 2011 amendment to 28 U.S.C.A. § 1446(c)(1) – permitting avoidance of the one-year limit if the plaintiff, in bad faith, acted to prevent removal – was inapplicable because this suit was filed before that amendment became effective.

### **XI. Venue in Removed Actions**

#### **Venue if Filed in Federal Court Immaterial**

*McPhearson v. Anderson*, 874 F.Supp.2d 573 (E.D.Va. 2012) (post-removal, directing judgment in favor of Anderson, holding that while the court would entertain a post-removal motion to dismiss for lack of proper venue, the removal statute, rather than the general venue statute, determined whether venue was proper in federal district court following removal of this action from Virginia state court suit, and since defendant removed to the district court embracing the state court where the action was filed, venue was proper).

#### **But see**

*Marshall v. Allison*, 908 F.Supp.2d 186 (D.D.C. 2012) (in removed case, erroneously concluding that venue was proper, as assessed under 28 U.S.C.A. § 1391(b)(2)).

*Celestial Community Development Corp., Inc. v. City of Philadelphia*, 901 F.Supp.2d 566 (E.D.Pa. 2012) (in removed case, erroneously concluding that venue was proper by reference to satisfaction of 28 U.S.C.A. § 1391(b)).

#### **Transfer after Removal**

*Lothian Cassidy, LLC v. Lothian Exploration & Development II, L.P.*, 487 B.R. 158 (S.D.N.Y. 2013) (denying remand to state court and ordering transfer of creditors' removed action against non-debtors, asserting state law claims arising out of an alleged fraudulent conveyance of the debtors' assets, to the Western District of Texas, reasoning that the transfer was in the interest of justice and for the convenience of the parties, although the creditors' choice of forum was entitled to great weight and transfer would shift inconvenience from the non-

debtors to the creditors, where the transfer would ensure supervision by the court most familiar with, and with continuing administrative responsibility for, the related bankruptcy proceeding).

### **Compare—Refusal to Transfer**

*Molex Co., LLC v. Andres*, 887 F.Supp.2d 1189 (N.D.Ala. 2012) (denying remand of a removed action alleging violation of the Alabama Trade Secrets Act and breach of fiduciary duty and denying transfer of plaintiff chemical company's case against its consultant to a federal court in the state where he resided, where the suit was filed where the plaintiff company was headquartered, the plaintiff company's business records were in Alabama, and Alabama law would apply to the controversy).

## **XII. Content and Amendment of the Notice of Removal**

### **Failure to File Papers**

*Ackerberg v. Citicorp USA, Inc.*, 887 F.Supp.2d 934 (N.D.Cal. 2012) (denying remand to state court, holding in part that defendants' failure to provide the federal district court with the summons, civil case cover sheet, and motion for leave to amend the complaint from plaintiff's removed state-court proceedings was a technical defect that did not strip the district court of jurisdiction and was cured by defendants' filing of the missing documents, even though the 30-day removal period had expired by the time of that filing).

### **Amendment of Removal Notice Allowed or Denied**

*Haber v. Massey*, 904 F.Supp.2d 136 (D.Mass. 2012) (remanding to state court a personal injury action against a truck driver and his employer, removed to federal court on ground of relation to a bankruptcy case after defendant driver filed a petition for bankruptcy, holding that defendants were not entitled to amend their notice of removal to add diversity as a ground for removal both because defendants' argument that the non-diverse driver should be dismissed from the action, leaving only diverse parties, was based on contingencies that fell short of a new basis for jurisdiction and because, after the 30-day period for removal, it was too late for defendants to add a new basis for jurisdiction).

*Kinetic Sys., Inc. v. Federal Financing Bank*, 895 F.Supp.2d 983 (N.D.Cal. 2012) (denying post-removal motion to dismiss but holding that the Federal Financing Bank (FFB) was required to amend its notice of removal under the federal-agency removal statute – 28 U.S.C.A. § 1442 – in a contractor's action against the FFB to enforce a bonded stop notice for the contractor's work, where the FFB had failed to allege personhood under the federal-agency removal statute, a causal nexus between its actions and the contractor's claims, and that it had a colorable federal defense; noting that the federal-agency removal statute is broadly construed to favor removal, and further holding that the Bank was not prohibited from amending its notice of removal even though the 30-day removal period had expired, where the FFB sought only to clarify the factual underpinnings of its previously asserted basis of jurisdiction, that it was an agency and instrumentality of the United States Government).

Moreno Energy, Inc. v. Marathon Oil Co., 884 F.Supp.2d 577 (S.D.Tex. 2012) (denying remand to state court of action alleging that oil company and its affiliates deprived plaintiff of substantial royalties from overseas property, and holding that leave to amend notice of removal, rather than remand, was appropriate, where the removing defendant failed to identify the citizenship of members or partners of defendant unincorporated associations, and failed to alleged that certain co-defendants were formed under the laws of the Cayman Islands).

Wesolek v. Layton, 871 F.Supp.2d 621 (S.D. Tex. 2012) (dismissing action removed pursuant to the Class Action Fairness Act and denying leave to amend complaint, holding that, in removed class action brought by limited partners in two energy funds against the funds and individuals who ran them, asserting state law claims, proposed amendments to the complaint that would establish standing represented an attempt to remedy inadequate jurisdictional allegations, not defective jurisdictional facts, and to that extent was permissible, but limited partners' loss of value did not provide them standing to bring claims directly, as opposed to derivatively, and limited partners were not entitled to amend to satisfy the conditions for asserting derivative claims; however, plaintiffs pleaded other claims that – while they would be dismissed for failure to plead with particularity as required by federal Civil Rule 9(b) – supported jurisdiction under CAFA).

Henry v. O'Charleys Inc., 861 F.Supp.2d 767 (W.D.La. 2012) (denying remand to state court, granting leave to amend removal notice, in restaurant patron's removed action against restaurant owners and manager, seeking to recover damages for injuries allegedly sustained when plaintiff slipped and fell at restaurant, where the amendment merely corrected faulty allegations in the original notice and did not make any substantive changes; defendants' original removal notice alleged diversity jurisdiction, and proposed amendment alleged that non-diverse defendant was improperly joined).

### **XIII. Post-Removal Procedure**

#### **Proceed as if Filed in Federal Court**

Gurley v. FedEx Ground Package Systems, Inc., 869 F.Supp.2d 999 (S.D.Iowa 2012) (striking, without prejudice, post-removal motion for summary judgment and ordering plaintiff to respond to the removal, reasoning that the district court was required to determine whether it had diversity jurisdiction over a removed action before considering the merits of defendants' motion for summary judgment on limitations grounds, and thus court would strike defendants' motion, without prejudice, in action alleging violations of Iowa Civil Rights Act, where defendants' motion was filed one week after they removed the action based on alleged fraudulent joinder of non-diverse defendants, where plaintiff had not yet filed a motion to remand).

Brooks v. GAF Materials Corp., 284 F.R.D. 352 (D.S.C. 2012) (Where suit was removed after the state court granted partial summary judgment to plaintiffs on their claim of breach of implied warranties and after the plaintiffs amended their complaint to seek more than \$5 million in class damages, the district court announced that when a matter is removed to federal court after a state court has entered a judgment, the district court should immediately adopt the judgment as its own, and the judgment should then be treated the same as other judgments

entered by the district court, and the ordinary rules regarding post-judgment remedies should apply. Proceeding accordingly, the court denied reconsideration of the state court's denial of summary judgment to defendant on plaintiffs' individual claims and adhered to the state court's decision of that motion, vacated the partial summary judgment for plaintiffs by virtue of genuine issues of material fact, and decertified the class, without prejudice to possible re-certification upon better class definition.)

### **In Accordance with the Federal Civil Rules**

*Mendez v. Jarden Corp.*, 503 Fed.Appx. 930 (11th Cir. 2013) (denying remand, holding removal timely, and further holding that where plaintiff served the complaint on one defendant 124 days after she filed her complaint in state court, defendants did not receive notice of the complaint within 120 days of its filing, as required for relation back of claims against the second defendant, who was named in an amended complaint; applying civil Federal Rules as in a case filed in federal court).

*Burns v. Winnebago Industries, Inc.*, 492 Fed. Appx. 44 (11th Cir. 2012) (affirming denial of a motion to amend the complaint to add an additional allegation of product defect, add a defendant and add claims in a removed case, holding that plaintiff delayed too long where plaintiff easily could have amended months earlier and plaintiff's deposition already had been taken; in addition, plaintiff could file a separate case asserting the new claims, which the court found to be unrelated to the existing breach of warranty claim).

*Swindell-Filiaggi v. CSX Corp.*, 922 F.Supp.2d 514 (E.D.Pa. 2013) (applying ordinary federal Civil Rules in denying motions for reconsideration of denials of leave to amend complaint, after removal; refusing to stay the mailing to state court of a certified copy of the district court's remand order where defendants cited no authority to justify certification of an appeal, the public interest in resolving contradictory rulings on a jurisdictional question was inapplicable since the dispute concerned a procedural, not a jurisdictional, requirement of the removal statute, and a stay would be in tension with the policy to pay due regard to the interests of the state in resolving state law controversies in their courts).

*Krauser v. BioHorizons, Inc.*, 903 F.Supp.2d 1337 (S.D.Fla. 2012) (noting that when a declaratory judgment action has been removed to federal court, it is treated as though it had been filed under the federal Declaratory Judgment Act). Because the action was a declaratory judgment action, it was not barred by the statute of limitations that would have applied to a claim for specific performance.

*St. John's African Methodist Episcopal Church v. Guideone Specialty Mut. Ins. Co.*, 902 F.Supp.2d 783 (E.D.Va. 2012) (in a removed case, applying civil Federal Rule 42(b) to govern a party's motion to bifurcate).

### **Completion of Service of Process**

*Moore v. McCalla Raymer, LLC*, 916 F.Supp.2d 1332 (N.D.Ga. 2013) (dismissing removed action, without prejudice, holding that a mortgagor failed to properly serve a

mortgagee's nominee either before or after removal of her wrongful foreclosure action). The court noted that in actions removed from state court, the sufficiency of service of process prior to removal is determined by the law of the state from which the action was removed, and after removal, the sufficiency of service is determined according to federal law.

*Butchard v. County of Doña Ana*, 287 F.R.D. 666 (D.N.M. 2012) (noting that, in removed cases, the 120 days to serve the summons and complaint starts at the date of removal, citing 28 U.S.C.A. § 1448).

### **Federal Procedure Governing Challenges to Post-Removal Service**

*Moore v. McCalla Raymer, LLC*, 916 F.Supp.2d 1332 (N.D.Ga. 2013) (dismissing removed action, without prejudice, holding that a mortgagor failed to properly serve a mortgagee's nominee either before or after removal of her wrongful foreclosure action). The court noted that in actions removed from state court, the sufficiency of service of process prior to removal is determined by the law of the state from which the action was removed, and after removal, the sufficiency of service is determined according to federal law.

### **Federal Treatment of State Court Rulings**

*Caswell v. Olympic Pipeline Co.*, 484 Fed.Appx. 151 (9th Cir. 2012) (affirming summary judgment for defendants, upholding removal based on diversity jurisdiction and holding that district court correctly adopted as its own the state court's decision to dismiss defendants on the ground that Oregon's statute of repose barred the product liability claims against them; although one defendant had its principal place of business in Washington, the decision to apply Oregon law was correct, where plaintiffs were Oregon residents and plaintiff was injured in Oregon while working in Oregon for an Oregon employer).

*Wane v. Loan Corp.*, 926 F.Supp.2d 1312v (M.D.Fla. 2013) (granting defendant mortgagee's motion for summary judgment in a quiet title suit that had been removed by the FDIC, reasoning in part that, after removal, orders issued by the state court are considered orders of the district court, but concluding nonetheless that the federal court would independently evaluate evidence that had been admitted in state court in connection with motions for summary judgment, to ensure that it complied with civil Federal Rule 56).

*Brown v. K-MAC Enterprises*, 897 F.Supp.2d 1098 (N.D.Okla. 2012) (post-removal, severing and remanding to state court plaintiff employee's workers' compensation claim and refusing to reconsider the state court's order granting the employee's motion to vacate the order dismissing her action). While noting that a federal court is free to reconsider a prior state court order and to treat the order as it would any interlocutory order it might itself have entered, the court held that the state court was within its discretion in vacating its own order dismissing plaintiff's action for failure to issue a summons within 90 days after filing the action, and therefore denied reconsideration of the order vacating dismissal.

## **XIV. Remand**

## **Entire Case to be Remanded**

Jackson v. Wal-Mart Stores Texas, LLC, 925 F.Supp.2d 810 (N.D.Tex. 2013) (remanding to state court, holding that an employer's removal, based on diversity jurisdiction, of an employee's action asserting the Texas law claim that he was fired in retaliation for filing a workers' compensation claim, as well as a claim for race discrimination and retaliation in violation of the Texas Commission on Human Rights Act, was improper in light of the statutory prohibition on removing cases arising under state workers' compensation laws; further, remand of the entire case and not just the retaliatory termination claim was warranted, since the court did not have authority under federal law to sever nonremovable claims in a diversity action). The court added that the phrase "civil action" in the removal statute refers to an entire case rather than to separate causes of action, and thus a defendant may remove – and the court may remand – only an entire case, not individual claims.

## **Remand to State Court from which the Case was Removed**

Konold v. Superior Intern. Industries Inc., 911 F.Supp.2d 303 (W.D.Pa. 2012) (denying remand to a state court other than that from which the case had been removed, noting that the court lacked power to remand to such a court and also lacked power to remand with directions to transfer to another state court).

Lewis v. Lycoming, 876 F.Supp.2d 497 (E.D.Pa. 2012) (During the pendency of a motion to remand a removed suit, plaintiff having moved to collaterally estop a defendant from re-litigating a determination of its principal place of business, the court held that an unappealable order to remand an action to a state court – rendered in another case -- did not have the finality required for issue preclusion to apply.)

## **Futility Exception to the Duty to Remand**

Potts v. Rawlings Co., LLC, 897 F.Supp.2d 185 (S.D.N.Y. 2012) (granting motions to dismiss for lack of subject-matter jurisdiction and for failure to state a claim in a removed action in which Medicare beneficiaries alleged that secondary payers under the Medicare Act did not have the right to recover payments, made to beneficiaries from third-party tortfeasors' insurance carriers, on the ground that the claims "arose under" the Medicare Act, and the beneficiaries therefore were required to exhaust their administrative remedies before seeking judicial review).

## **Compare**

Sibley v. Alexander, 916 F.Supp.2d 58 (D.D.C. 2013) (dismissing and remanding case to the District of Columbia superior court, despite the futility of plaintiff's claims, where the federal court lacked subject-matter jurisdiction because plaintiff lacked Article III standing and his claims were moot). The D.C. Circuit appeared not to have adopted a futility exception to the remand requirement of 28 U.S.C.A. § 1447(c).

## **30-day Period to Seek Remand**

Sae Young Kim v. National Certification Com'n for Acupuncture and Oriental Medicine, 888 F.Supp.2d 78 (D.D.C. 2012) (denying remand and dismissing case on res judicata grounds, holding that the plaintiff acupuncture school waived its objection to removal by the commission, a citizen of the forum state – the District of Columbia – where this breach of contract action was removed on the basis of diversity jurisdiction, but the school's motion to remand was untimely filed, 38 days after the filing of the removal notice).

### **Waiver of Objections to Removal**

Petri v. Kestrel Oil & Gas Properties, L.P., 878 F.Supp.2d 744 (S.D.Tex. 2012) (disposing of claims on the merits after holding that although claims – such as plaintiff's -- arising under the Texas Workers' Compensation Act may not be removed to federal court, the removal was only procedurally defective, and plaintiff, administrator of an oil rig platform worker's estate and guardian of the decedent's sole heir, waived any objection to removal on that ground because plaintiff failed to assert it within thirty days of removal, even though plaintiff filed a timely motion to remand, where that motion was based on the employer's failure to obtain consent of all served parties, rather than on the unremovability of claims arising under workers' compensation laws).

Noatex Corp. v. King Const. of Houston, LLC, 864 F.Supp.2d 478 (N.D.Miss. 2012) (remanding to state court, holding that the district court lacked jurisdiction over a project owner's removed interpleader action concerning funds it owed to a general contractor that were "bound" by the subcontractor pursuant to Mississippi statutory procedure, where the parties were not completely diverse, and the subcontractor was a Mississippi citizen; further holding that plaintiff waived the requirement that all defendants join in the removal by failing to object to the procedural defect in a timely fashion).

### **Award of Attorneys' Fees and Costs in Connection with Removals and Remands**

#### **Bad faith Not Necessary**

Janis v. Workhorse Custom Chassis, LLC, 891 F.Supp.2d 970 (N.D.Ill. 2012) (remanding to state court because of defendant's failure to establish that the requisite amount was in controversy under the Magnuson-Moss Warranty--Federal Trade Commission Improvement Act and ordering the removing defendant to pay fees and costs related to removal, noting that bad faith is not required to justify such an award, but denying sanctions under federal Civil Rule 11 and 28 U.S.C.A. § 1927).

### **Cases following Martin v. Franklin Capital**

#### **Making an Award:**

Allstate Ins. Co. v. Nowakowski, 861 F.Supp.2d 866 (W.D.Mich. 2012) (remanding to state court, holding that no-fault auto insurer's claim against an insured motorist, seeking a declaratory judgment that it was not obligated to indemnify the insured against liability for a claim asserted by the insured's primary health plan, did not seek declaratory relief on a matter for

which the insured could bring a coercive action arising under federal law against the insurer, and thus removal was not permitted; further holding that removal was not objectively reasonable, and awarding attorneys' fees and costs incurred as result of removal).

Loudin v. J.P. Morgan Trust Co., N.A., 481 B.R. 388 (S.D.W.Va. 2012) (awarding fees attendant upon removal, holding that defendants lacked an objectively reasonable basis for removing an action as related to bankruptcy proceedings, and thus, plaintiff purchasers of a mobile home would be awarded attorneys' fees incurred as result of improper removal, in an action under state law for unconscionable inducement, unauthorized practice of law, and fraud, brought after the reopening of the purchasers' Chapter 7 bankruptcy cases, and naming as defendants the vendor, assignee of a loan originated by the vendor, the loan servicer, and loan closer, where the requirements of mandatory abstention were clear and uncomplicated, and defendants' contention that mandatory abstention was not required was based on an unreasonable reading of the statute granting a district court exclusive jurisdiction over a bankruptcy debtor's property and property of the estate). That statute did not provide an independent basis for federal jurisdiction that defeated mandatory abstention.

### **Denying an Award**

Jackson v. Wal-Mart Stores Texas, LLC, 925 F.Supp.2d 810, 814 (N.D.Tex. 2013) (remanding to state court, holding that an employer's removal, based on diversity jurisdiction, of an employee's action asserting the Texas law claim that he was fired in retaliation for filing a workers' compensation claim, as well as a claim for race discrimination and retaliation in violation of the Texas Commission on Human Rights Act, was improper in light of the statutory prohibition on removing cases arising under state workers' compensation laws; denying an award of attorneys' fees and costs because no controlling Fifth Circuit precedent governed and defendant had made a reasonable argument for severance and remand of only the workers' compensation claim). The court **cited 14B Wright, Miller, Cooper & Steinman** for the proposition that Congress eliminated § 1441(c)'s applicability to diversity cases.

Fastmetrix, Inc. v. ITT Corp., 924 F.Supp.2d 668 (E.D.Va. 2013) (remanding to state court but denying an award of attorneys' fees and costs to the plaintiff subcontractor on a prime contract for a federal agency, because the references in the complaint to alleged violations by defendant of federal acquisition regulations provided a weak but objectively reasonable basis for removing).

Cabalce v. VSE Corp., 922 F.Supp.2d 1113 (D. Hawai'i 2013) (remanding to state court, denying an award of attorneys' fees and costs based upon a contractor's improper removal of state law claims – under the federal officer removal statute -- where the contractor had an objectively reasonable basis for removal because the removal involved a somewhat complex analysis of the statute and the statute is to be interpreted broadly in favor of removal).

Hernandez v. Ignite Restaurant Group, Inc., 917 F.Supp.2d 1086 (E.D. Cal. 2013) (remanding to state court for lack of diversity jurisdiction but holding that plaintiff employee was not entitled to an award of attorneys' fees and costs incurred as a result of removal of her action against her employer and supervisor, asserting claims for wrongful termination and employment

discrimination, where there was a lack of clarity in the case authority on the manager's privilege under California law, and the employer therefore had an objectively reasonable basis for removal on the theory that the non-diverse supervisor was fraudulently joined to defeat removal based on diversity jurisdiction).

*Whelchel v. Regus Management Group, LLC*, 914 F.Supp.2d 83 (D. Mass. 2012) (remanding to state court, holding that the functions and powers of the Massachusetts Commission Against Discrimination (MCAD) weighed against finding the MCAD to be a state court, as required to make proper the removal of an age discrimination in employment action from the MCAD, but further holding that the removal was not frivolous or vexatious, and thus that an award of attorneys' fees incurred as result of the improper removal was not warranted, where it had not been settled law whether removal from the MCAD was permissible).

*Carey v. Bank of America, N.A.*, 904 F.Supp.2d 617 (N.D.Tex. 2012) (remanding to state court an action alleging age and disability discrimination, harassment, and worker's compensation retaliation in violation of Texas law, holding that the suit was non-removable based on diversity of citizenship, as the general removal statute authorized removal of cases as a whole when they are civil actions within the original jurisdiction of the federal courts but the worker's compensation retaliation claim was non-removable under 28 U.S.C.A. § 1445(c) and was not severable from the other claims, but denying an award of attorneys' fees and costs in connection with the motion to remand because, in light of the absence of controlling authority on the issue, the employer had objectively reasonable grounds to believe that removal was proper).

*Johnson v. USAA Cas. Ins. Co.*, 900 F.Supp.2d 1310 (M.D.Fla. 2012) (remanding to state court, but holding that plaintiff insureds were not entitled to attorneys' fees incurred in responding to the removal because filing of the removal notice one day after expiration of the 30-day statutory removal period did not constitute a lack of an objectively reasonable basis for removal).

*In re Darvocet, Darvon and Propoxyphene Products Liability Litigation*, 889 F.Supp.2d 931 (E.D.Ky. 2012) (remanding to state court, having rejected contentions of both fraudulent joinder and fraudulent misjoinder, but denying an award of attorneys' fees to plaintiff, concluding that a pharmaceutical company's removal of the case was not objectively unreasonable, where, at the time of removal, the company presumably did not know whether the consumers would be able to present evidence linking the non-diverse distributor defendant to their injuries and some precedent supported the removal).

*Weil v. Process Equipment Co. of Tipp City*, 879 F.Supp.2d 745 (S.D. Ohio 2012) (remanding to state court, holding that a former chief executive officer's (CEO) claim that his employer breached his employment agreement by failing to provide post-separation COBRA coverage under his compensation plan did not assert a claim to recover damages based on the employer's failure to issue a mandatory COBRA notice, but rather alleged only a state law breach of contract claim, and thus was not completely preempted by federal COBRA, where the CEO sought to recover severance pay, vacation pay, and reimbursement for his expenses, in addition to COBRA benefits, and did not seek relief based on any COBRA violation; further denying attorneys' fees for frivolous removal, citing that ambiguity of the complaint as to its intended

claims).

Huber v. Tower Group, Inc., 881 F.Supp.2d 1195 (E.D.Cal. 2012) (remanding to state court, holding that joinder of a non-diverse insurance adjuster as a defendant in a lawsuit brought by insureds against their insurer, under their homeowners' policy, was not fraudulent, but denying fees and costs to plaintiff on the ground that the removal did not lack an objectively reasonable basis in law).

May v. Apache Corp., 870 F.Supp.2d 454 (S.D.Tex. 2012) (denying an award of attorneys' fees incurred in connection with plaintiff's motion to remand where the court denied remand to state court of plaintiff's federal question claim in property owners' action against an oil and gas company, alleging that the company's drilling activities violated the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), a federal statute, where that claim was ripe, but remanded plaintiff's state law claims, in the exercise of the court's discretion under the supplemental jurisdiction statute).

Underwriters at Interest Under Bailee Ins. Policy No. 09RTAMIA1158 v. SeaTruck, Inc., 858 F.Supp.2d 1334 (S.D.Fla. 2012) (remanding to state court, holding that a negligence claim was not completely preempted by the Carriage of Goods by Sea Act (COGSA), but denying costs and fees, on the ground that the removal was not objectively unreasonable as defendant made a good faith argument for the ability of the parties to extend COGSA to a pre-loading, pre-custody period).

Johnson v. Auto Handling Corp., 857 F.Supp.2d 848 (E.D.Mo. 2012) (remanding to state court, holding that adjudication of a worker's action against a truck manufacturer and the company that serviced truck, asserting strict liability and negligence leading to injury allegedly sustained while securing automobiles on the truck, did not require interpretation of the collective bargaining agreement between the employee's union and his employer, and therefore that the claims were not completely preempted by the LMRA; denying a fee award on the ground that defendants arguably had an objectively reasonable basis for removal).

Cohn v. Charles, 857 F.Supp.2d 544 (D.Md. 2012) (holding that, although removal of a mortgagor's counterclaim against substitute trustees in a state court foreclosure action and a third-party complaint against the mortgagee for alleged violation of federal TILA and RESPA was not permissible as there was no federal question jurisdiction and the removing parties were not "defendants" within the meaning of the removal statutes, the mortgagor was not entitled to an award of attorneys' fees and costs, since removal was objectively reasonable due to the murky state of remand law based on recent amendments to Maryland foreclosure law, and problematic nature of adjudicating foreclosure governed by Maryland law together with federally-based counterclaims and third-party claims).

### **When Federal Courts Have Discretion to Remand**

Glover v. Borelli's Pizza, Inc., 886 F.Supp.2d 1200 (S.D.Cal. 2012) (remanding to state court, purportedly for lack of subject-matter jurisdiction, plaintiff's action against a restaurant,

alleging negligence, premises liability and violations of California statutes, and seeking declaratory relief under the Americans with Disabilities Act (ADA), where, after removal, plaintiff amended its complaint to allege claims under California law only, reciting the principle that, although jurisdiction of a removed case is determined at the time of removal, a court retains discretion as to whether to continue to exercise jurisdiction when no federal claims remain). The court should have dismissed in its discretion, not for lack of jurisdiction, since it had federal question jurisdiction at the time of removal.

### **Abstention**

Brigham Oil & Gas, L.P. v. North Dakota Bd. Of Univ. & Sch. Lands, 866 F.Supp.2d 1082 (D.N.D. 2012) (upholding removal of an interpleader action, brought to determine title to mineral rights in and under the “shore zone” of the Missouri River, concluding that the court likely had jurisdiction under the interpleader statute, 28 U.S.C.A. § 1335, but remanding to state court under the Burford abstention doctrine).

## **XV. Appealability of Orders Relating to Removal or Remand**

### **Appealability of Remand or Denial of Remand, Generally**

Jacks v. Meridian Resource Co., LLC, 701 F.3d 1224 (8th Cir. 2012) (vacating remand to state court, holding in part that, to the extent that the district court’s order remanding a removed case to state court was based on the district court’s interpretation of the local controversy exception in CAFA, the remand was an appealable order, as the local controversy exception operates as an abstention doctrine, and does not divest the district court of subject-matter jurisdiction).

### **De novo Review**

#### **Seventh Circuit**

Northeastern Rural Elec. Membership Corp. v. Wabash Valley Power Ass'n, Inc., 707 F.3d 883 (7th Cir. 2013) (vacating denial of motion to remand and grant of preliminary injunction, and remanding to district court for remand to state court, holding that the district court’s denial of plaintiff’s motion to remand fell within the doctrine of pendent appellate jurisdiction, where the appeal of the district court’s grant of defendant’s motion for preliminary injunction presented the same question of subject-matter jurisdiction as did plaintiff’s motion to remand – thus the court of appeals could review the remand denial; further holding that the court of appeals would review the denial of remand de novo, at least in the absence of disputed factual issues).

Farnik v. Federal Deposit Ins. Corp., 707 F.3d 717 (7th Cir. 2013) (on post-removal motion of Federal Deposit Insurance Corporation (FDIC), as lender’s receiver, made on appeal, ordering dismissal of complaint for lack of jurisdiction based upon failure of plaintiffs to exhaust their administrative remedies). The FDIC had removed, as any civil suit to which the FDIC is a party is deemed to arise under the laws of the United States. However, neither the FDIC nor the

plaintiff-appellants now believed that the federal courts had subject-matter jurisdiction. The court reasoned that to reach the conclusion that the case should be remanded to state court (rather than dismissed) – as plaintiff-appellants desired – it would have to conclude that the removal was proper and that the district court had erred in denying what was effectively a motion to remand. The court thus imposed on the plaintiff-appellants the burden to establish that the federal court had had jurisdiction over this action, which alleged that a lender had deceived plaintiffs by failing to base their interest rates on an index rate, as promised. Reviewing jurisdiction de novo, the court rejected plaintiff's arguments.