Subject Matter Jurisdiction: Basic Principles

- Federal courts are courts of limited jurisdiction
  - Federal Question, Diversity, Admiralty, or specific statute authorizing suit
- Party invoking jurisdiction bears the burden of establishing it
  - originally filed = Plaintiff; removed actions = defendant
- Lack of subject matter jurisdiction may be noticed *sua sponte* because parties cannot agree to confer subject matter jurisdiction.

Federal Question Jurisdiction, 28 U.S.C § 1331

- Well-pleaded complaint rule:
  - A case “arises under” federal law when a substantial, disputed issue of federal law (e.g., the Constitution, federal statutes, treaties) appears from the face of the well-pleaded complaint.
    - State court quiet title action “arises under” federal law when claim implicates significant federal interest and turns on substantial question of federal law.
    - Pre-patent inventorship dispute does not “arise under” federal law.
      - *Camsoft Data Sys., Inc. v. S. Elecs. Supply, Inc.*, 756 F.3d 327, 332 (5th Cir. 2014)
  - A federal defense is insufficient to create federal question jurisdiction.
    - *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149, 152 (1908) (holding that a suit arises under federal law or the Constitution only when a plaintiff’s statement of his own cause of action shows it is based on those laws; it is not enough that a plaintiff anticipate a defense or that federal law invalidates a defense)
    - *See also Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 10 n.9 (1983);
- Two exceptions to the well-pleaded complaint rule:
  - When federal statute expressly provides for subject matter jurisdiction.
    - Other specific jurisdictional grants:
      - Admiralty, Maritime & Prize, § 1333
      - Bankruptcy, § 1334
      - Interpleader, § 1335
      - Antitrust, § 1337
When there is “complete preemption” of the field such that even a purported state law claim is deemed to arise under federal law.

- *Avco Corp. v. Machinists*, 390 U.S. 557 (1968) (LMRA);
- *Beneficial Nat’l Bank v. Anderson*, 539 U.S. 1, 123 S. Ct. 2058 (2003) (determining that because the National Bank Act provides an exclusive cause of action for claims of usury, a purported state law usury claim may be removed to federal court).

### Diversity Jurisdiction, 28 U.S.C § 1332

- $75,000 minimum amount in controversy, exclusive of interest and costs, is required.
- Complete diversity of citizenship
  - Citizenship of Corporations
    - Corporations are only citizens of their state of incorporation and principal place of business. 28 U.S.C § 1332(c)(1).
    - “Principal place of business” is defined as the nerve center of the company.
      - *Hertz Corp. v. Friend*, 559 U.S. 77 (2010). (‘’[P]rincipal place of business’ refers to the place where the corporation’s high level officers direct, control, and coordinate the corporation’s activities.’’).
  - Citizenship of Partnerships, LLCs, and other unincorporated associations
    - Citizenship of an unincorporated association depends on the citizenship of all the association’s members. *See Carden v. Arkoma Assocs.*, 494 U.S. 185, 194-95 (1990)
    - However, there are some statutory exceptions to this general rule (e.g., CAFA).
  - Citizenship of Insurers
    - Insurers are deemed citizens of its state of incorporation and principal place of business as well as any state in which its insured is a citizen. 28 U.S.C. § 1332.
  - Other entities:
    - States are not citizens of any state for diversity purposes.
    - National banks are “citizens of States in which they are located”
    - Trusts have been held to be citizens of the state of the trustee. *Navarro Savings Ass’n v. Lee*, 446 U.S. 458 (1980) (diversity based on trustee’s citizenship, without regard to beneficiaries, when trustee had legal title, managed assets, and controlled the litigation).
      - Just last week, in *Americold Realty Trust v. ConAgra Foods, Inc.*, ___ U.S. ____ (Mar. 7, 2016), the Court clarified that *Navarro* applies only when an individual trustee files suit in its own name and that diversity of a trust,
like any other unincorporated association, is based on the citizenship of its members.

Class Action Fairness Act (“CAFA”), 28 U.S.C § 1332(d):

- **Before CAFA:**
  - The court considered only the citizenship of the named class representatives (not the unnamed class members) but required that each class member (including unnamed class members) satisfy the $75,000 amount in controversy requirement.
    - *See Zahn v. Int’l Paper Co.*, 414 U.S. 291 (1973) (finding that class members’ claims cannot be aggregated to satisfy the amount in controversy requirement);
    - *Supreme Tribe v. Cauble*, 255 U.S. 356, 365 – 66 (1921) (holding that citizenship of only named class representatives is relevant to diversity analysis).

- **In re Abbott Labs.,** 51 F.3d 524 (5th Cir. 1995) – state antitrust class action, with Louisiana’s statute authorizing award of attorneys’ fees to named Plaintiff. Court found that fees were attributable to named Plaintiff and had supplemental jurisdiction over unnamed class members even without independent amount in controversy.

  - Louisiana’s class action statute (La. Code Civ. Pro. art. 595) likewise attributes full award of attorneys’ fees recoverable to the class representative. *See Grant v. Chevron Phillips Chem. Co.*, 309 F.3d 864 (5th Cir. 2002), which held that full award determines whether the named representative satisfied the amount in controversy requirement. La. Code Civ. Pro. art. 595; And when the named class representative’s claim, including attorneys’ fees, exceeds the statutory minimum, the court has supplemental jurisdiction over the remaining claims of the unnamed class members.

  - In 2005, the United States Supreme Court agreed with Louisiana’s method.
    - *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546 (2005) (holding 28 U.S.C. § 1367 overruled Zahn v. International Paper Co. to enable a federal court to exercise supplemental jurisdiction over a plaintiff’s claims that do not meet the amount in controversy so long as the other elements of diversity exist and at least one named plaintiff satisfies the amount in controversy requirement).

- **After CAFA:**
  - CAFA created an additional jurisdictional provision: a federal court shall have original jurisdiction over a class action in which –
    - The amount in controversy exceeds $5 million, exclusive of interests and costs and
    - There is at least minimal diversity (any citizen of the plaintiff class is diverse from any defendant, or a foreign state is involved).
    - Provides for both mandatory and discretionary abstention for local controversy/home state defendant: 1332(d)(3) (“may” decline jurisdiction if more than 1/3 but less than 2/3ds of the plaintiffs and primary defendant reside in the same state as where action filed; (1332(d)(4) (“shall” abstain if more than 2/3ds are citizens of state where action is filed and at least 1 defendant from whom significant relief is sought and whose conduct forms a significant basis for suit is a citizen of state where suit is filed).
Class actions include “mass actions” where at least one plaintiff must satisfy the $75,000 individual amount in controversy requirement.

- 28 U.S.C. § 1332(a), (d)(11)(B)(i); see also Robertson v. Exxon Mobil Corp., No. 15-30920, 2015 WL 9592499, at *2 (5th Cir. Dec. 31, 2015) (reversing district court’s finding that the amount in controversy requirement had not been met by applying “common sense inferences” to support Defendants’ evidence on Plaintiffs’ monetary claims).
- “Mass actions” are defined as “any civil action…in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs’ claims involve common questions of law or fact…..” 28 U.S.C. § 1332(d)(11)(B)(i).
  - Miss v. AU Optronics (134 S. Ct. 736 (2014) (persons = plaintiffs, not “real parties in interest” so AG’s suit on behalf of citizens is insufficient).

**Supplemental Jurisdiction, 28 U.S.C § 1367**

- Applies to claims that are part of the same case or controversy
- Includes joinder of claims and parties, unless original jurisdiction is founded solely on § 1332 and either
  - The claims by the plaintiff against the additional party are under FED. R. CIV. P. 14, 19, 20, or 24; or
  - The claims are presented by persons proposed to be joined as plaintiffs under FED. R. CIV. P. 19 or seeking to intervene under FED. R. CIV. P. 24.
- Gives a court discretion to decline to exercise supplemental jurisdiction when:
  - A case presents novel or complex issues of state law,
  - The claim substantially predominates over original jurisdiction claims,
  - The court has dismissed all original jurisdiction claims, or
  - In exceptional cases, where there are other compelling reasons for declining jurisdiction.

**Multiparty, Multiforum Jurisdiction, 28 U.S.C § 1369**

- Minimal diversity; arises from single accident where at least seventy-five people have died at a discrete location.
- Court may abstain if substantial majority of plaintiffs are citizens of single state where defendant is also a citizen and state law governs the claim.
- Corporation deemed citizen of state of incorporation, has its principal place of business and resident of every state in which it is licensed to do business § 1369(c)(2).

**Removal & Procedures for Removal**

**Removal Jurisdiction**

- Removal based on Original Jurisdiction
  - Defendant(s) may remove a state court case to federal court if the federal court would have had original jurisdiction. 28 U.S.C. § 1441(a).
For understanding of “original jurisdiction,” please refer to section on Subject Matter Jurisdiction, supra

- Counter-claim defendant is not a “defendant” under § 1441(a).
  - Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 108 – 09 (1941).

  - But see Carl Heck Engineers, Inc. v. LaFourche Parish Police Jury, 622 F.2d 133 (5th Cir. 1980) (A third-party defendant may remove under 1441(c) because, unlike 1441(a), 1441(c) does not limit its application according to party status).
  - Carl Heck relied on the “separate and independent” clause that was removed by 2011 Clarification Act to 1441(c) and on that basis, some courts question whether this holding is still valid. Some district courts are, however, continuing to follow it. See, e.g., Genusa v. Asbestos Corp. 18 F. Supp. 3d 773 (M.D. La. 2014) (Brady, J.)

- “Artful Pleading” Rule
  - If the federal court determines that the plaintiff has “artfully pleaded” claims in this manner, it may allow removal even though no federal question appears on the face of the complaint. The artful-pleading doctrine generally allows removal in cases where federal law completely preempts state-law claims pleaded by the plaintiff. Id.

- Removal based on Diversity:
  - When a case is removed based on diversity, the case must have been removable at the time it was filed in state court. Thus, post-filing changes in a party’s citizenship will not convert a nonremovable case into a removable one.
    - Gibson v. Bruce, 108 U.S. 561, 563 (1883);
  - Requires complete diversity between plaintiffs and defendants.
    - Disregard fictitious defendants. § 1441(b)(1).
    - Properly joined and served home-state defendant precludes removal based on diversity. § 1441(b)(2).

- Improperly Joined Defendants are not considered for diversity
  - “[Improper] joinder can be established in two ways: (1) actual fraud in the pleading of jurisdictional facts, or (2) inability of the plaintiff to establish a cause of action against the non-diverse party in state court.” Mumfrey v. CVS Pharmacy, Inc., 719 F.3d 392 (5th Cir. 2013) (quoting Travis v. Irby, 326 F.3d 644, 647 (5th Cir. 2003)).
  - The Fifth Circuit set forth the standard for misjoinder in Smallwood v. Ill. Cent. R.R. Co., 385 F.3d 568, 573 (5th Cir. 2004) (en banc). “Ordinarily, if a plaintiff can survive a Rule 12(b)(6) challenge, there is no improper joinder.” When, however, a complaint states a claim that satisfies 12(b)(6) but has “misstated or omitted
discrete facts that would determine the propriety of joinder . . . the district court may, in its discretion, pierce the pleadings and conduct a summary inquiry.” Id. at 573 (citations omitted).

- *See also Hornbuckle v. State Farm Lloyds*, 385 F.3d 538 (5th Cir. 2004) (“[A] local defendant is deemed fraudulently joined not only when there is no arguably reasonable basis for predicting that the local law would recognize the cause of action pled against that defendant, but also when, as shown by piercing the pleadings in a summary judgment type procedure, there is no arguably reasonable basis for predicting that the plaintiff would produce sufficient evidence to sustain a finding necessary to recover against that defendant.”);

- *Badon v. R J R Nabisco, Inc.*, 224 F.3d 382, 390 (5th Cir. 2000) (“[W]e have consistently recognized that diversity removal may be based on evidence outside of pleadings to establish that the plaintiff has no possibility of recovery on the claim or claims asserted against the named resident defendant and that hence such defendant is fraudulently joined and his citizenship must be disregarded for jurisdictional purpose . . . . Thus it is clear that although a state court complaint on its face may allege a state law claim against an in-state defendant that does not preclude it from being removable (by the non-resident defendant), when filed, if the plaintiff’s pleading is pierced and it is shown that as a matter of law there is no reasonable basis for predicting that the plaintiff might establish liability on that claim against the in-state defendant.”);

- *Ross v. Citifinancial, Inc.*, 344 F.3d 458, 462 (5th Cir. 2003) (there must be a “reasonable possibility of recovery” against the nondiverse defendant, “not merely a theoretical one”).

- *Smallwood v. Illinois Cent. R.R. Co.*, 385 F.3d 568 (5th Cir. 2004)(“[W]hen, on a motion to remand, a showing that compels a holding that there is no reasonable basis for predicting that state law would allow the plaintiff to recover against the in-state defendant necessarily compels the same result for the nonresident defendant, there is no improper joinder; there is only a lawsuit lacking in merit.”).

- *Tapscott v. MS Dealer Service Corp.*, 77 F.3d 1353 (11th Cir.1996), abrogated on other grounds by *Cohen v. Office Depot, Inc.*, 204 F.3d 1069 (11th Cir.2009) (finding that egregious misjoinder (not mere misjoinder) under FRCP 20 can constitute fraudulent joinder).

  - Note, the Fifth Circuit has not yet adopted this concept, but many lower courts have.

  - Removal when case “becomes” removable
    - If not initially nonremovable, a case may later become removable through the dismissal of all nondiverse parties.
      - *Estate of Martineau v. ARCO Chem. Co.*, 203 F.3d 904, 910 (5th Cir. 2000);
    - Defendant(s) may also remove a case that could not initially have been removed within 30 days of an “amended pleading, motion, order or other paper” from which it is ascertainable that the case has become removable. § 1446(b)(3).
“Other papers” may include a variety of things.
- *S.W.S. Erectors, Inc. v. Infax, Inc.*, 72 F.3d 489, 494 (5th Cir. 1996) (deposition transcript);

Generally, a decision by a court of appeal is not an “other paper” except in narrowly limited circumstances.

The information supporting removal based on a copy of an amended pleading, motion, order or other paper should be “unequivocally clear and certain” to start the time limit running for a notice of removal.
- *Bosky v. Kroger Tex., LP*, 288 F.3d 208, 211 (5th Cir. 2002).

This promotes judicial economy and avoids “protective removals.” But this often presents a dilemma to a defendant. If removal is done upon receipt of some “other paper” indicating no claim, it may be premature.
- *Travis v. Irby*, 326 F.3d 644, 650-51 (5th Cir. 2003) (removal based on lack of evidence was premature because discovery was ongoing and lack of evidence at given time was insufficient to show that she has no possibility of establishing liability against a non-diverse defendant at trial). Note, however, that the end of discovery is not a trigger.

- There is a one-year limitation on removing cases that “become” removable absent a bad faith effort to prevent removal. 1446(c)
- Courts distinguish, however, between “voluntary and involuntary” dismissals, which requires the dismissal be pursuant to a voluntary act of the plaintiff.
  - The Fifth Circuit has recognized two situations in which the plaintiff’s voluntariness is irrelevant:
    - (1) when the court dismisses a claim against a nondiverse defendant based on fraudulent joinder and
    - (2) when the state court severs the claims against improperly joined nondiverse defendants, rendering the action against the diverse defendant removable.
- *Crockett v. R.J. Reynolds Tobacco Co.*, 436 F.3d 529, 533 (5th Cir. 2006).

- Other Removal Issues:
  - All Writs Act, 28 USC § 1651(a) is not an independent grant of jurisdiction that can support removal.
    - *See also Rivet v. Regions Bank*, 522 U.S. 470 (1998) (prior federal judgment was res judicata, but that is only a defense and not a basis for removal).
  - Special rules for removal in Multi-party, Multiforum removals:
    - “No home-state defendant” rule allows removal even if there would not have been original jurisdiction.
    - This rule also provides a notice of removal may be filed “within 30 days of a after the date on which the defendant first becomes a party to an action [before] a United States district court that arises from the same accident as the action in State court, or at a later time with leave of the district court. § 1441(e).
  - Separate and Independent Claims, 28 U.S.C. § 1441(c):
• Joinder of non-removable claim does not bar removal when joined with federal question claim, but court must remand the non-removable claims only to state court.
• A third-party defendant may not remove under § 1441(a) and most courts hold under 1441(c) either. But Fifth Circuit is in the minority in finding some instances in which third-party defendants may remove under 1441(c). Carl Heck Engineers, Inc. v. LaFourche Parish Police Jury, 622 F.2d 133 (5th Cir.1980) (A third-party defendant, however, may remove under 1441(c) because, unlike 1441(a), 1441(c) does not limit its application according to party status).
  o The “separate and independent” clause was removed by 2011 Amendments to 1441(c) and on that basis, some courts question whether this holding is still valid. Courts are, however, continuing to follow it. See, e.g., Genusa v. Asbestos Corp. 18 F. Supp. 3d 773 (M.D. La. 2014) (Brady, J.)
• Earlier cases may no longer apply
• Pre-1990 version: discretionary remand of the entire matter
• 1990-2011 version: discretionary remand of “all matters in which State law predominates” other than the claims conferring removal jurisdiction.
  o Poche v. Tex. Air Corps., Inc., 549 F.3d 999, 1004 (5th Cir. 2008) (discussing different versions and reversing remand of FLSA claim when state law issues predominated).
  • Removal of maritime/admiralty claims:
    o Before 2011, the law was clear that “saving to suitors” clause in 28 U.S.C. § 1333(1) prohibited removal of maritime cases from state court, permitting a plaintiff whose admiralty or maritime case does not fall within the federal court’s exclusive admiralty jurisdiction to bring a claim “at law” in state court.
      ▪ Luera v. M/V Alberta, 635 F.3d 181, 188 (5th Cir. 2011);
      ▪ In re Dutile, 935 F.2d 61, (5th Cir. 1991) (practical effect of § 1441(a) and § 1441(b) is to prevent removal of admiralty claims pursuant to § 1441(a) unless there is complete diversity of citizenship predicated on out of state defendants);
      ▪ Morris v. T E Marine Corp., 344 F.3d 439, 444 (5th Cir. 2003) (To remove a maritime claims brought in state court under the “saving to suitors” clause, the case must have a separate statute that provides an independent basis for federal jurisdiction) (citing Romero v. Int’l Terminal Operating Co., 358 U.S. 354, 377–79, 79 S.Ct. 468, 3 L.Ed.2d 368 (1959)).
    o 28 U.S.C. § 1441(a) no longer contains the “arising under” language from the prior version.
      ▪ Although some district courts have interpreted the revision to now allow removal, most courts have rejected that approach and continue to find general maritime claims are not removable absent some basis for federal jurisdiction other than admiralty.
There is no derivative jurisdiction bar to federal court resolution. 1441(f).

Special Removal Statutes (§§ 1442 – 1444; 1452-1455)
- Federal Officer or agencies, § 1442
- Armed forces for acts done under color of office or status, § 1442a
- Civil rights, § 1443
- Foreclosure, § 1444
- Bankruptcy, § 1452
- Class Actions, § 1453
- Patents, § 1454
- Criminal Prosecutions, § 1455

Non-removable actions (§ 1445)
- Certain suits against RR or commercial carriers based on Bills of Lading
- Worker’s compensation suits
- Violence against women’s act

Removal Procedure

- Notice Requirement § 1446:
  - Removing party must “promptly” give notice of removal to all adverse parties and file a copy of the Notice with the clerk of state court, which effects the removal.
  - Must contain short and plain statement for grounds of removal, together with pleadings and orders served upon defendants in such action
  - Filing time:
    - Must be filed 30 days after receipt of copy of initial pleading, or
    - If not originally removable and the case later becomes removable, must be filed within 30 days of receipt of copy of amended pleading, motion, order or other paper from which it may first be ascertained that the case has become removal.
      - Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc., 526 U.S. 344 (1999) (30-day removal period began to run not when defendant received faxed, file-stamped copy of complaint, but rather, when defendant was later formally served by certified mail).
      - Cases based on diversity jurisdiction may not be removed unless they “become removable” within 1 year of commencement, absent plaintiff’s bad faith actions to prevent removal.
- Rule of Unanimity - all defendants “properly joined and served” must join in or consent to the removal
  - This requirement only applies to removal under § 1441(a) (original jurisdiction) and not to federal officer or other special removal provisions
  - 2011 major change – Removal is no longer limited to the first-served defendant.
    - Each defendant has its own right to remove within 30 days of receipt by or service of the initial pleading and earlier filed defendants can still consent even though they can no longer remove the case.
      - Andrews v. AMERCO, 920 F. Supp. 2d 696 (E.D. La. 2013) (Brown, J.) (holding removal improper because only defendant that could timely remove was fraudulently joined in-state defendant).
  - Merely representing that X consents is not sufficient; each defendant must file something in the record to reflect that party’s consent.
    - Getty Oil Corp. v. Ins. Co. of N. Amer., 841 F.2d 1254, 1262 (5th Cir. 1988).
What about an unserved co-defendant who has additional grounds for removal?

- In Humphries v. Elliot Co., 760 F.3d 414 (5th Cir. 2014), the district court remanded a claim premised on supplemental jurisdiction after dismissing the claims against removing defendant. The remaining defendant was not served when the prior defendant removed, did not file its own notice of removal, and did not join in the removing defendant’s removal. It did, however, assert the federal contractor defense in its Answer. The court reasoned that the defendant waived its right to pursue its government contractor defense in a federal forum when it failed to join in the Notice of Removal or file its own. The Fifth Circuit reversed, holding: “where a party removes a case to federal court pursuant to § 1442, a later-served defendant preserves its right to a federal forum under §1442 by asserting the grounds for same in its answer filed after removal.”

- Amount in controversy:
  - If case is removed based on diversity, the sum demanded in good faith in the complaint is deemed to be the amount in controversy. 28 USC § 1446(c)(2); Mt. Healthy City Sch. Bd. of Ed. v. Doyle, 429 U.S. 274, (1977) (“[T]he sum claimed by the plaintiff controls if the claim is apparently made in good faith.”) (quoting St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283, 288 (1938)).
  - The Notice of Removal may assert the amount in controversy if the initial pleading seeks nonmonetary relief, or a money judgment, but State practice either does not permit demand for a specific sum or permits recovery of damages in excess of the amount demanded.” 28 USC § 1446(c)(2).
  - § 1446(a) specifies the same “short and plain” statement requirement as Rule 8, so defendant need not include evidentiary support for the allegation in the notice of removal. Dart Cherokee Basin Operating Co., LLC v. Owens, 135 S.Ct. 547 (2014).
  - Disputed amounts:
    - If Plaintiff disputes the allegation, both sides may submit evidence and the court determines whether, by a preponderance of the evidence, that the amount requirement is satisfied. § 1446(c)(2)(B); Dart, 135 S. Ct. at 553-54
    - When amount is in dispute, the burden is on removing party. Gebbia v. Wal-Mart Stores, Inc., 233 F.3d 880, 882 (5th Cir. 2000) (attorneys’ fees included in amount in controversy).
    - The U.S. 5th Circuit recently noted, however, the fact “that the removing party bears the burden of proving the amount in controversy does not mean that the removing party cannot ask the court to make common-sense inferences about the amount put at stake by the injuries the plaintiffs claim.” Robertson v. Exxon Mobil Corp., No. 15-30920, 2015 WL 9592499, at *3 (5th Cir. Dec. 31, 2015) (citing De Aguilar v. Boeing Co., 11 F.3d 55, 57 (5th Cir. 1993) in which the court “found it facially apparent that claims for wrongful death…exceeded [the amount in controversy], even though the complaint did not specify an amount of damages and the plaintiffs’ attorney had submitted an affidavit stating that no plaintiff’s damages exceeded [the amount in controversy] and Allen v. R&H Oil & Gas Co.,
63 F.3d 1326, 1336 (5th Cir. 1995) where federal jurisdiction was supported “because a court, in applying only common sense, would find that hundreds of plaintiffs who sought punitive damages for a wide variety of harm...would collect more than [the amount in controversy] if they were successful) (internal quotation marks omitted).

- **Stipulations**
  - Before removal, Plaintiff may stipulate that recovery will not exceed jurisdictional amount.
    - *St. Paul Mercury Indemnity Co.* at 294 (1938) ("If [a plaintiff] does not desire to try his case in the federal court he may resort to the expedient of suing for less than the jurisdictional amount, and though he would be justly entitled to more, the defendant cannot remove.").
  - But Plaintiff’s post-removal efforts to stipulate away jurisdiction are insufficient.
    - *Id.*
  - Class representatives, however, cannot stipulate away putative class members’ monetary recovery because those stipulations by the putative representative are not binding on class members.

- **Value of non-monetary relief:**
  - The “amount in controversy” is determined by the value of the object of the litigation.
  - In *Duderwicz v. Sweetwater Sav. Ass’n,* 595 F.2d 1008, 1014 (5th Cir. 1979), the Fifth Circuit stated that the amount in controversy is valued by measuring the judgment’s pecuniary consequences to those involved in the litigation.
  - Although this language suggests the court should value the amount from both the perspective of the value to Plaintiff and loss to Defendant, later Fifth Circuit cases suggest (and most district court cases hold) that the plaintiff’s viewpoint rule applies to measure the amount in controversy. See, e.g., *Garcia v. Koch Oil Co.,* 351 F.3d 636, 638 (5th Cir. 2003).

- **Potential Defendants**
  - A removing defendant need not negate the existence of a potential defendant whose presence in the action would destroy diversity.

- **Amendments to Notice of Removal**
  - Notice may be freely amended within the 30 day period.
  - May amend to cure defective or inartful allegations of jurisdiction later (28 USC § 1653). This means that a defendants may amend to set out more specifically the grounds for removal that already have been stated, albeit imperfectly, in the original notice,” but not that it may add completely new grounds for removal.

**Post-Removal Proceedings governed by FRCP**

- FRCP 81(c) - Answer due 21 days after service or 7 days after removal, whichever is longer.
Remands (§ 1447(c) & (e))

- Remand must be filed within 30 days of removal for any defect other than lack of subject matter jurisdiction.
  - The presence of an in-state defendant is a procedural defect that is waived unless raised within thirty days of removal.
    - 28 U.S.C. § 1447(c); Denman by Denman v. Snapper Div., 131 F.3d 546, 548 (5th Cir. 1998); In re Shell Oil Co., 932 F.2d 1518, 1521, 1523 (5th Cir. 1991);
    - See also Williams v. AC Spark Plugs Div. of GM Corp., 985 F.2d 783, 786 (5th Cir. 1993); In re Digicon Marine, Inc., 966 F.2d 158, 160 (5th Cir. 1992) (explaining that any defects other than lack of subject matter jurisdiction are waivable procedural defects).
  - 28 USC § 1445 sets forth some non-removable claims, and removal of case despite a statutory prohibition is a procedural defect.
    - “We have consistently held that ‘when section 1447(c) speaks of any defect in removal procedure, it includes within its reach the bringing of an action not within the court’s removal jurisdiction but that could have been brought originally in that court.’” Ernewayn v. Home Depot U.S.A., Inc., 727 F.3d 369, 371 (5th Cir. 2013) (citing Hopkins v. Dolphin Titan Intern., Inc., 976 F.2d 924, 926 (5th Cir. 1992) (quoting Baris v. Sulpicio Lines, Inc., 932 F.2d 1540, 1544–45 (5th Cir. 1991) (internal quotations omitted)));
  - There is a continued dispute over whether maritime claims are now removable. The law is clear, however, that removing a case in violation of the “savings to suitors” clause is a procedural defect.
    - Williams v. AC Spark Plugs Div. of Gen. Motors Corp., 985 F.2d 783, 787 (5th Cir. 1993); see also Baris v. Sulpicio Lines, 932 F.2d 1540, 1543–44 (5th Cir. 1991) (“The plaintiffs have confused improper removal (i.e., lack of removal jurisdiction) with lack of original subject matter jurisdiction. The former is waivable ... the latter is not.” (citations omitted)). Accordingly, if a case is removed on that basis and no remand is filed within 30 days of removal, it stays in federal court.
- Court must remand at any time if, at any time before final judgment, it appears the court lacks subject matter jurisdiction. 28 USC § 1447(c).
  - Court may not, however, sua sponte remand on procedural grounds. In re Allstate Ins. Co., 8 F.3d 219, 221 (5th Cir. 1993) (vacating district court’s sua sponte procedural-defect-based remand order); see also Schexnayder v. Entergy La., Inc., 394 F.3d 280, 284 (5th Cir. 2004) (“[W]ithout a motion from a party, [a] district court's [procedural-defect-based] remand order is not authorized by § 1447(c)”).
- If plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, court may either deny joinder or permit joinder and remand. 28 USC § 1447(e).
  - The district court should scrutinize an amended pleading naming a new nondiverse defendant in a removed case “more closely than an ordinary amendment.” Hensgens v. Deere & Co., 833 F.2d 1179, 1182 (5th Cir. 1987).
  - Court should consider several factors, including “the extent to which the purpose of the amendment is to defeat federal jurisdiction, whether plaintiff has been dilatory in asking for amendment, whether plaintiff will be significantly injured if amendment is not allowed, and any other factors bearing on the equities.” Hensgens, 833 F.2d at 1182;
• Priester v. JP Morgan Chase Bank, N.A., 708 F.3d 667, 679 (5th Cir. 2013) (noting that Hensgens is the “correct legal standard” to apply in determining whether joinder of nondiverse parties should be permitted after removal);
• See also Moore v. Manns, 732 F.3d 454, 456 (5th Cir. 2013) (denying motion for leave to amend to add non-diverse defendants (safety employees of defendant employer) because any general administrative responsibility was insufficient to impose personal liability and amendment served only to defeat jurisdiction).

Remand Procedure

• Certified copy of Order of remand shall be sent to the Clerk of state court.
  o 28 USC § 1447(c).
• Jurisdiction over the removed case shifts back to the state court once the Clerk of Court certifies and mails the remand order.
  o Meyers v. Chesterson, Civil Action No. 15-292, 2015 WL 3797139 (E.D. La. June 18, 2015) (Fallon, J.) (court divested of its jurisdiction to issue stay or reconsider once clerk mails certified copy of remand order);
  o See also Browning v. Navarro, 743 F. 2d 1069, 1078 (5th Cir. 1984) (“federal court completely divested of jurisdiction once it mails a certified copy of the [remand] order to the clerk of the state court.”).
• But, when an exception to non-reviewability of remand exists, the appellate court has jurisdiction to review the remand order and the district court has jurisdiction to review its own order, and to vacate or reinstate that order.
  o In re Shell, 932 F.2d 1523, 1528 (5th Cir. 1991).
• There are some statutory exceptions to remand procedures
  o e.g., § 1441(e)(3): remand of damages after liability determination in Multiparty, Multiforum cases.
• § 1447(c) allows the court to impose “just cost and actual expenses, including attorneys’ fees” when remanding a case.
  o Courts interpret this provision to allow attorneys’ fees for improper removal if the removing party lacked objectively reasonable basis for removal.

Appeal of Remand Orders

• Congress has placed broad restrictions on the power of federal appellate courts to review district court orders remanding removed cases to state court.
• Some examples of the limitation on review:
  o A district court’s decision to abstain from “hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11“ for reasons of comity is not reviewable by the court of appeals. See 28 U.S.C. § 1334(d).
  o A district court’s decision to remand a case, “on any equitable ground,” that had been removed to the district court under 28 U.S.C. § 1452(a) is not reviewable by a court of appeals. See 28 U.S.C. § 1452(b).
§ 1447(d) provides: “An order remanding a case . . . is not reviewable on appeal or otherwise, except . . . [cases removed] pursuant to 1442 [federal officer or agency] or 1443 [civil rights] . . .”

- In Thermtron Prods., Inc. v. Hermansdorfer, 423 U.S. 336, 351, (1976), the Court interpreted the restrictions in § 1447(d) to be limited to remands based on grounds set forth in § 1447(c). Section 1447(d) “must be read in pari materia with § 1447(c), so that only remands based on grounds specified in § 1447(c) are immune from review under § 1447(d).”

- There have been at least three versions of § 1447(c) in the last 30 years:
  - Before 1988, §1447(c) read, in pertinent part: “If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the court shall remand the case.
  - In 1988, Congress amended § 1447(c) to read, in pertinent part: “A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal . . . . If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.”
  - Now, § 1447(c) reads, in pertinent part: “A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded . . . .”

- Addressing the post-1988 version of § 1447(c) in Quackenbush v. Allstate Ins. Co, 517 U.S. 706, 711–12 (1996), and Things Remembered, Inc. v. Petrarca, 516 U.S. 124, 127, (1995), the Court interpreted § 1447(c) & (d) to preclude only review of remands when based on lack of subject matter jurisdiction or in response to a motion to remand for defect in removal procedure.
  - When a district court remands a properly removed case because it lacks subject matter jurisdiction, the remand is covered by § 1447(c) and is thus shielded from review by § 1447(d).
    - Powerex Corp. v. Reliant Energy Servs., 551 U.S. 224, 234 (2007);
    - See also Kircher v. Putnam Funds Trust, 547 U.S. 633 (2006) (holding that § 1447(d) bars review of remand of case removed under the Securities Litigation Uniform Standards Act);
    - Arnold v. State Farm Fire & Cas. Co., 277 F.3d 772, 775 n. 2 (5th Cir. 2001) (determining that under 28 U.S.C. § 1447(d) and the Supreme Court’s interpretation of that statute, there is no appellate review of remand orders premised on lack of subject-matter jurisdiction).

- The Fifth Circuit has also held § 1447(d) precludes appellate review of a remand order issued pursuant to § 1447(e) (decision to allow joinder of non-diverse defendants and remand after proper removal).
  - Fontenot v. Watson Pharm., Inc., 718 F.3d 518, 521 (5th Cir. 2013)
  - However, in Vaillancourt v. PNC Bank, N.A., 771 F.3d 843 (5th Cir. 2014), the Fifth Circuit reviewed a district court’s remand order, which found that a Trustee was properly joined in the suit. The court declined to exercise supplemental jurisdiction over those claims because the court’s stated rationale fell within the discretionary remand ambit, and reversed remand because the district court had diversity jurisdiction. Id. (“[W]hen the trial court ‘clearly and affirmatively’ states that it is remanding on a ground other than a lack of subject matter jurisdiction,
the [28 U.S.C. § 1447(d) bar to appeal does not apply.”] (quoting Tillman v. CSX Transp., 929 F.2d 1023, 1027 (5th Cir. 1991)).

- **Appellate review is allowed when:**
  - Remand is for a reason other than those listed in § 1447(c).
    - If the statutory bars to review do not apply, a remand order is a final order for the purposes of 28 U.S.C. § 1291. *Quackenbush,* 517 U.S. at 713.
  - Reviewing a court’s sua sponte remand for procedural defects.
    - *Texas v. Florance,* 235 Fed. Appx. 319, 320 (5th Cir. 2007) (holding that a court may review a district court’s sua sponte remand for procedural defect because that is neither a subject matter based remand nor a ruling on a timely filed motion to remand under § 1447(c) asserting procedural defect);
    - *In re Allstate Ins. Co.*, 8 F.3d 219, 221 (5th Cir. 1993) (vacating district court’s sua sponte procedural-defect-based remand order);
    - *Schexnayder v. Entergy La., Inc.*, 394 F.3d 280, 284 (5th Cir. 2004) (“[W]ithout a motion from a party, [a] district court’s [procedural-defect-based] remand order is not authorized by § 1447(c).”).
    - A removal in violation of a procedural rule is a defect in removal procedure that must be timely asserted; it is not a jurisdictional defect. *Ernewayn v. Home Depot U.S.A., Inc.*, 727 F.3d 369, 370–71 (5th Cir. 2013) (finding that the removal of a worker’s comp case contrary to state law is a defect in removal procedure that bars appellate review of remand).
  - A court exceeds its statutorily-defined authority to remand.
    - *Thermtron Prods., Inc. v. Hermansdorfer,* 423 U.S. 336, 351 (1976) (holding that the remand of a properly removed case based on diversity could not be remanded on the basis of efficiency and that the fact that the review was proper because the court exceeded its statutory authority).
    - An order is “distinct and separable” if it precedes the remand order “in logic and in fact” and is “conclusive.”
    - An order precedes a remand “in logic and in fact” when the prior order is what deprives the court of subject-matter jurisdiction and necessitates the remand. *See, e.g., Heaton v. Monogram Credit Card Bank of Ga.*, 297 F.3d 416, 421 (5th Cir. 2002) (finding an order preceded the remand in logic and in fact when the remand decision was “necessarily predicated” on the order).
    - An order is conclusive when “it will have a preclusive effect in the state-court litigation and will not be subject to review there.” *Regan,* 524 F.3d at 631 (quoting *First Nat’l Bank,* 136 F.3d at 394).
    - A separate order “does not just determine the forum in which a claim will be heard. It...determines whether there is any claim to be heard in any forum.” *Id.* at 631–32.
  - Review is limited to propriety of award of attorneys’ fees.
- *Garcia v. Amfels, Inc.*, 254 F.3d 585, 587 (5th Cir. 2001) (“This Court has appellate jurisdiction to review the imposition of costs and fees even though 28 U.S.C. § 1447(d) provides that a remand order is not reviewable by appeal or otherwise.”);
- *Miranti v. Lee*, 3 F.3d 925, 927–28 (5th Cir. 1993) (“Guided by . . . authorities which favor appellate review of a sanctions order (even if the remand order itself is not reviewable), we hold that § 1447(d) does not prohibit review by this court of the order of costs and fees.”).

- Remand is discretionary.
  - *Carlsbad Tech., Inc. v. HIF Bio, Inc.*, 556 U.S. 635, 640–41 (2009) (Statutory bar on appellate review of an order that remands a case to the state court from which it was removed does not apply to a district court’s dismissal of all federal claims and discretionary remand based on decision not to exercise supplemental jurisdiction because that remand decision is not jurisdictional).
  - The review is statutorily-authorized.
    - Class actions 28 U.S.C. § 1453(c)(1)
    - Remand of bankruptcy proceedings involving permissive abstention of a Chapter 15 bankruptcy case itself or permissive abstention of proceedings arising in or related to a Chapter 15 case. 28 U.S.C.A. §§ 1334(c)(1), 1452(b).
  - The 5th Circuit also recently recognized “a limited exception to the nonreviewability provisions of §§ 1334(c)(1) and 1452(b), but only for cases that involve permissive abstention and are related to Chapter 15 bankruptcies.”
    - *Firefighters’ Ret. Sys. v. Citco Grp. Ltd.*, 796 F.3d 520, 525 (5th Cir. 2015)
      - “As a Chapter 15 Bankruptcy is not an enumerated ground for permissive abstention, an appellate court may review an abstention order despite § 1334(d)’s bar against appellate review of decisions to abstain. Similarly, an appellate court may review a remand order that is based on permissive abstention despite § 1452(b)’s bar against appellate review of decisions to remand. Otherwise the [2005] amendment to § 1334(c)(1) would be rendered nugatory in Chapter 15-related cases that are removed from state court.”

**Impact of Removal on Remanded State Court Action**

- When a remand to the state court is based on want of jurisdiction on the part of the federal court, it is for the state court to determine what effect, if any, will be given to pleadings filed in the federal court.
- Numerous Louisiana appellate courts have given effect to Answers filed in federal court:
  - *Armentor v. Gen. Motors Corp.*, 399 So.2d 811 (La. App. 3d Cir. 1981) (exception of improper venue waived by filing of answer in federal court);
  - *deReyes v. Marine Mgmt. & Consulting*, 544 So.2d 1259 (La. App. 4th Cir. 1989) (no waiver of declinatory exception of lack of personal jurisdiction after remand when federal court answer included special defense of lack of personal jurisdiction as party who avails himself
of procedural device while in federal court should not be penalized for procedural pleading differences);

- While agreeing that an Answer will be given effect, the Louisiana Supreme Court expressly reserved a decision as to whether all pleadings filed in federal court during the removal period will be given effect in state court after remand.
  - Rivet v. Regions Bank, 2002-1813 (La. 2/25/03); 838 So.2d 1290, 1294.
  - Lewis v. Transocean Terminal Operators, Inc., 2004-0476 (La. App. 4 Cir. 3/16/05, 4-5); 900 So.2d 179, 181-82 (finding that neither the failure to file an answer when due in federal court nor filing of Motion to Dismiss for Lack of Procedural Capacity (equivalent to dilatory exception in state court) precludes assertion of declinatory exceptions in state court after remand, because to do so would penalize party for pleading difference because improper venue was not a valid objection in federal court).
  - Object Tech. Info. Specialists Corp. v. Sci. & Eng'g Assocs., 2006-0162 (La. App. 4 Cir. 2/28/07); 955 So.2d 151, 155 (finding no waiver of right to file exception seeking arbitration by removal to federal court and a motion to dissolve TRO because both steps were taken in effort to invoke alternative dispute resolution procedure of Contracts Dispute Act);
  - State of Louisiana, through the Division of Administration v. Algernon Blair, Inc., 415 So. 2d 612 (La. App. 3d Cir. 1982) (contractor did not waive right to arbitrate by failing to raise through dilatory exception prior to Answer where case was removed to federal court and defendant filed in its answer a motion to dismiss for failure to arbitrate and motion to stay proceeding and compel arbitration).