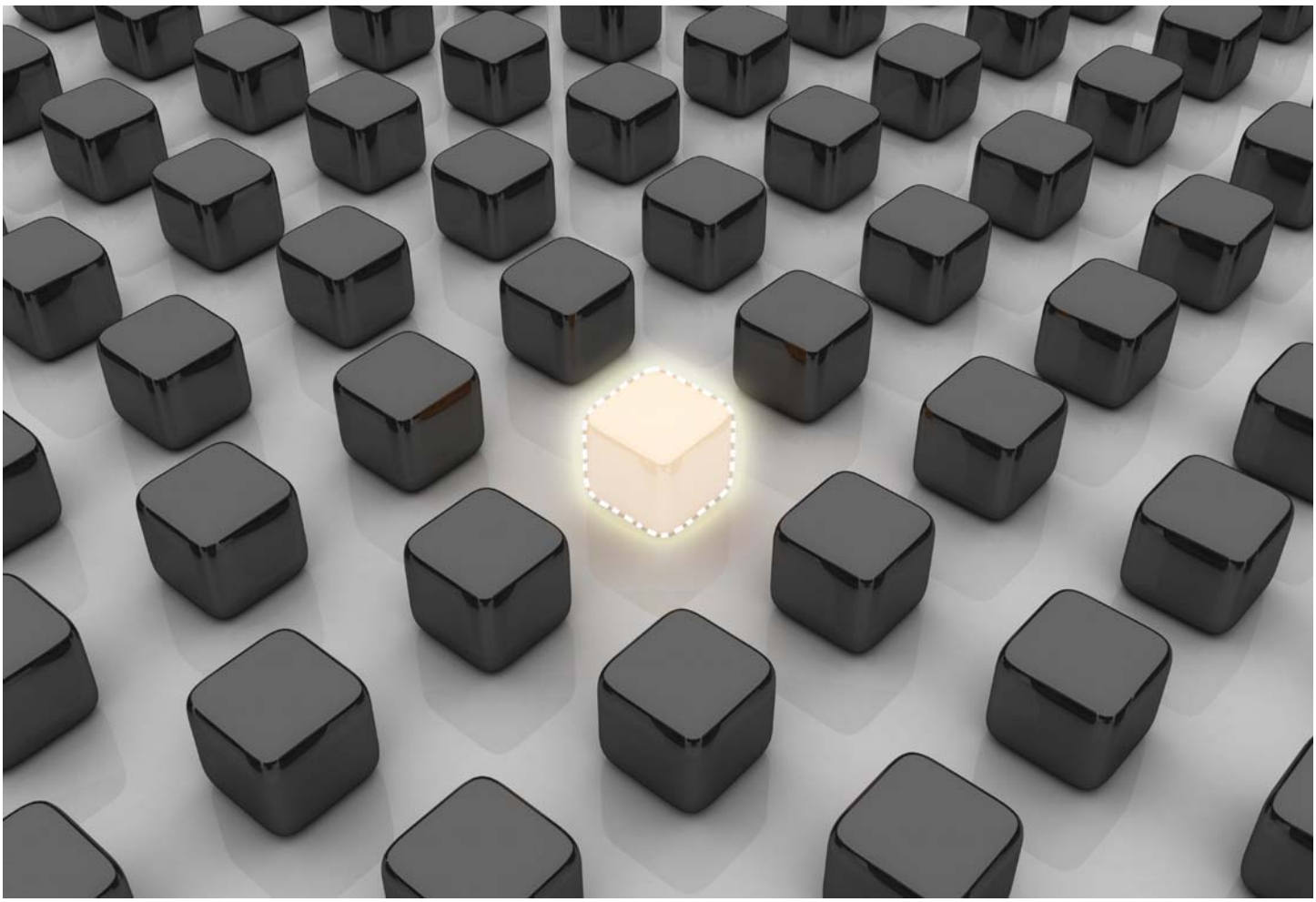
Diversity Removals

By Madeline H. Haikala and Ivan B. Cooper

Federal Jurisdiction's Disappearing Act



Diversity jurisdiction is as old as the Constitution. Article III, Section 2 provides that the federal courts' judicial power shall extend to cases "between citizens of different States." Congress first addressed diversity jurisdiction in the Judiciary Act of 1789. Pursuant to 28 U.S.C. §§1441 and 1446, Congress made diversity jurisdiction equally available to plaintiffs and defendants, empowering defendants to remove from state court any case that a plaintiff initially could have filed in federal court on the basis of 28 U.S.C. §1332(a). Every time Congress has visited the issue of diversity jurisdiction, it has reaffirmed its commitment to provide a federal forum for substantial state law controversies between citizens of different states. *See* S. Rep. 85-1830, 85th Cong., 2nd Sess. 1958, 1958 U.S.C.C.A.N. 3099, 3101; H. Rep. 100-889, 100th Cong., 2nd Sess. (1988), 1988 U.S.C.C.A.N. 5982, 5985–86, 6005–06; S. Rep. 104-366, 104th Cong., 2nd Sess. 1996, 1996 U.S.C.C.A.N. 4202, 4209.

But original diversity jurisdiction and removal jurisdiction are not created equal. Despite the constitutional foundation for diversity jurisdiction and the federal courts' "strict duty to exercise the jurisdic-

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tion that is conferred upon them by Congress," *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996), recent decisions have erected barriers to diversity removal that often place a federal forum far beyond a defendant's reach.

To secure removal, a defendant must establish that none of the defendants share the plaintiff's state of citizenship and that more than $75,000 is in controversy. 28 U.S.C. §1332(a). The burden is a heavy one, and courts have little incentive to add cases to their already-congested dockets. In this article, we take the pulse of diversity removals, examine the areas in which they are most vulnerable, and discuss whether these removals can survive the presumption against removal that the courts vigorously enforce.

Is Diversity Jurisdiction by Removal Still Relevant?

To a degree, federal courts have always regarded removal with suspicion. As early as 1799, the United States Supreme Court stated that courts should presume that there is no federal jurisdiction unless the defendant proves otherwise. *Turner v. Bank of North America*, 4 U.S. 8, 9 (1799). To this day, "all doubts about jurisdiction should be resolved in favor of remand to state court." *University of South Alabama v. American Tobacco Co.*, 168 F.3d 405, 411 (11th Cir. 1999).

The courts' presumption against jurisdiction contrasts with the widely accepted rationale for removal. Congress designed removal to protect foreign defendants from the biases of local juries. Just recently, the Supreme Court identified "diversity jurisdiction's basic rationale" as "opening the federal court's doors to those who might otherwise suffer from local prejudice against out-of-state parties." *Hertz v. Friend*, 130 S. Ct. 1181, 1188 (2010). Congress also worried that state legislatures would interfere in the administration of justice against foreign entities in state courts. Lastly, a federal forum allows a defendant engaged in interstate commerce to play by the same set of procedural and evidentiary rules in a variety of jurisdictions.

Have these rationales lost relevance? Obviously, the country (and for that matter, the world) is a much different place. Advanced technology and the evolution of international commerce allow companies to have a visible presence in many places at once. And one would be hard pressed to find an example of a state legislature interfering in state court litigation to the detriment of a foreign entity. On the other hand, defendants still benefit from the consistency and predictability of litigation under the federal rules of procedure and evidence.

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Courts largely overlook the last rationale, so it is not surprising that some express the sentiment that diversity jurisdiction has outlived its usefulness. But diversity jurisdiction still plays an important role for a defendant. Plaintiffs' counsel routinely identify out-of-state companies and play to juror bias, telling jurors that those companies "do not value things the way we do here." And even when jurors have no pronounced bias against an out-of-state entity, some jurisdictions seem to have a bias against defendants in general. We all read reports of the jurisdictions labeled "Tort Hell," and almost every state has counties that seem to be more hostile to defendants than others.

A federal forum can provide a defendant much needed protection, so corporate defendants should be wary of current trends in removal and remand practice. Courts have used perceived deficiencies of proof concerning both citizenship and amount in controversy as a basis for remand. We examine the citizenship prong of diversity first.

Diversity of Citizenship

"[D]iversity jurisdiction does not exist unless *each* defendant is a citizen of a different State from *each* plaintiff." *Owen Equipment and Erection Co. v. Kroger*, 437 U.S. 365, 373 (1978) (emphasis in original). But determining citizenship can sometimes be complicated, and establishing complete diversity on removal presents many hurdles.

Defendants Must Establish the Citizenship of the Parties

The first hurdle lies in the notice of removal itself. As the Seventh Circuit recently said "[w]e hope to make it clear once and for all (if such a wish were ever possible) that an appellant's naked declaration that there is diversity of citizenship is never enough." *Thomas v. Guardmark, LLC*, 487 F.3d 531 (7th Cir. 2007). Instead, in the complaint or notice of removal, the party claiming jurisdiction must establish the citizenship of the parties. In some jurisdictions, that means that the defendant must provide evidence of citizenship; the defendant cannot merely plead facts pertaining to citizenship. *See, e.g., Leys v. Lowe's Home Centers, Inc.*, 601 F. Supp. 2d 908, 913 (W.D. Mich. 2009) ("In any event, even if Lowe's counsel had asserted in the removal notice that Lowe's had its [principal place of business] in some State other than Michigan, such an assertion *by counsel* alone would not be competent evidence on the issue." (emphasis in original)).

For Individuals, Residence Does Not Equal Citizenship

The requirement that the action be between citizens of different states seems simple enough. But how do you determine a person's state of citizenship? For purposes of diversity, citizenship is generally equated with domicile. *McCormick v. Aderholt*, 293 F. 3d 1254, 1257 (11th Cir. 2002). But where a person is domiciled is not necessarily where the person currently resides. Rather, "a person's domicile is the place of his true, fixed and permanent home and principal establishment, and to which he has the intention of returning whenever he is absent therefrom." *Mas v. Perry*, 489 F.2d 1396, 1399 (5th Cir. 1974). In determining where a person is domiciled, courts look at the "'totality of the circumstances'… weighing a constellation of objective facts, no single one of which is entitled to con-

trolling weight." *Slate v. Shell Oil Co.*, 444 F. Supp. 2d 1210, 1215 (S.D. Ala. 2006). These factors include where real and personal property are held, where taxes are paid, where driver's licenses are obtained, where mail is received, where memberships in organizations are held, and other similar facts.

Further, once a person establishes domicile in a state, that state is *presumed* to be a person's domicile until a new domicile is proven. "The effect of this presumption is to put a heavier burden on a party who is trying to show a change of domicile than is placed on one who is trying to show the retention of an existing or former one." *Audi Performance & Racing, LLC v. Kasberger*, 273 F. Supp. 2d 1220, 1226 (M.D. Ala. 2003).

The combined effect of the presumption, the distinction between citizenship and residence, and the difficulty of proving domicile is seen in a recent case from the Southern District of Alabama. In *Price-Williams v. Admiral Insurance Company*, 2010 WL 419416 (S.D. Ala. Jan. 28, 2010), the plaintiff alleged that he was an Alabama resident and filed suit in state court against an Alabama individual, a Mississippi individual, and an insurance company doing business in Alabama. The defendants removed the case to federal court alleging that the plaintiff was really a citizen of Montana, not Alabama. The defendants produced evidence (including a statement from the plaintiff's own mother!) that the plaintiff had been a resident of Montana for at least three or fours years. Nevertheless, the district court granted the motion to remand, noting that while the defendants had introduced evidence of the plaintiff's *residence*, they had introduced no evidence that the plaintiff's *domicile* had changed from Alabama to Montana. Therefore, the defendants failed to meet their burden of proof to overcome the presumption that the plaintiff's domicile was still Alabama.

A Corporation's Citizenship Is Determined by Its "Nerve Center"

Because corporations cannot have a "domicile," the diversity statute provides that "a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business." 28 USC §1332(c)(1). The state by which it has been incorporated is easy to determine, but the site of a corporation's principal place of business has been the subject of much litigation. Recognizing that "[t]he phrase 'principal place of business' has proved more difficult to apply than its originators likely expected," the United States Supreme Court recently provided guidance on this issue. *Hertz v. Friend*, 130 S. Ct. 1181, 1184 (2010).

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In *Hertz v. Friend*, the Supreme Court decided that a corporation's citizenship should be decided by looking at where the corporation's "nerve center" is located rather than where the majority of the corporations "business activities" took place: "[w]e conclude that "principal place of business" is best read as referring to the place where a corporation's officers direct, control, and coordinate the corporation's activities. It is the place that Courts of Appeals have called the corporation's 'nerve center.'" *Hertz*, 130 S. Ct. at 1192. The Court went on to say that "in practice it should normally be the place where the corporation maintains its headquarters—provided that the headquarters is that actual center of direction, control, and coordination, *i.e.*, the 'nerve center,' and not simply an office where the corporation holds its board meetings (for example, attended by directors and officers who have traveled there for the occasion)." *Id.*

The Supreme Court stated that "this approach, while imperfect, is superior to other possibilities," *Hertz*, 130 S. Ct. at 1192, and gave three rationales for this conclusion. "First, the statute's language supports the approach." *Id.* The statute says that a corporation will be a citizen of "the State where it has its principal place of business." The word "place" is singular, and the reference to having a place within the state implies a location within the state, not the state itself. Looking at the "business activities" rather than the "nerve center" means looking at activities throughout the state and not at a singular "place."

"Second, administrative simplicity is a major virtue in a jurisdictional statute," and "[a] nerve center approach, which ordinarily equates that 'center' with a corporation's headquarters, is simple to apply *comparatively speaking*." *Hertz*, 130 S. Ct. at 1193 (emphasis in original). Looking for a "corporation's brain" implies a single location, while having to look at all the places a corporation has plants, sales, etc., will often be a more complicated inquiry.

"Third, the statute's legislative history, for those who accept it, offers a simplicity-related interpretative benchmark." *Hertz*, 130 S. Ct. at 1194. An initial proposal for the diversity jurisdiction statute containing the "principal place of business" language provided that the corporation "would be deemed a citizen of the State that accounted for more than half of its gross income." *Id.* This test was rejected as being too complex and impractical to apply. The "nerve center" test gives the possibility of a simpler solution.

The rules regarding the citizenship of corporations apply only to corporations, not to other entities such as partnerships or limited liability companies. *Carden v. Arkoma Associates*, 494 U.S. 185, 189 (1990). The citizenship of a partnership or limited liability company is determined by looking at the citizenship of each of its members. *Id.*; *see also Thomas v. Guardsmark, LLC*, 487 F.3d 531, 534 (7th Cir. 2007) ("For diversity jurisdiction purposes, the citizenship of an LLC is the citizenship of each of its members.").

Defendants May Use "Fraudulent Joinder" to Eliminate Non-Diverse Defendants

As noted earlier, "diversity jurisdiction does not exist unless *each* defendant is a citizen of a different State from *each* plaintiff." *Owen Equipment and Erection Co. v. Kroger*, 437 U.S. 365, 373 (1978). Sometimes a non-diverse defendant seems to have no

real connection to the case. Chances are that the plaintiff's counsel added the defendant strategically to defeat diversity jurisdiction. When that happens, a defendant can remove the case to federal court if it can prove that the diversity-defeating defendant is fraudulently joined.

"Fraudulent joinder is a term of art. If the plaintiff fails to state a cause of action against a resident defendant, and the failure is obvious according to the settled rules of the state, the joinder of the resident defendant is fraudulent." *McCabe v. General Foods Corporation*, 811 F.2d 1336, 1339 (9th Cir. 1987). Generally, to establish that a defendant is fraudulently joined, the removing defendant must show that "there is no possibility that the plaintiff can establish a cause of action against the resident defendant." *Florence v. Crescent Resources, LLC*, 484 F.3d 1293, 1297 (11th Cir. 2007) (internal citations omitted). If the non-diverse defendant has been fraudulently joined, then the district court must dismiss the non-diverse defendant and deny the motion to remand.

As with most efforts to establish federal jurisdiction, "the burden of persuasion on those claiming fraudulent joinder remains a heavy one." *Ross v. Citifinancial, Inc.*, 344 F.3d 458, 462 (5th Cir. 2003). For a defendant to be properly joined, "there must be a *reasonable* possibility of recovery, not merely a *theoretical* one." *Id.* (emphasis in original). If there is ambiguity concerning the state law at issue, and "if there is any possibility that the state law might impose liability on a resident defendant under the circumstances alleged in the complaint, the federal court cannot find that joinder of the resident defendant was fraudulent, and remand is necessary." *Florence*, 484 F.3d at 1299.

But while the defendant's burden is heavy, it is not insurmountable. The district court can consider summary judgment-type evidence in determining whether a plaintiff has joined a resident defendant improperly. Affirmative defenses like statutes of limitations and immunity often provide successful tools for proving fraudulent joinder.

Amount in Controversy

If the doctrine of fraudulent joinder was a setback to plaintiffs' attempts to defeat legitimate removals, recent decisions regarding the amount in controversy have enabled plaintiffs to regain lost ground. *Lowery v. Alabama Power Co.*, 483 F.3d 1184 (11th Cir. 2007), is emblematic of this trend. *Lowery* has received attention for its analysis of CAFA removals, but the Eleventh Circuit also used the opinion to raise the bar for proving the amount in controversy in all diversity removals.

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The *Lowery* court started with the proposition that "in the removal context where damages are unspecified, the removing party bears the burden of establishing the jurisdictional amount by a preponderance of the evidence." Many circuit courts apply the preponderance standard when damages are unspecified; however, after imposing this significant evidentiary burden on defendants, the court held that the only proper evidence of the amount in controversy consists of documents that the defendant receives from the plaintiff, "be it the initial complaint or a later received paper." *Id.* at 1213; *see King v. Board of Pensions*, 2010 WL 339779 (M.D. Ga. 2010), and *Innovative Health & Wellness, L.L.C. v. State Farm Mut. Auto Ins.*, 2008 WL 3471957 (S.D. Fla. 2008) (remanding on basis of *Lowery* because affidavits generated by defendants rather than plaintiffs were not admissible evidence of the amount in controversy).

Of course, a defendant has one year from the date that the plaintiff filed his or her complaint to use state court discovery to coax from the plaintiff evidence that establishes that more than $75,000 is in controversy. 28 U.S.C. §1446(b). But savvy plaintiffs' counsel use vague pleading and evasive discovery responses to fend off a defendant's attempt to gather evidence of the amount in controversy until the one year window for removal closes.

The *Lowery* court admonished that a federal district court cannot allow post-removal discovery regarding the amount in controversy, commenting that a defendant's "request for discovery is tantamount to an admission that the defendants do not have a factual basis for believing that jurisdiction exists." *Id.* at 1215–17. Though it acknowledged that "where damages are unspecified and only the bare pleadings are available—we are at a loss as to how to apply the preponderance burden meaningfully," the court viewed the dilemma as unavoidable. The court reasoned that "any attempt to engage in a preponderance of the evidence assessment at this juncture would necessarily amount to unabashed guesswork, and such speculation is frowned upon." *Id.* at 2010–11.

The implications of *Lowery* for removal were not lost on plaintiffs' counsel. In the wake of *Lowery* and similar opinions in other circuits, plaintiffs "use their pleadings in state court tactically, leaving damages unspecified to block removal without foreclosing an ultimate recovery of more than the federal jurisdictional minimum." *Bartnikowski v. NVR, Inc.*, 307 Fed. Appx. 730 (4th Cir. 2009).

Many district courts have welcomed the opportunity to winnow their dockets and have pressed decisions like *Lowery* to their limits, declining to allow as proof of the amount in controversy seemingly irrefutable evidence, such as evidence of settlement demands in excess of $75,000. *Mark v. Wood Haulers, Inc.*, 2009 WL 5218030 (S.D. Ala. 2009), is a prime example. There, the court remanded a personal injury action in which the plaintiffs claimed damages for past and future medical expenses, lost wages, pain and suffering and permanent disability for neck and back injuries. The defendant attached to its removal petition a settlement demand of $350,000 for each of the two plaintiffs. The court found that the

> pre-suit demand letter attached to the defendants' notice of removal clearly contains a modicum of specific infor-

> mation—*i.e.*, the medical expenses incurred by each plaintiff—in support of the demands; however, because the demands are 35 times the medical expenses incurred by each plaintiff, the undersigned can reach no other conclusion but that the demands are both exaggerated/'puffed' and constitute unreasonable assessments of the value of the plaintiffs' claims.

Id. at *9. Courts also disregard a plaintiff's refusal to admit or stipulate to the fact that more than $75,000 is in controversy. *Leys v. Lowe's Home Centers, Inc.*, 601 F. Supp. 2d 908, 915–17 (W.D. Mich. 2009); *Norton v. Kent*, 2009 WL 2996988 (N.D. Ohio 2009).

Courts also have refused to "speculate" about the amount in controversy, even when the injuries described in the complaint are severe, and the plaintiff undoubtedly seeks damages in excess of $75,000. For example, in *Hemerling v. Eli Lilly & Co.*, 2010 WL 431262 (M.D. Ala. 2010), the court remanded a personal injury pharmaceutical action in which the plaintiff claimed unspecified damages for irreversible blindness in one eye, loss of enjoyment of life; past and future medical bills, "economic losses and income," "pain and suffering, mental anguish, anxiety and worry," and punitive damages. The district court advised that

> [d]espite the serious nature of the alleged damages, exercising jurisdiction in this case would require impermissible guesswork… and the court will not speculate as to the amount of damages resulting from the loss of vision in one eye and the potential loss of vision in the other.

Id. at *2.

The burden that courts have placed on removing defendants makes the diversity equation extremely lopsided in favor of plaintiffs. As the Tenth Circuit remarked in *McPhail v. Deere & Co.*, 529 F.3d 947 (10th Cir. 2008),

> if the in-state plaintiff wishes to remain in state court, all it needs to do is to refrain from alleging any particular sum in its prayer for relief (assuming that is permitted, as it often is, under state rules of civil procedure), and, according to this and most other courts, the defendant is required to prove jurisdictional facts by a 'preponderance of the evidence' such that the amount in controversy may exceed $75,000.

Id. at 953. Thus,

> when the proponent of federal jurisdiction is the party that does not need it, mere allegations suffice; but when the proponent of federal jurisdiction is the party in whose interest diversity jurisdiction was created, actual proof of jurisdictional facts is required, at a stage in the litigation when little actual evidence is yet available.

Id. at 952–53.

A district court need only use the magic words "subject matter jurisdiction" in its remand order to eliminate a defendant's ability to appeal the order.

Based on their conviction that the narrow means of proving amount in controversy enunciated in *Lowery* cannot be reconciled with the "purpose of diversity jurisdiction which is, after all, to protect the out-of-state defendant," the Tenth and Seventh Circuits offer defendants greater latitude. They permit defendants to make good faith estimates of damages based on the allegations of the complaint—and a bit of common sense. They do not limit the defendant to the plaintiff's pleadings. They allow as evidence of the amount in controversy affidavits, documents related to the allegations of the complaint, and settlement demands. 529 F.3d at 956; *Meridian Security Ins. Co. v. Sadowski*, 441 F.3d 536, 541–42 (7th Cir. 2006). These courts recognize that, "[t]he amount in controversy is not proof of the amount the plaintiff will recover. Rather, it is an estimate of the amount that will be put in issue in the course of the litigation." 529 F.3d at 956. They reverse the standard that other circuits have adopted, holding that it must appear to a "legal certainty" that the plaintiff claims less than the jurisdictional amount to warrant remand. *Id.* at 541.

Nevertheless, even within these defendant-friendly circuits, district courts apply much less forgiving removal standards. *Keen v. Schlumberger Technology Corp.*, No. No. 10-153 LH/CG (D.N.M. March 23, 2010) (sua sponte remand of action for unpaid overtime where the amount in controversy was not apparent on the face of the complaint, and the defendant did not provide additional information about the plaintiff's alleged damages in the removal pleadings); *Joyce v. Chesrown*, No. Civ. 08-04 LH/WPL (D.N.M. October 28, 2009) (sua sponte remand of claims against three defendants for "damages for bodily injury, pain and suffering, medical expenses, loss of income, and earning capacity" and claim against insurer for compensatory and punitive damages for alleged breach of the duty of good faith where the complaint did not contain details about plaintiff's damages or an allegation of joint liability among the defendants; court could not aggregate damages, and defendants did not assert facts in their removal petition that would enable court to determine the extent of plaintiff's injuries, the amount of his medical expenses, or his earning capacity).

Appeals of Remand Orders

District courts may disregard binding precedent in circuits that provide a more lenient standard for proof of the amount in controversy because §1447(d) insulates remand orders from appellate review. Even the most egregious remand orders escape scrutiny. A district court need only use the magic words "subject matter jurisdiction" in its remand order to eliminate a defendant's ability to appeal the order.

In *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976), the United States Supreme Court held that §1447(d) must be read *in pari materia* with §1447(c) so that §1447(d) only bars review of §1447(c) remands. Until recently, circuit courts occasionally used *Thermtron* to create opportunities for appellate review of remand orders. For example, some courts recognized a collateral rule, holding that appellate courts may review preliminary

orders that form the basis for a related remand order. *See*, *e.g.*, *Arnold v. State Farm Fire & Cas. Co.*, 277 F.3d 772, 776 (5th Cir. 2001); *Borneman v. United States*, 213 F.3d 819, 825 (4th Cir. 2000) ("[A]n otherwise reviewable ruling is not shielded from review merely because it is a constituent aspect of a remand order that would itself appear to be insulated from review by §1447(d)").

The United States Supreme Court extinguished that limited review in *Powerex Corp. v. Reliant Energy Services, Inc.*, 551 U.S. 224 (2007). There, the Court held that

> we need not pass on whether §1447(d) permits appellate review of a district-court remand order that dresses in jurisdictional clothing a patently non-jurisdictional ground (such as the docket congestion invoked by the District Court in *Thermtron*, 423 U. S. at 344, 96 S. Ct. 584). We hold that when, as here, the District Court relied upon a ground that is colorably characterized as subject-matter jurisdiction, appellate review is barred by §1447(d).

Id. at 237. Thus, when a remand order is, "based on one of the [grounds enumerated in 28 U.S.C. §1447(c)], review is unavailable no matter how plain the legal error in ordering the remand." *Kircher v. Putnam Funds Trust*, 547 U.S. 633, 642 (2006).

Since *Powerex*, circuit courts have allowed appeals only when courts have remanded diversity cases sua sponte on the basis of an alleged procedural deficiency in the removal. Section 1447(d) permits remands only for lack of subject matter jurisdiction or for a procedural defect *that a party raises*. Because a "district court cannot remand sua sponte for defects in removal procedure,… section 1447(d) interposes no jurisdictional barrier to review." *Ellenburg v. Spartan Motors Chassis, Inc.*, 519 F.3d 192 (4th Cir. 2008).

Even this narrow class of appealable sua sponte remand orders is endangered. Concurring opinions in last year's *Carlsbad Technology, Inc. v. HIF Bio, Inc.*, 129 S. Ct. 1862 (2009), signal the demise of *Thermatron*. Justice Scalia wrote, "our decision in *Thermtron* was questionable in its day and is ripe for reconsideration in the appropriate case." *Id.* at 1868 (Scalia, J. concurring). Should the Court overrule *Thermatron*, the Court in all likelihood will revert to a literal reading of §1447(d), meaning that all remand orders (except remand orders in civil rights cases) will be free from appellate oversight, regardless of the nature of the alleged error.

The only potentially viable means of securing appellate review then will lie in a constitutional challenge to the statutory framework for removal and remand. As Chief Justice Rehnquist explained in *Demore v. Kim*, 538 U.S. 510 (2003), when a party asserts a constitutional challenge to a "statutory framework," an appellate court may review the constitutional arguments even though the statute may preclude judicial review of decisions rendered under it. *Id.* at 517 (quoting *Webster v. Doe*, 486 U.S. 592, 603 (1988)) (court had jurisdiction in case arising out of INS proceeding to review constitutional challenge to 8 U.S.C. §1226(c) even though 8 U.S.C. §1226(e) provides that, "application of this section shall not be subject to review. No court may set aside any action or decision by the Attorney General under this section"). Like the statute at issue in *Demore*, 28 U.S.C. §1447(d) does not expressly preclude a constitutional challenge to the statutory framework for remand in 28 U.S.C. §1447 (or a challenge to the requirements for diversity removal in 28 U.S.C. §1332(a) and 1441(a)); §1447(d) addresses only review of certain "orders." Therefore, constitutional challenges to the removal and remand statutes should be viable.

Conclusion

"Congress enacted §1447(d) so that state court actions could proceed without delay if federal courts *consider proper factors* and remand." *Mobile Corp. v. Abeille General Ins.*, 984 F.2d 664, 666 (5th Cir. 1993) (emphasis added). Recent decisions interpreting §1447(d) in a way that allow courts free reign over the procedural and evidentiary standards that govern a remand decision effectively strips Congress of its constitutional authority to dictate the length and breadth of diversity jurisdiction. This was not Congress's intent in restricting appeals of remand orders.

Ultimately, it may be up to Congress to revive removal. In his concurring opinion in *Carlsbad Technology*, Justice Breyer pointed out that liberal interpretation of §1447(d) could lead to illogical results and argued that statutory revision might be necessary. 129 S. Ct. at 1869 (Breyer, J. concurring). Congress can reinstate the tools that defendants may use to prove the amount in controversy. It may accomplish this by incorporating language from 28 U.S.C. §2108, "Proof of Amount in Controversy," into §1332. Section 2108 states, "[w]here the power of any court of appeals to review a case depends on the amount or value in controversy, such amount or value, if not otherwise satisfactorily disclosed upon the record, may be shown and ascertained by the oath of a party to the case or by other competent evidence." In the alternative, Congress may revise §1447(d) so that defendants may appeal erroneous remand orders that improperly stifle removal. Until there is legislative relief or the winds of judicial sentiment change course, defendants should use extreme care when removing a case on the basis of diversity.

Postscript—11th Circuit Distinguishes *Pretka* from *Lowery*

Since the authors submitted this article for publication, the Eleventh Circuit issued its decision in *Pretka, et al. v. Kolter City Plaza, Inc.*, No. 10-11471 (11th Cir. June 8, 2010). Like *Lowery*, *Pretka* is a CAFA opinion that addresses much more than CAFA removals. While discussing a variety of issues concerning proof of the amount in controversy in diversity removals, the *Pretka* panel initially takes care to distinguish *Pretka* from *Lowery* so that the *Pretka* opinion will not run afoul of the prior panel rule, *i.e.*, the rule that when one panel decision conflicts with another, the first is binding until it is reversed by the United States Supreme Court or by an en banc decision. By the end of the decision, the *Pretka* panel takes the *Lowery* panel to task and describes certain aspects of the *Lowery* opinion as dicta. The *Pretka* opinion cites with approval the Tenth Circuit's discussion of diversity removals in *McPhail*. The contrast between the *Lowery* and *Pretka* opinions highlights the unpredictable waters that defendants must navigate when they remove cases on the basis of diversity jurisdiction.