

Removal: What Every Litigator Should Know

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This outline should not be utilized as a substitute for professional service in specific situations or to provide legal advice. This outline is intended to provide general information about certain aspects of employment law. Since the law changes over time, questions about individual problems should be addressed to the attorney of your choice.

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What Every Litigator Should Know About Removal to Federal Court

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I. INTRODUCTION: HISTORICAL BACKGROUND AND PURPOSE FOR REMOVAL JURISDICTION

The removal of cases from state to federal courts is not referenced in the Constitution, and is purely statutory in nature. Removal jurisdiction was first established by the Judiciary Act of 1789. 1 Stat. 73, §12. This statute was gradually expanded until, by 1875, virtually all cases within the jurisdiction of federal courts could be removed by either party. 18 Stat. 740, §2. The Judiciary Act of 1887 narrowed the right of removal, raising the jurisdictional amount and limiting the right to defendants. 24 Stat. 552, §§1 and 2. This statute is the basis for the present removal statute. *See* 14B Wright, Miller and Cooper, *Federal Practice and Procedure: Jurisdiction* 3d §3721 (1998).

It appears certain that the original purpose of the right of removal in diversity cases was to protect non-resident defendants from local prejudice they might encounter in state courts (i.e., local judges or jurors favoring local plaintiffs). In federal question cases, the purpose was to have questions of federal law presented to the system of courts more familiar with such issues. In modern practice, fear of local prejudice or the perception of incompetent state courts is not typically the reason for removal. More often, removal is sought on the basis of what defendants perceive to be the practical and strategic advantages of litigating the case in federal court, rather than state court.

Clearly, an understanding of the requirements and procedures for removal is essential for the competent litigator. However, an attorney contemplating removal must first decide whether removal to federal court is in the best interests of the client, considering both the nature of the case and the individual characteristics of the courts in question.

II. STRATEGY: SHOULD I REMOVE?

In deciding whether to remove a state court action to federal court, defendants should consider the same factors that the plaintiff should have considered in selecting the forum initially. The following considerations are by no means exhaustive, but do provide some guidance when analyzing the efficacy of removing the case to federal court:

A. Judge

1. Federal judges are appointed for life and, right or wrong, federal judges are generally considered to be more knowledgeable concerning complex cases, or cases in which federal issues predominate.
2. Because of their lifetime appointment, as opposed to election, federal judges may be less susceptible to public opinion and local political considerations.
3. Federal judges have the assistance of *attorney* law clerks.
4. Federal judges are likely to be more familiar with the case file and, therefore, may be more inclined to grant summary judgment or other pretrial dispositions.

B. Jury

1. Unanimous verdicts are required in federal civil trials (F.R.Civ.P. 48).
2. Consider the geographic area from which the jury is drawn (for example: the federal, Wichita-Hutchinson jury division comprises Butler, Cowley, Harper, Harvey, Kingman, Marion, McPherson, Reno, Rice, Sedgwick and Sumner counties. See D.Kan. Rule 38.1).
3. Consider how *voir dire* is conducted in the respective courts.
4. Where a jury is desired by the plaintiff, there is always a chance that by removing to federal court, plaintiff's counsel will inadvertently waive his or her right to a jury trial by failure to make a timely demand.

C. Other Factors

1. Consider the time to trial, i.e., congestion of the civil trial dockets of the respective state and federal courts.
2. Are there mandatory alternative dispute resolution procedures in either court?
3. Are there differences between federal and state rules of evidence?
4. Consider the desirability of being in the state or federal appellate court if the case is a likely candidate for appeal.
5. Remove the "home-court" advantage. If the suit is pending in the plaintiff's home county or the county in which plaintiff's attorneys practice, removal may bring the case to a more familiar and/or more convenient forum for you or your client and a less comfortable and/or more inconvenient forum for opposing counsel.

6. Familiarity with federal procedure. If you are more familiar with local federal practice than plaintiff's counsel, it may work to your advantage to remove the case.
7. Finally, because the notice of removal must be signed in accordance with Rule 11, prudent counsel will take into account the possibility that sanctions may be imposed if removal is subsequently determined to be improper.

III. PROCEDURE: HOW DO I DO IT?

If, after considering the pertinent factors, you have come to the conclusion that removal is appropriate in your case, you can now turn your attention to the procedural aspects involved in the removal process.

A. Who Can Remove?

1. **Defendants.** The right to remove a case from state to federal court is vested exclusively in “. . . the defendant or the defendants . . .” 28 U.S.C. §1441(a); 28 U.S.C. §1446(a). *See also Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 61 S.Ct. 868 (1941).
2. **But Not Plaintiffs.** Because the right of removal is vested exclusively in true defendants, a plaintiff who has chosen to commence the action in state court cannot later remove to federal court, even to defend against the counterclaim. *See* 14C Wright, Miller and Cooper, *Federal Practice and Procedure: Jurisdiction* 3d §3731 (1998). The “well-established rule is that the plaintiff, who chose the forum, is bound by that choice and may not remove the case.” *Scott v. Communications Services, Inc.*, 762 F.Supp. 147, 150 (S.D. Texas 1991).
3. **Nor Third-Party Defendants.** The majority of the circuits have held that third-party defendants brought into the state action by the original defendant may not exercise the right of removal to federal court. (*See Radio Shack v. Williams*, 804 F.Supp. 151 (D.Kan. 1992)).

B. What Causes and Claims are Removable?

1. **Federal Question Jurisdiction.** “Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties.” 28 U.S.C. §1441(b).
 - a) Well Pleased Complaint Rule. “The presence or absence of federal-question jurisdiction is governed by the ‘well-pleaded complaint rule,’ which provides that federal jurisdiction exists only when a federal question is presented on the face on the plaintiff’s properly pleaded complaint.” *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987). “[T]he federal question must be

presented by plaintiff's complaint as it stands at the time the petition for removal is filed and the case seeks entry into the federal system. It is insufficient that a federal question has been raised as a matter of defense or as a counterclaim." *Metro Ford Truck Sales, Inc. v. Ford Motor Co.*, 145 F.3d 320, 326-27 (5th Cir. 1998).

- b) Plaintiff is the "Master of the Claim". The "well pleaded" complaint rule makes the plaintiff the "master of the claim" for purposes of removal jurisdiction. This means that, absent diversity, a case is removable only where a federal question is presented on the face of plaintiff's petition: "The party who brings the suit is master to decide what law he will rely upon." *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392, 107 S.Ct. 2425, 2429, fn.7, 96 L.Ed.2d 318 (1987). Thus where a plaintiff could maintain claims under both federal and state law, plaintiff can prevent removal by ignoring the federal claim and alleging only state law claims.
- c) Artful Pleading Doctrine. The rule that the plaintiff is the "master of the claim" is subject to this limitation: plaintiff cannot defeat removal of a federal claim by disguising or "artfully pleading" it as a state claim. If the only claim involved is one arising under federal law, the federal court will "recharacterize" it accordingly, in order to uphold removal. *Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 101 S.Ct. 2424, fn.2, 69 L.Ed.2d 103 (1981).
- d) Complete Preemption Doctrine. In certain limited cases, the preemptive force of federal law is so powerful that it displaces any state law cause of action, and leaves room only for a federal claim for purposes of the "well pleaded complaint" rule. *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 107 S.Ct. 1542, 95 L.Ed.2d 55 (1987). In effect, what is pleaded as a state law claim is "recharacterized" as a federal claim, and as such is removable. *Franchise Tax Board of State of Cal. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 23-24, 103 S.Ct. 2841, 2853-2854, 77 L.Ed.2d 420 (1983). The complete preemption doctrine is limited primarily to state law claims that are displaced by ERISA (Employee Retirement and Income Security Act), LMRA §301 (Labor Management and Relations Act) and RLA (Railway Labor Act). Most federal statutes do not involve the sort of pervasive regulation that precludes enforcement of state laws on the same subject.

2. **Diversity Jurisdiction**. Diversity jurisdiction exists over any civil action in which the amount in controversy exceeds the sum or value of \$75,000, exclusive of costs and interest, and the action is between citizens of different states. 28 U.S.C. §1332(a).

- a) Diversity Defined. Diversity jurisdiction exists only where there is complete diversity, which occurs when none of the defendants (served or not) is a citizen of the same state as any of the plaintiffs. *Id.*
- b) Determining Citizenship.

- (1) Corporations. A corporation is a “citizen” both of the state in which it was incorporated and of the state where it has its principal place of business. 28 U.S.C. §1332(c)(1). Therefore, actions brought in the courts of either state cannot be removed to federal court.
- (2) Aliens. Aliens lawfully admitted for permanent residence in the U.S. are “citizens” of the state of their domicile for diversity purposes (28 U.S.C. §1332(a)) and are subject to the “no local defendant” limitation of §1441(b).
- (3) Unincorporated Associations and Partnerships. The citizenship of each member of an unincorporated association or partnership must be considered in determining diversity. *Carden v. Arkoma Associates*, 494 U.S. 185, 110 S.Ct. 1015, 1021, 108 L.Ed.2d 157 (1990).
- (4) Representative Parties. The citizenship of executors, administrators, guardians, conservators and insurers sued in direct action suits is deemed to be the same as the represented party, or insured. *See, Northbrook Nat’l. Ins. Co. v. Brewer*, 493 U.S. 6, 110 S.Ct. 297, 299, 107 L.Ed.2d 223 (1989).

- c) No Local Defendant Limitation. Removal jurisdiction over diversity cases is more limited than jurisdiction over diversity cases originally brought in federal court, since removal is permissible only if none of the parties in interest *properly joined and served* as defendants is a citizen of the state in which the action is filed. 28 U.S.C. §1441(b).
- d) Diversity Must Exist When the Action is Filed and Removed. For removal purposes, diversity must exist both at the time the action was commenced and at the time of removal. *See United Food Local 919 v. Centermark Properties*, 30 F.3d 298, 301 (2nd Cir. 1994). This rule may be invoked where the original parties have changed domicile or assigned the cause of action in the intervening period. It also applies if new parties (non-diverse) have been added or have intervened after commencement but before removal. *See Farm Bureau Mutual Ins. Co., Inc. v. Eighmy*, 849 F.Supp. 40, 42 (D.Kan. 1994).
- e) Defendant's Burden to Allege Diversity. Where the petition does not disclose the citizenship of each party and the amount in controversy, these jurisdictional facts must be set forth in defendant's notice of removal. It is also the defendant's burden to prove the jurisdictional facts. *Schroeder v. Trans World Airlines, Inc.*, 702 F.2d 189, 191 (9th Cir. 1983). *See also Christian v. College Boulevard Nat. Bank*, 795 F.Supp. 370, 371 (D. Kan. 1992) (“[t]he burden of showing the propriety of removal always rests with the removing party.”); 14C Wright, Miller and Cooper, *Federal Practice and Procedure: Jurisdiction* 3d §3739 (1998).
- f) Amount in Controversy.
 - (1) Burden of Proof. If the amount of damages sought by plaintiff is unclear, defendant must also allege and “bears the burden of actually proving the facts to support . . . the jurisdictional amount” (\$75,000). *Gans v. Miles, Inc.*, 980 F.2d 564, 567 (9th Cir. 1992).
 - (2) No Counterclaims. A court should not consider the value of counterclaim in assessing the amount in controversy in the removal jurisdiction context. *Leader Mortgage Co. v. Earel*, 1998 WL 781225 (D.Kan.) *See also* 14C Wright, Miller and Cooper, *Federal Practice and Procedure: Jurisdiction* 3d §3725 (1998).
- g) Realignment of the Parties. The plaintiff's alignment of the parties is not binding on the federal court considering the defendant's removal petition. The court, if necessary, may realign the parties as plaintiffs and defendants according to their real interests. *City of Indianapolis v. Chase National Bank of New York*, 314 U.S. 63, 62 S.Ct. 15, 86 L.Ed. 47 (1941); *Maryland Cas. Company v. W. R. Grace & Company*, 23

F.3d 617, 622-23 (2nd Cir. 1993, cert. denied 513 U.S. 1052, 115 S.Ct. 655, 130 L.Ed.2d 559 (1994).

h) Sham or Fraudulent Joinder. A non-diverse party (plaintiff or defendant) named in the state court action may be disregarded if the federal court determines that that party's joinder is a "sham" or "fraudulent" so that no possible cause of action has been stated against that party. *Farias v. Bexar County Bd. of Trustees*, 925 F.2d 866, 871 (5th Cir. 1991). The removing defendant has the burden of alleging and proving the non-diverse party's joinder is "sham" or "fraudulent". *Jernigan v. Ashland Oil Co.*, 989 F.2d 812, 815-816 (5th Cir. 1993).

3. **Separate and Independent Causes of Action**. Whenever a separate and independent claim arising under federal law is joined with one or more otherwise non-removal claims, "the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which state law predominates." 28 U.S.C. §1441(c).

a) Requirements for Removal. §1441(c) allows removal where:

(1) Several claims are joined in the state law complaint;

(2) One or more of those claims is otherwise non-removable (i.e., no diversity and non "arising under" federal law); and

(3) One or more claims is a federal claim that is "separate and independent" from the non-removable claims.

b) Separate and Independent Defined. Claims are not "separate and independent" simply because they are asserted in different causes of action or derived from different "primary rights". Rather, the claims must arise from different sets of acts and different wrongs inflicted upon the plaintiff: "Where there is only a single wrong to plaintiff, for which relief is sought, arising from an interlocked series of transactions, there is no 'separate and independent' claim." *American Fire & Cas. Co. v. Finn*, 341 U.S. 6, 13, 71 S.Ct. 534, 539-540 (1951); *Emrich v. Touche Ross & Co.*, 846 F.2d 1190 (9th Cir. 1988); *In re: City of Mobile*, 75 F.3d 605, 608 (11th Cir. 1996).

c) Determination of Separate and Independent. In making all determinations of "separateness" and "independence", the complaint controls. *American Fire & Cas. Co. v. Finn*, 341 U.S. at 14, 71 S.Ct. at 540.

C. Time for Removal

1. **Notice by Initial Pleading**. "The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty

days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.” 28 U.S.C. §1446(b).

- a) Receipt vs. Service. If removability can be determined from the face of the petition, the 30 day removal period runs from the date defendant receives the complaint “by service or otherwise”. 28 U.S.C. §1446(b).
- b) Clarification of “Through Service or Otherwise”. A named defendant’s time to remove is triggered by simultaneous service of the summons and complaint, or receipt of the petition, “through service or otherwise,” after and apart from service of the summons, but not by mere receipt of the complaint unattended by any formal service. *Murphy Brothers, Inc. v. Michetti Pipestringing, Inc.*, 119 S.Ct. 1322 (1999).
- c) Notice to Any of Several Defendants. The 30 day removal period runs for all defendants from the date the first of them is served. *See Martin Pet Products, Inc. v. Lawrence*, 814 F.Supp. 56, 57 (D.Kan. 1993); (“[w]here there are multiple defendants, the 30- day period commences at least when the first defendant is served.”) If that defendant fails to remove the action within 30 days, later-served defendants cannot remove. *Id.*; *Henderson v. Holmes*, 920 F.Supp. 1184 (D. Kan. 1996); *Brown v. Demco, Inc.*, 792 F.2d 478, 481-482 (5th Cir. 1986).

2. **Notice by Amended Pleading, Motion, Order or Other Paper**. “If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, . . .” 28 U.S.C. §1446(b).

- a) Must Result from Plaintiff’s Act. Removal is appropriate only where the change that makes the action removable occurs as a result of a voluntary act by the plaintiff. *Yarnevic v. Brink’s, Inc.*, 102 F.3d 753, 754 (4th Cir. 1996); *S.W.S. Erectors, Inc. v. Infax, Inc.*, 72 F.3d 489, 494 (5th Cir. 1996); *Poulos v. Naas Foods, Inc.*, 959 F.2d 69 (7th Cir. 1992). See also *DeBry v. TransAmerica Corp.*, 601 F.2d 480 (10th Cir. 1979) (removal appropriate where the amended complaint gave notice of plaintiff’s change of residence). Other examples of “voluntary” acts include: amended complaint increases the amount in controversy; plaintiff adds a claim within jurisdiction of the federal courts; or dismissal by the plaintiff of a nondiverse defendant. See also 14 C Wright, Miller and Cooper, *Federal Practice and Procedure*: Jurisdiction 3d §3732 (1998).
- b) “Other Paper”. There is a split in the courts as to what specific items constitute “other paper” to begin the running of the 30 day period. One line of cases holds that the “other paper” provision applies only to papers filed in the state court proceeding. See *Phillips v. Allstate Ins.*

Co., 702 F.Supp. 1466 (C.D. Cal. 1989). Other courts have applied the provision to “papers” generally, and the status as “other paper” of such items as demand letters, depositions and correspondence between the parties depends on the interpretation given to §1446(b) by the individual court. *See also* 14 C Wright, Miller and Cooper, *Federal Practice and Procedure*: Jurisdiction 3d §3732 (1998).

3. **Removal Based on Diversity.** Cases may not be removed on diversity grounds more than one year after commencement of the action. 28 U.S.C. §1446(b).

D. Steps to Effect Removal

1. **Notice of Removal.** To remove a case from state court, the defendant must file in the federal court for the district and division in which the state action is pending, a notice of removal signed pursuant to Rule 11. 28 U.S.C. §1446(a). When a federal district has a division, the notice of removal should be filed in the division that embraces the county where the state court action was pending. *See* D.Kan. Rule 81.1(b).
 - a) Federal Question Cases. The notice must state that removal is based on a claim “arising under” federal law, and identify the statutory basis for the claim. If it is not otherwise apparent from the face of the petition, it should explain why the action “arises under” federal law.
 - b) Diversity Cases. The notice must state that removal is based on diversity and must state the citizenship of all parties to the state action. Specifically, the notice must state:
 - (1) Defendant’s citizenship, both when the state court action was filed and at the time of removal;
 - (2) That none of the defendants is a citizen of the state in which the action is pending;
 - (3) If a corporation is a party, both the state of its incorporation and its principal place of business; and
 - (4) Amount in Controversy. If the state court petition does not allege the amount in controversy, the removing defendant must supply this jurisdictional fact in the removal notice.
 - c) Other Grounds for Removal. If removal is based on some other ground (special statutes permitting removal), the appropriate jurisdictional facts must be stated in the removal notice.
 - d) Signed Pursuant to Rule 11. The notice of removal must be signed by the attorney subject to the certification requirements of Rule 11. *See* 28 U.S.C. §1446(a). Under Rule 11, the attorney’s signature constitutes a certificate that he or she has read it, that to the best of his or his knowledge, based on a reasonable investigation, it is well

grounded in fact and is warranted by law; “and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.” F.R.Civ.P. 11.

- e) Joinder by All Defendants. Kansas district courts have concluded that the removal statute requires all served defendants, except nominal defendants, join in or consent to the removal notice within thirty days of service. *First Nat’l. Bank and Trust Co. in Great Bend v. Nicholas*, 768 F.Supp. 788, 790 (D.Kan. 1991); *Cohen v. Hoard*, 696 F.Supp. 564, 565 (D.Kan. 1998).
- f) Exceptions. Joinder of certain defendants not required: unserved defendants (*Northern Illinois Gas Company v. Airco Indus. Gases*, 676 F.2d 270, 272 (7th Cir. 1982)); nominal or sham defendants (*Farias v. Bexar County Bd. of Trustees*, 925 F.2d 866, 871 (5th Cir. 1991)); separate and independent claims (28 U.S.C. § 1441(c)); (Where the basis for removal is that the claim against the removing defendant is “separate and independent” from claims against other defendants, their joinder is not required. *Henry v. Independent American Sav. Ass’n.*, 857 F.2d 995, 999 (5th Cir. 1988).)

2. **Copies of State Court File Attached**. A copy of all pleadings, process and orders served on the removing defendant in the state action must be filed with the removal notice. 28 U.S.C. §1446(a)

- a) D.Kan. Rule 81.2: “Within 20 days after filing the notice of removal, the removing party shall procure and file with the clerk of this court a copy of all records and proceedings had in the state court. The court may remand any case sought to be removed to this court because of failure to comply with the provisions of this subsection.”

3. **Notice to Other Parties and to State Court**. “Promptly after the filing of such notice of removal of a civil action, the defendant or the defendants shall give written notice thereof to all adverse parties and shall file a copy of the notice with the clerk of such State court, which shall effect the removal . . .” 28 U.S.C. §1446(d).

- a) Separate Notice to Plaintiff Required. §1446(d) apparently requires separate written notice to all adverse parties. It is technically not sufficient simply to serve a copy of the notice of removal filed in federal court.
- b) D.Kan. Rule 81.1(c) Notice to Parties. “Written notice of the filing of the notice of removal shall be promptly served upon all adverse parties. A copy of the notice of removal shall be filed forthwith with the clerk of the state court from which the case is removed and such filing shall effect the removal. The party removing the action shall file proof of service of all notices and filings with the clerk of the state court by certificate filed in the case with the clerk of this court.”

E. Procedure After Removal

1. **State Court Ousted of Jurisdiction.** The defendant is required to file a copy of the notice of removal with the clerk of the state court “which shall effect the removal and the state court shall proceed no further unless and until the case is remanded.” 28 U.S.C. §1447(d). No order by the federal court is necessary to complete removal. *Libhart v. Santa Monica Dairy Co.*, 592 F.2d 1062 (9th Cir. 1979). The removal is effected automatically by defendants filing a notice of removal in the federal court, filing a copy of the notice in the state court and giving notice to all adverse parties. 28 U.S.C. §1446(e). *See also* 14C Wright, Miller and Cooper, *Federal Practice and Procedure: Jurisdiction* 3d §3737 (1998).
2. **Effect of Prior State Court Proceedings.** The federal court takes the action as it stood in the state court when removed. All existing orders, including rulings on discovery and extensions of time to plead, remain in effect until modified by the federal court. *Jenkins v. Commonwealth Land Title Ins. Co.*, 95 F.3d 791, 795 (9th Cir. 1996).
3. **Federal Rules Apply After Removal.** Once a case has been removed from state court, it is subject to the Federal Rules of Civil Procedure: “These rules apply to civil actions removed . . . from state courts and govern procedure after removal . . .” F.R.Civ.P. 81(c). *See also Willy v. Coastal Corp.*, 503 U.S. 131, 135-136, 112 S.Ct. 1076, 1079, L.Ed.2d 280 (1992).
4. **Repleading Not Required.** Repleading of the state court pleadings according to federal form and content is not usually required. 14C Wright, Miller and Cooper, *Federal Practice and Procedure: Jurisdiction* 3d §3738 (1998).
5. **Service of Process After Removal.** After removal from state court, defendants not yet served with process must be served in the manner required in cases originally filed in federal court. (F.R.Civ.P. 4).

F. Remand to State Court

1. **Who May Seek Remand:** Normally, plaintiff is the party seeking remand to state court. However, where the federal court lacks subject matter jurisdiction, either the plaintiff or defendant (even the defendant who caused the removal) may seek to remand the case. 28 U.S.C. §1447(c). *American Fire & Cas. Co. v. Finn*, 341 U.S. 6, 71 S.Ct. 534 (1951). In addition, the court can and should raise lack of subject matter jurisdiction on its own motion. *See Laughlin v. Kmart Corp.*, 50 F.3d 871, 873 (10th Cir. 1995) (“If the parties fail to raise the question of the existence of jurisdiction, the federal court has the duty to raise and resolve the matter.”). Sua sponte remand for procedural defects is also permissible in Kansas. *See Townsell v. City of Kansas City, Kansas*, Case No. 95-2339-KHV, 1996 WL 225194 (D.Kan. April 12, 1996).
2. **Time for Seeking Remand**
 - a) **Based on Procedural Defects.** A motion to remand a case based on a procedural defect must be filed within 30 days after the filing of the notice of removal. 28 U.S.C. §1447(c). Procedural defects include: tardy filing of the removal notice; defects in its form or content; failure to furnish the state court papers, or to give requisite notice to adverse

parties. (Generally, the phrase “defect in removal procedure” includes any impropriety excepting those based on lack of subject matter jurisdiction. *Pierpoint v. Barnes*, 94 F.3d 813 (2nd Cir. 1996)).

There is authority to suggest that a sua sponte remand based on procedural defects must occur within the 30 day period for remand motions under 28 U.S.C. §1447(c). See *Townsell v. City of Kansas City, Kansas*, Case No. 95-2339-KHV, 1996 WL 225194 (D.Kan. April 12, 1996); *But compare Greentree Financial Corporation v. Arndt*, Case No. 98-1373-MLB. (Report and recommendation of Magistrate Judge Karen M. Humphreys dated February 18, 1999, recommending remand after the 30 day period to remand under §1447(c) expired based on plaintiff’s misrepresentation regarding its party status in the removal notice).

- b) Based on Jurisdictional Defects. Under §1447(c), “[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.” Accordingly, a motion for remand lies where there is no diversity of citizenship, or the claim does not in fact “arise under” federal law and the district court may remand a removed case in which the lack of subject matter jurisdiction is discovered at any time prior to the entry of judgment. *Amundson & Associates Art Studio, Ltd. v. National Council on Compensation Ins., Inc.*, 977 F.Supp. 1116 (D.Kan. 1997).
- c) Remand After Final Judgment. If the district court could never have exercised original jurisdiction over the case, remand is required, even after the entry of final judgment. *Barbara v. New York Stock Exchange, Inc.*, 99 F.3d. 49, 55 (2nd Cir. 1996).

3. Grounds for Remand

- a) Removal Statute Strictly Applied. Because there is a presumption against removal jurisdiction, the court must strictly construe the federal removal statute and resolve all doubt in favor of remand. *Fajen v. Foundation Reserve Ins. Co.*, 683 F.2d 331, 333 (10th Cir. 1982).
- b) Burden of Proof. The party seeking removal has the burden of proving the grounds necessary to support removal, including compliance with procedural requirements. See *Christian v. College Boulevard Nat. Bank*, 795 F.Supp. 370, 371 (D. Kan. 1992); *Dawson v. Orkin Exterminating Co., Inc.*, 736 F.Supp. 1049, 1050 (D.Colo. 1990); *Laughlin v. Prudential Ins. Co.*, 882 F.2d. 187 (5th Cir. 1989).
- c) Lack of Subject Matter Jurisdiction. Either party may seek to remand a case, or the court may remand *sua sponte*, where subject matter jurisdiction is lacking. See *American Fire & Cas. Co. v. Finn*, 341 U.S. 6, 71 S.Ct. 534, 95 L.Ed. 702 (1951).
- d) Procedural Defects. A case may be remanded for any defect in removal procedure. 28 U.S.C. §1447(c). Examples of defects held to

be procedural include: (1) removal of a case where removal is prohibited by statute (*Pierpoint v. Barnes*, 94 F.3d 813 (2nd Cir. 1996)); (2) filing a notice of removal after the 30 day period (*Wilson v. General Motors Corp.*, 888 F.2d 779 (11th Cir. 1989)); and (3) failing to explain a defendant's failure to join in the notice of removal (*Home Owners Funding Corp. of America v. Allison*, 756 F.Supp. 290 (N.D. Tex. 1991)).

- e) Joinder of Additional Defendants. "If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court." 28 U.S.C. §1447(e).

4. Waiver of Right to Remand

- a) Plaintiff's Failure to Object. A motion to remand based on a defect in removal procedure must occur within 30 days after the filing of the notice of removal in federal court. 28 U.S.C. §1447(c). If there is no objection within the 30 day limit, the plaintiff waives its right to object.
- b) Defendant's Failure to Object. Defendant's failure to object to the timeliness of the motion to remand may also constitute a waiver of any objection, and the case may be remanded. *Student A v. Metcho*, 710 F.Supp. 267 (N.D. Cal. 1989).

5. Partial Remand. Where federal and state law claims are joined, the court has the power to retain the federal claims and to remand the state law claims, in effect severing the action. *Emrich v. Touche Ross & Co.*, 846 F.2d 1190 (9th Cir. 1988). In addition, where removal was based on a federal question, and the federal claim has been eliminated, the court may either retain, remand or dismiss supplemental state claims. *Taylor v. First of America Bank-Wayne*, 973 F.2d 1284, 1287 (6th Cir. 1992).

6. Imposing Costs. "An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of removal." 28 U.S.C. §1447(c).

- a) Court's Discretion. The imposition of costs and attorney's fees is at the discretion of the district court. *Suder v. Blue Circle, Inc.*, 116 F.3d 1351 (10th Cir. 1997); *Excell, Inc. v. Sterling Boiler & Mechanical, Inc.*, 106 F.3d 318 (10th Cir. 1997).
- b) Basis for Award. Many courts require a showing of something more than lack of jurisdiction alone, i.e., that the removal was "unjustifiable," "in bad faith", "not colorable" or "tenuous". *Beightol v. Capitol Bankers Life Ins. Co.*, 730 F.Supp. 190, 196 (E.D. Wis. 1990); *Samura v. Kaiser Foundation Health Plan, Inc.*, 715 F.Supp. 970 (N.D. Cal. 1989). However, other courts have held to the contrary: "the district court does not have to find that the state court action has been removed in bad faith as a prerequisite to awarding attorney's fees." *Excell, Inc. v. Sterling Boiler & Mechanical, Inc.*, 106 F.3d 318, 322 (10th Cir. 1997).

- c) Fees as Sanctions. Federal courts have authority under F.R.Civ.P. 11 and inherent equitable power to assess attorney's fees as sanctions against the party whose litigation conduct is found to be "vexatious" or in bad faith. *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980).

ACKNOWLEDGEMENT

I wish to gratefully acknowledge the Federal Jurisdiction Workshop materials prepared by James M. Wagstaffe, Esq., of San Francisco, California.

**APPENDIX A
REMOVAL CHECKLIST**

REMOVAL JURISDICTION

A. Diversity

- ? Is there complete diversity?
- ? Does removal notice show *citizenship* (not mere residence) of each party?
- ? If there is a *corporate* party, does notice of removal show *both* its principal place of business and state of incorporation?
- ? Are there any resident defendants (who have been served), thus preventing removal?
- ? Does the notice of removal allege specific facts demonstrating that the amount in controversy exceeds \$75,000?

B. Federal Question

- ? Does the state court petition plead a claim “arising under” federal law?
- ? If not, does the “artful pleading” or “complete preemption” doctrine apply?

REMOVAL PROCEDURE

A. Removal Notice

- ? Did all defendants (who were served) join in the removal notice?
- ? Were copies of the state court pleadings attached?
- ? Was notice of removal given to state court and adverse parties?

B. Timeliness of Removal

- ? Did *initial pleadings* reveal removal jurisdiction? If so, was removal effected within 30 days after the *first* defendant received such pleadings?
- ? If initial pleadings did not show removability, when was any defendant put on notice that removal jurisdiction existed (e.g., through dismissal of nondiverse party, or addition of federal claim)? Was removal effected within 30 days thereafter?
- ? In diversity case, has more than one year passed since filing of the state court petition?

APPENDIX B 1

**NOTICE OF REMOVAL
(DIVERSITY)**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

_____)	
)	
	)	Case No.: _____
)	
Plaintiff,)	
)	
vs.)	
)	
_____)	
)	
)	
Defendant.)	
_____)	

NOTICE OF REMOVAL

TO THE CLERK OF THE ABOVE-ENTITLED COURT:

PLEASE TAKE NOTICE that defendant _____ hereby removes to this Court the state court action described below.

IV. On ____ (*date*) ____, an action was commenced in the _____ Judicial District, District Court, _____ County, Kansas, entitled _____, Plaintiff, vs. _____, Defendant, Case number _____.

V. Defendant was served with summons on _____, 19____, and received a copy of plaintiff's petition on _____, 19____. This Notice is timely.

VI. A copy of all process, pleadings and orders served upon defendant in the state court action are attached hereto as Exhibit "A".

VII. This action is a civil action of which this Court has original jurisdiction under 28 U.S.C. §1332, and is one which may be removed to this Court by defendant pursuant to the provisions of 28 U.S.C. §1441(b) in that it is a civil action between citizens of different states and the matter in controversy exceeds the sum of \$75,000, exclusive of interest and costs because ____ (*allege facts supporting allegation of amount in controversy*) _____.

VIII. Defendant is informed and believes that plaintiff, ____ (*name*) ____, was, and still is, a citizen of the State of _____. Defendant ____ (*name*) ____ was, at the time of the filing of this action, and still is, a citizen of: ____ (*ex: corporation incorporated under the laws of the*) _____

State of Delaware, having its principal place of business in the State of Ohio , and is the only defendant that has been served summons and complaint in this action.

IX. (Where citizenship of certain named defendants to be disregarded on ground of "fraudulent joinder"): The complaint herein also names as defendants _____, and _____, all or some of whom are citizens of the same state as plaintiff. The citizenship of said defendants should be disregarded for purposes of determining jurisdiction under 28 U.S.C. §1332 and 28 U.S.C. §1441(b) on the ground that there is no possibility that plaintiff will be able to establish liability against said parties for the following reasons: _____.

X. (Where removal based on changes in diversity after original complaint filed): When this action was originally filed, complete diversity of citizenship was lacking because (plaintiff/defendant name) was a citizen of the same state as (plaintiff/defendant name). On (date), complete diversity of citizenship between plaintiffs and defendants was created by reason of the following facts: (ex: voluntary settlement and dismissal of non-diverse party).

WHEREFORE, defendant _____ prays that this action be removed to the United States District Court for the District of Kansas.

DATED: _____, 19__

By _____
(Attorney name), # _____
Attorneys for Defendant

APPENDIX B 2

**NOTICE OF REMOVAL
(FEDERAL QUESTION)**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

_____)	
)	
	)	Case No.: _____
)	
Plaintiff,)	
)	
vs.)	
)	
_____)	
)	
)	
Defendant.)	
_____)	

NOTICE OF REMOVAL

TO THE CLERK OF THE ABOVE-ENTITLED COURT:
PLEASE TAKE NOTICE that defendant _____ hereby removes to this Court the state court action described below.

XI. On ____ *(date)* ____, an action was commenced in the _____ Judicial District, District Court, _____ County, Kansas, entitled _____, Plaintiff, vs. _____, Defendant, Case number _____.

XII. Defendant was served with summons on _____, 19____, and received a copy of plaintiff's petition on _____, 19____. This Notice is timely.

XIII. A copy of all process, pleadings and orders served upon defendant in the state court action are attached hereto as Exhibit "A".

XIV. This action is a civil action of which this Court has original jurisdiction under 28 U.S.C. §1331, and is one which may be removed to this Court by defendant pursuant to the provisions of 28 U.S.C. §1441(b) in that it arises under ____ (statute, constitutional provision, or other basis of federal question jurisdiction) _____.

XV. All other defendants who have been served with summons and petition have joined in this Notice of Removal, as evidenced by the Joinders of defendant _____ and defendant _____, filed concurrently herewith.

WHEREFORE, defendant _____ prays that this action be removed to the United States District Court for the District of Kansas.

DATED: _____, 19__

By _____
(Attorney name), # _____
Attorneys for Defendant

APPENDIX B 3

**NOTICE TO ADVERSE PARTY
OF REMOVAL**

IN THE _____ JUDICIAL DISTRICT
DISTRICT COURT, _____ COUNTY, KANSAS
CIVIL DEPARTMENT

_____)	
)	
	)	Plaintiff,
)	
vs.	)	Case No. _____
)	
_____)	
)	
	)	Defendant.
_____)	

Pursuant to Chapter 60,
Kansas Statutes Annotated

NOTICE OF REMOVAL TO FEDERAL COURT

TO PLAINTIFF _____ AND (*HIS/HER/ITS*) ATTORNEYS OF RECORD:
PLEASE TAKE NOTICE THAT a Notice of Removal of this action was filed in the United States District Court for the District of Kansas on _____, 19__.
A copy of the said Notice of Removal is attached to this Notice, and is served and filed herewith.
DATED: _____, 19__

By _____
(Attorney name), # _____
Attorneys for Defendant

APPENDIX B 4

NOTICE TO STATE COURT OF REMOVAL

IN THE _____ JUDICIAL DISTRICT
DISTRICT COURT, _____ COUNTY, KANSAS
CIVIL DEPARTMENT

_____)	
)	
	)	Plaintiff,
)	
vs.	)	Case No. _____
)	
_____)	
)	
	)	Defendant.
_____)	

Pursuant to Chapter 60,
Kansas Statutes Annotated

NOTICE OF FILING OF NOTICE OF REMOVAL

TO: Clerk of the District Court
_____ County Courthouse

Please take notice that pursuant to 28 U.S.C. §(1331 or 1332) and §1146 and D.Kan. Rule 81.1, defendant _____ did, on the _____ day of _____, 19____, file a Notice of Removal in the United States District Court for the District of Kansas, a copy of which is attached hereto, and that said matter shall proceed hereafter in the United States District Court for the District of Kansas.

By _____

(Attorney name) _____, # _____
Attorneys for Defendant

**APPENDIX B 5
JOINDER OF DEFENDANTS**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

)		
)		
	)	Plaintiff,	Case No.: _____
vs.)		
)		
)		
	)	Defendant.	
)		

JOINDER IN NOTICE OF REMOVAL OF ACTION

TO:

Defendant _____ (*name*), hereby joins in _____ (*name*)'s Notice of Removal to this Court of the state court action described in the said Notice of Removal.

DATED: _____, 19__

By _____

(Attorney name), # _____
Attorneys for Defendant

**APPENDIX B 6
MOTION TO REMAND**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

_____)		
)		
	)	Plaintiff,)
))
vs.	)	Case No. _____)
))
_____))
	)	Defendant.)
_____))

MOTION TO REMAND

The plaintiff moves this Court to remand this cause to the _____ Court of the State of _____, in and for _____ County, from which Court it was attempted to be removed to this Court. In support of this Motion, the plaintiff states as follows:

1. [insert grounds for remand]
2. _____.
3. _____.

WHEREFORE, the plaintiff respectfully requests that this Court remand this action to the _____ Court of _____ County, _____.

DATED: _____, 19__

By _____

(Attorney name), # _____
Attorneys for Plaintiff

APPEXDIX E

D.KAN. RULE 81.1

REMOVAL FROM STATE COURTS

- (a) **Notice of Removal.** A defendant or defendants desiring to remove any civil action from a state court shall file a notice of removal as required by 28 U.S.C. §1446.
- (b) **Place of Filing Notice of Removal.** Except in cases removed by the United States, when removal of a civil case is from a state court of the First, Sixth, Tenth, Eleventh, Twenty-second or Twenty-ninth Judicial Districts of Kansas, the notice of removal shall be filed in the record office of the clerk of this court at Kansas City; when from the state court of the Second, Third, Fourth, Fifth, Seventh, Eighth, Twelfth, Twenty-first, Twenty-eighth or Thirty-first Judicial Districts of Kansas, the notice of removal shall be filed in the record office of the clerk of this court at Topeka; when from a state court of the Ninth, Thirteenth, Fourteenth, Fifteenth, Sixteenth, Seventeenth, Eighteenth, Nineteenth, Twenty-sixth, Twenty-seventh or Thirtieth Judicial Districts of Kansas, the notice of removal shall be filed in the record office of the clerk of this court at Wichita.
- (c) **Notice to Parties.** Written notice of the filing of the notice of removal shall be promptly served upon all adverse parties. A copy of the notice of removal shall be filed forthwith with the clerk of the state court from which the case is removed and such filing shall effect the removal. The party removing the action shall file proof of service of all notices and filings with the clerk of the state court by certificate filed in the case with the clerk of this court.

As amended 3/10/92

Renumbered June 1995. Formerly Rule 202(a)-(c).

D.KAN. RULE 81.2

COPIES OF STATE COURT PROCEEDINGS IN REMOVED ACTIONS

Within 20 days after filing the notice of removal, the removing party shall procure and file with the clerk of this court a copy of all records and proceedings had in the state court. The court may remand any case sought to be removed to this court because of failure to comply with the provisions of this subsection.

Renumbered June 1995. Formerly Rule 202(d).