Standards for Removal and Remand

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I. The Removing Party Bears The Burden Of Proving That Removal Was Proper.

A district court must remand a case to state court if, at any time before final judgment, it appears that the Court lacks subject matter jurisdiction. 28 U.S.C. § 1447(C). The removal statute is strictly construed. *Sea Robin Pipeline Co. v. New Medico Head Clinic Facility*, 1995 WL 479719 at *1 (E.D. La. Aug. 14, 1995) (Clement, J.). When challenged by a plaintiff seeking remand, the defendant attempting to establish removal bears the burden of proof. *Wilson v. Republic Iron & Steel Co*., 257 U.S. 92, 97 (1921); *see also Berthelot v. Boh Bros. Const. Co*., *LLC*, 2006 WL 1984661 at *6 (E.D. La. June 1, 2006) (Duval, J.). "A party invoking the removal jurisdiction of the federal courts bears a heavy burden." *Sid Richardson Carbon & Gasoline Co. v. Interenergy Res*., 99 F.3d 746, 751 (5th Cir. 1996). "If the right to remove is doubtful, the case should be remanded." *Berthelot*, 2006 WL 1984661 at *6.

Any doubts regarding whether removal jurisdiction is proper should be resolved in favor of remand. *Gutierrez v. Flores*, 543 F.3d 248, 251 (5th Cir. 2008); *Acuna v. Brown & Root, Inc.,* 200 F.3d 335, 339 (5th Cir.2000).[1] Any ambiguities are construed against removal because the

1*See also, Willy v. Coastal Corp.,* 855 F.2d 1160, 1164 (5th Cir.1988); *Glaser Vision Ventures, Inc. v. Directory Assistants, Inc.*, CIV.A. 09-3405, 2009 WL 1970767 (E.D. La. July 2, 2009).

removal statute should be strictly construed in favor of remand. *Manguno v. Prudential Prop.& Cas. Ins. Co.,* 276 F.3d 720, 723 (5th Cir.2002).[2]

II. The Removing Party Removing for Diversity Bears the Burden of Proving That The Amount in Controversy Is Satisfied.

The Fifth Circuit advises the district courts to review their diversity cases to ensure that subject matter jurisdiction is present, specifically that the amount in controversy is satisfied. *Arnold v. Lowe's Home Centers,* 2011 WL 976512, 2:10-cv-04454 (E.D. La. Mar. 16, 2011) (citing *Asociacion Nacional De Pescadores A Pequena Escala O Artesanales De Colombis (ANPAC) v. Dow Quimica De Colombia, S.A.*, 988 F.2d 559 (5th Cir. 1993), cert. denied, 114 S.Ct. 685 (1994) and *Luckett v. Delta Airlines, Inc*., 171 F.3d 295 (5th Cir. 1999)). In removal practice, when a complaint does not allege a specific amount of damages, the party invoking federal jurisdiction must prove by a preponderance of the evidence that the amount in controversy exceeds the jurisdictional amount. *St. Paul Reinsurance Co., Ltd. v. Greenberg*, 134 F.3d 1250, 1253 (5th Cir. 1998). Stated otherwise, the removing defendant bears the burden of proving the amount in controversy to support diversity jurisdiction. *Gebbia v. Wal-Mart Stores, Inc*., 233 F.3d 880, 882-83 (5th Cir. 2000). "The defendant may prove that amount either by demonstrating that the claims are likely above $75,000 in sum or value, or by setting forth the facts in controversy that support a finding of the requisite amount." *Id.*

In a class action removed on grounds of diversity under Section 1332(a), Defendants would bear the burden of proving that an individual class member's claim exceeds $75,000, exclusive of interest and costs. *H&D Tire & Auto.-Hardware Inc. v. Pitney Bowes Inc.*, 250 F.3d 302, 305 (5th

2*See also, Glaser Vision Ventures, Inc. v. Directory Assistants, Inc.*, CIV.A. 09-3405, 2009 WL 1970767 (E.D. La. July 2, 2009).

Cir. 2001)[3] A single class member standing alone must have a claim that exceeds $75,000 in order to satisfy § 1332(a), and the claims of the individual class members may not be aggregated to determine the amount in controversy. *Id.*; *see also Benjamin v. Multi-Chem Group, L.L.C.*, 2012 WL 3548060 (W.D. La. July 16, 2012) *report and recommendation adopted*, 2012 WL 3549835 (W.D. La. Aug. 16, 2012).

Removal cannot be based simply upon conclusory allegations. *Allen v. R & H Oil & Gas Co.*, 63 F.3d 1326, 1335 (5th Cir. 1995). "When the plaintiff's complaint does not allege a specific amount of damages, the removing defendant must prove by a preponderance of the evidence that the amount in controversy exceeds [the amount in controversy]."[4] *Id.* "[U]nder any manner of proof, the jurisdictional facts that support removal must be judged at the time of the removal, and any post-petition affidavits are allowable only if relevant to that period of time." *Id.*

Merely stating in a conclusory manner that the amount in controversy exceeds the jurisdictional amount is not sufficient to support diversity jurisdiction. *Simon v. Wal-Mart Stores, Inc.*, 193 F.3d 848, 850 (5th Cir. 1999). "The defendant may make this showing in either of two ways: (1) by demonstrating that it is 'facially apparent' that the claims are likely above $75,000, or (2) 'by setting forth facts in controversy—preferably in the removal petition, but sometimes by affidavit—that support a finding of the requisite amount.'" *Id.*

3 *H & D Tire* was decided both before the enactment of CAFA and before the amount in controversy on individual claims was raised from $50,000 to $75,000. Nevertheless, the principles enunciated therein for the amount in controversy remain valid, with the only difference that Congress has since raised the jurisdictional amount to $75,000.

4 *Allen* was decided under the former statutory amount in controversy of $50,000. As with *H & D Tire* above, the amount has since been raised under 28 USC § 1332(a) to $75,000. In all respects, the holdings of *Allen* and *H & D Tire* remain good law.

The Fifth Circuit in *Simon* held that mere allegations of unspecified injuries do not make it "facially apparent" that the claims exceeded $75,000. *Id.* The plaintiff in that case had alleged that her purse was grabbed by a person in a moving car, and that she was physically dragged by the car several parking spaces. *Id.* As a result of the incident, the plaintiff alleged in her petition that she "suffered bodily injuries and damages including but not limited to a severely injured shoulder, soft-tissue injuries throughout her body, bruises, abrasions and other injuries to be shown more fully at trial, and has incurred or will incur medical expenses" and also that she was entitled to "reasonable damages for loss of consortium." *Id.* at 849. Based on these allegations, the Court found that it was not "facially apparent" that the claims exceeded $75,000. *Id.* at 849-50. The Court went on to hold that "Wal–Mart therefore had an **affirmative burden to produce information, through factual allegations or an affidavit,** sufficient to show 'by a preponderance of the evidence that the amount in controversy exceed[ed] $75,000.'" *Id.* at 851 (emphasis added). The Court held that because the defendant "neither filed an affidavit with its Notice of Removal nor set forth any facts in controversy in that Notice", mere allegations "in a conclusional manner that the amount in controversy exceeded the jurisdictional amount" were not sufficient to support diversity jurisdiction. *Id.* at 850.

"The preponderance burden forces the defendant to do more than point to a state law that might allow the plaintiff to recover more than what is pled. The defendant must produce evidence that establishes that the actual amount in controversy exceeds [the jurisdictional amount]." *Drill Cuttings Disposal Co. L.L.C. v. Chesapeake Operating, Inc.*, 2012 WL 399247 (W.D. La. Feb. 7, 2012). It is not sufficient for a party to merely state "without proof of any kind – that the plaintiffs were forced to evacuate their homes and businesses" in order to satisfy the amount in controversy. *Benjamin*, 2012 WL 3548060 (W.D. La. July 16, 2012).

III. Fraudulent Joinder

The removing party bears the burden of proving fraudulent joinder. *Mumfrey-Martin v. Stolthaven New Orleans, L.L.C.*, No. CIV.A. 12-2539, 2013 WL 4875088, at *3 (E.D. La. Sept. 10, 2013). "The burden of persuasion placed upon those who cry 'fraudulent joinder' is indeed a heavy one." *Ford v. Elsbury*, 32 F.3d 931, 935 (5th Cir. 1994). "The improper joinder doctrine is a 'narrow exception to the rule of complete diversity, and the burden of persuasion on a party claiming improper joinder is a heavy one.'" *Alexis v. Hilcorp Energy Co.*, 493 F. Supp. 3d 497, 507 (E.D. La. 2020) (citing *Campbell v. Stone Ins., Inc.*, 509 F.3d 665, 669 (5th Cir. 2007)). Doubts regarding whether removal jurisdiction is proper should be resolved against federal jurisdiction." *Acuna v. Brown & Root Inc.,* 200 F.3d 335, 339 (5th Cir.2000). As a result, all disputed questions of fact and ambiguities of state law must be resolved in favor of the non-moving party. *Turner v. Murphy Oil USA, Inc.*, CIV.A. 05-4206, 2007 WL 4233676 (E.D. La. Nov. 28, 2007).

The standard is as follows:

> Where charges of fraudulent joinder are used to establish [federal] jurisdiction, the removing party has the burden of providing that claimed fraud…. To prove their allegation of fraudulent joinder [removing parties] must demonstrate that there is **no possibility** that [plaintiff] would be able to establish a cause of action against them in state court. In evaluating fraudulent joinder claims, we must initially resolve all disputed questions of act and all ambiguities in the controlling state law in favor of the non-removing party. We are then to determine whether that party has **any possibility of recovery** against the party whose joinder is questioned.

Id. (quoting *Dodson v. Spiliada Maritime Corp.*, 951 F.2d 40 (5th Cir. 1992)) (emphasis added).

Since the purpose of the improper joinder inquiry is to determine whether or not the in-state defendant was properly joined, the focus of the inquiry must be on the joinder, not the merits

of the plaintiff's case. *Smallwood v. Illinois Cent. R. Co.*, 385 F.3d 568, 573 (5th Cir. 2004). There are two ways to prove improper joinder: "(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." *Id.* The test for improper joinder is whether "the defendant has demonstrated that there is **no possibility** of recovery by the plaintiff against an in-state defendant, which stated differently means that there is no reasonable basis for the district court to predict that the plaintiff might be able to recover against an in-state defendant." *Id.* (emphasis added). "Ordinarily, if a plaintiff can survive a Rule 12(b)(6) challenge, there is no improper joinder." *Id.*; *Mumfrey-Martin v. Stolthaven New Orleans, L.L.C.*, No. CIV.A. 12-2539, 2013 WL 4875088, at *4 (E.D. La. Sept. 10, 2013).

In determining whether the defendant has proven improper or fraudulent joinder, "[a]ny contested issues of fact and any ambiguities of state law must be resolved in [the party requesting remand's] favor." *Travis v. Irby*, 326 F.3d 644, 649 (5th Cir. 2003). "The burden of persuasion on those who claim fraudulent joinder is a heavy one." *Id.* The removing party "must put forward evidence that would negate a possibility of liability on the part of" the party allegedly improperly joined. *Id.* at 650-51. Simply pointing to a lack of evidence is "insufficient to show that there is to possibility for [the party requesting remand] to establish liability . . . ." *Id.*

"If the plaintiff has **any possibility** of recovery under state law against the party whose joinder is questioned, then the joinder is not fraudulent in fact or law." *Burden v. Gen. Dynamics Corp.*, 60 F.3d 213, 216 (5th Cir. 1995) (emphasis added). The Fifth Circuit further has stated, "We do not determine whether the plaintiff will actually or even probably prevail on the merits of the claim, but look only for a **possibility** that the plaintiff might do so." *Id.* (emphasis added). The Fifth Circuit "will not authorize removal on the basis of fraudulent joinder unless there is *no*

possibility that the plaintiff could state a cause of action against the non-diverse defendants." *Sid Richardson Carbon & Gasoline Co. v. Interenergy Res., Ltd.,* 99 F.3d 746, 751-52 (5th Cir. 1996).

Because the doctrine of improper joinder is a narrow exception to the rule of complete diversity, the burden of demonstrating improper joinder is a heavy one. *Amaya v. Holiday Inn New Orleans,* 2011 WL 4344591 at *2 (E.D. La. Sept. 15, 2011) (J. Africk). In conducting such inquiry, the Court "must also take into account all unchallenged factual allegations, including those alleged in the complaint, in the light most favorable to the plaintiff." *Id*. Additionally, the Court must resolve all ambiguities of state law in favor of the non-removing party. *Id.*

Although the standard for fraudulent joinder on a removal and the standard for Rule 12(b)(6) motions appear similar, the scope of the inquiry is different. *Travis v. Irby*, 326 F.3d 644, 648-49 (5th Cir. 2003). For Rule 12(b)(6) motions, a district court may only consider the allegations in the complaint and any attachments. *Id.* (citing *Great Plains Trust*, 313 F.3d at 313). For fraudulent joinder, the district court may "pierce the pleadings" and consider summary judgment-type evidence in the record, but must also take into account all unchallenged factual allegations, including those alleged in the complaint, in the light most favorable to the plaintiff. *Id.* (citing *Carriere*, 893 F.2d at 100 and *Griggs*, 181 F.3d at 699–702).

In certain circumstances, adding the manager of a facility can provide the basis for destroying diversity and preventing diversity jurisdiction. In *Hornsby*, the district court was faced with a situation in which the plaintiff had added the manager of the plant as a defendant for an incident occurring at the plant. *Hornsby v. Allied Signal Inc.*, 961 F. Supp. 923, 928 (M.D. La. 1997). The court stated that "it was important to determine whether the plant manager *delegated*

the responsibility of safe maintenance and operation with *due care* to others"; and "whether the plant manager was *aware or should have been aware* of a risk of harm." *Id.*

Judge Africk has held a plaintiff's claims against the manager of a facility with a personal duty are not "fraudulently joined" with the claims against the company. *Amaya*, 2011 WL 4344591. In *Amaya,* the plaintiff sued a hotel and its general manager for a security breach that led to assault and battery upon the plaintiff. The defendant alleged that these were claims against the manager for "administrative duties" rather than personal duties owed to the plaintiff. In response, the plaintiff argued that the manager had personal knowledge of the security problems at the hotel and failed to act to remedy that danger. The plaintiff further made allegations of "the ways in which [the manager] failed to take necessary precautions that could have protected [the plaintiff] . . . ." Based upon these allegations, the Court found that the manager "had personal knowledge and that he failed to act on that knowledge." *Id.* The Court ultimately held that "[a]n employee who has personal knowledge of a danger and fails to cure the risk of harm may be liable for a plaintiff's injuries under *Canter*." *Id.* As a result, the Court held that there was at least some possibility of recovery against the manager, and that the defendant failed to meet its "heavy duty to show that [the manager] was improperly joined." *Id.* Thus, the Court granted the Motion to Remand.

Judge Vance has also similarly held that a supervisor is a legitimate party in a negligence case, thereby defeating diversity . *Creppel v. Apache Corp.,* 2004 WL 1920932 (E.D. La. Aug. 25, 2004). In *Creppel*, the Court found that a form naming the individual as the "supervisor who is responsible for the facility" is sufficient to show that the company delegated its duty of care to that individual. *Id.* The Court further found that the supervisor could be personally at fault for failing to mark a well properly, for failing to "maintain and inspect the well," for failing "to take

remedial measures to alleviate the dangers that the well created," and for failing to "implement procedures and policies for locating unmarked and unlit wells." *Id.* The Court found that the supervisor would be potentially liable because he was "directly responsible for the safety of that well" and the supervisor "had personal knowledge of the dangerous condition of the well and he failed to remedy it." *Id.* The Court stated emphatically that the individual supervisor will be liable "if he had personal knowledge of the danger and failed to cure the risk of harm." *Id.* As a result, the Court found that the supervisor was properly joined, and the Court remanded the matter to state court.

The Fifth Circuit has held that a plant manager can be held individually liable under Louisiana law. *Ford v. Elsbury,* 32 F.3d 931, 935-37 (5th Cir. 1994). If the supervisor is aware of the danger presented, the supervisor may be individually liable in addition to the company itself. *Id.* Where the plant manager has been made aware of the danger but fails to take the necessary measures within the plant to protect against those dangers, the plant manager may be subject to individual liability. *Id.* at 939.

The *Stolthaven* court specifically discussed the ability to make a claim against an individual employee in order to defeat fraudulent joinder:

> An employee may be personally liable for breaching a duty that arises solely from an employment relationship when (1) the employer owes a duty of care to the plaintiff, (2) that duty is delegated to the employee, and (3) the employee breaches that duty through personal fault. With regard to personal fault, liability cannot be imposed on an employee simply because of "general administrative responsibility for performance of some function of the employment." Id. Rather, the employee must breach a distinct, delegated duty, and that breach must specifically cause plaintiffs' damages.

Mumfrey-Martin v. Stolthaven New Orleans, L.L.C., No. CIV.A. 12-2539, 2013 WL 4875088, at *4 (E.D. La. Sept. 10, 2013)

IV. Class Action Fairness Act

In 2005, the United States Congress enacted the Class Action Fairness Act, which reads in pertinent part as follows:

> (2) The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class action in which—
>
> (A) any member of a class of plaintiffs is a citizen of a State different from any defendant;
> (B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or
> (C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.
>
> (3) A district court may, in the interests of justice and looking at the totality of the circumstances, decline to exercise jurisdiction under paragraph (2) over a class action in which greater than one-third but less than two-thirds of the members of all proposed plaintiff classes in the aggregate and the primary defendants are citizens of the State in which the action was originally filed based on consideration of--
> (A) whether the claims asserted involve matters of national or interstate interest;
> (B) whether the claims asserted will be governed by laws of the State in which the action was originally filed or by the laws of other States;
> (C) whether the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction;
> (D) whether the action was brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants;
> (E) whether the number of citizens of the State in which the action was originally filed in all proposed plaintiff classes in the aggregate is substantially larger than the number of citizens from any other State, and the citizenship of the other members of the proposed class is dispersed among a substantial number of States; and
> (F) whether, during the 3-year period preceding the filing of that class action, 1 or more other class actions asserting the same or similar claims on behalf of the same or other persons have been filed.
>
> (4) A district court shall decline to exercise jurisdiction under paragraph (2)--
> (A) (i) over a class action in which--
> (I) greater than two-thirds of the members of all proposed plaintiff classes in the aggregate are

citizens of the State in which the action was originally filed;

(II) at least 1 defendant is a defendant--

(aa) from whom significant relief is sought by members of the plaintiff class;

(bb) whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class; and

(cc) who is a citizen of the State in which the action was originally filed; and

(III) principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in the State in which the action was originally filed; and

(ii) during the 3-year period preceding the filing of that class action, no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons; or

(B) two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed.

28 U.S.C.A. § 1332.

One major change in the law on diversity, as a result of CAFA, is the treatment of LLC's (limited liability companies). Prior to CAFA, there was no dispute that the citizenship of an LLC was determined by the citizenship of its members. *Harvey v. Grey Wolf Drilling Co.*, 542 F.3d 1077, 1080 (5th Cir. 2008). With the enactment of CAFA, LLC's are treated differently. 28 U.S.C. § 1332(d)(10) provides, "For purposes of this subsection and section 1453, an unincorporated association shall be deemed to be a citizen of the State where it has its principal place of business and the State where it has its principal place of business and the State under whose laws it is organized." 28 U.S.C. § 1332(d)(10).

In 2005, Congress amended 28 U.S.C. 1332 to include a provision that citizenship of defendant unincorporated associations, such as LLC's, shall be treated like corporations for purposes of diversity in class actions. 28 U.S.C. § 1332(d)(10). In *Harvey,* the Fifth Circuit held

that "in the limited context of class actions, Congress has created a statutory exception to *Carden*'s rule of citizenship for unincorporated associations." *Harvey v. Grey Wolf*, 542 F.3d 1077, 1080 (5th Cir. 2008). The Court then held that an LLC was such an "unincorporated association." *Id.* Therefore, the citizenship of an LLC was determined by the citizenship of each member, because this was not a class action.

The Congressional Report for the enactment of CAFA indicates that subsection (d)(10) was intended to apply to all class actions removed under diversity of citizenship. The official legislative comments to 28 U.S.C.A. § 1332 (d) (10) state:

> This provision is added **to ensure that unincorporated associations receive the same treatment as corporations for purposes of diversity jurisdiction**. The U.S. Supreme Court has held that "[f]or purposes of diversity jurisdiction, the citizenship of an unincorporated association is the citizenship of the individual members of the association." This rule "has been frequently criticized because often... an unincorporated association is, as a practical matter, indistinguishable from a corporation in the same business...." **It makes no sense to treat an unincorporated insurance company differently from, say, an incorporated manufacturer for purposes of diversity jurisdiction. New subsection 1332 (d) (10) seeks to correct this anomaly**.

S. Rep. 109-14, at pp. 45-46 (2005) (emphasis added). Therefore, one may argue that the congressional intent was to have citizenship of an unincorporated association (an LLC) treated in the same manner as a corporation. *Id.* There is no explanation and no history to suggest that Congress intended for unincorporated associations to be treated in one manner under subsection (a) for diversity in a class action but to be treated in a completely different manner under subsection (d) of the same statute for diversity in a class action.

There have been a few district court decisions that read CAFA to be only one of the means of removal in a class action. *See, e.g., Francois v. Georgia Gulf Lake Charles,* 2007 WL 5208856 at *1 (W.D. La. 2007); *Suntrust Bank v. Village at Fair Oaks Owner, LLC,* 766 F. Supp. 2d 686, 688-89 (E.D. Va. 2011); *Steel City Group v. Global Online direct, Inc.,* 2006 WL 3484318 at *1

(W.D. Pa. 2006). Thus, some lower courts do not believe that the definition of citizenship of an LLC will be different now that CAFA has been enacted, but that the new test for domicile of an LLC only applies to those situations in which CAFA is the mechanism chosen by the Defendants to remove. A recent decision reiterates that, outside of CAFA, the citizenship of an LLC shall be determined by the citizenship of all members of the LLC. *Perry v. Kiko Mgmt. Grp., LLC*, No. CV 21-203-JWD-EWD, 2021 WL 1950034, at *2 (M.D. La. May 14, 2021). This has not been addressed by the appellate level as of this time.

V. Federal Officer Removal

Especially following Hurricane Katrina, certain defendants have removed cases to federal court based upon the federal officer removal statute. The "federal officer removal" statute confers jurisdiction if the defendant can prove that: (1) it is a person under § 1442; (2) it acted under color of federal authority when committing the tortious conduct; (3) there is a "causal nexus" between the defendant's actions under color of federal office and plaintiff's claims; and (4) it can assert a colorable federal defense. *Joseph v. Fluor Corp.,* 513 F. Supp. 2d 664, 671-72 (E.D. La. 2007). "While the Federal Officer Removal Statute is to be liberally construed, it must nevertheless be interpreted 'with the highest regard for the right of the state to make and enforce their own laws in the field belonging to them under the Constitution.'" *Preston v. Tenet Healthsystem Memorial Med. Ctr., Inc.,* 463 F. Supp. 2d 583, 591 (E.D. La. 2006).

The basic purpose of federal officer removal is to "protect the Federal Government from the interference with its 'operations' that would ensue" if a state could arrest and bring federal officers and agents to trial for acting within the scope of their federal authority. *Watson v. Philip Morris Cos., Inc.,* 127 S. Ct. 2301, 2306 (2007). The same considerations apply when a private person acts to assist the federal official "in helping that official to enforce federal law." *Id.* at

2307. Removal is only appropriate if the private person was "authorized to act with or for [federal officers or agents] in affirmatively executing duties under ... federal law." *Id.* This does not include simply complying with the law, rules, or regulations of the federal officer. *Id.* at 2307-08. The statute is intended to protect the federal officer from being brought to trial in state court for "an alleged offense against the law of the State, yet warranted by the Federal authority they possess . . . ." *Willingham v. Morgan,* 395 U.S. 1813, 1815 (1969) (quoting *Tennessee v. Davis,* 100 U.S. 257, 263 (1880)).

The purpose is to protect a federal officer when he/she has acted in order to enforce a federal law or duty, but the enforcement of that duty conflicts with state law. There must be a conflict between the enforcement of federal interests and the state's tort law. *Sheppard v. Northrop Grumman Sys. Corp.,* 2007 WL 1550992 at *6 (E.D. La. May 24, 2007).

When a private entity invokes federal officer removal, it must demonstrate that a federal officer has direct and detailed control over it. *Preston,* 463 F. Supp. 2d at 590; *see also Joseph,* 513 F. Supp. 2d at 671. The burden of proving that a private person was "acting under" a federal officer "is substantive and is not satisfied by incantations of government contractor status alone." *Freiberg v. Swinerton & Walberg Prop. Servs., Inc.,* 245 F. Supp. 2d 1144, (D. Colo. 2002); *Good v. Armstrong World Indus., Inc.,* 914 F. Supp. 1125, 1129 (E.D. Penn. 1996).

"The established rule is that removal by a person 'acting under' a federal officer must be predicated on a showing that the acts forming the basis of the state suit were performed pursuant to an officer's 'direct orders or comprehensive and detailed regulations.'" *Freiberg,* 245 F. Supp. 2d at 1152. "It is not enough to prove only that 'the relevant acts occurred under the general auspices of a federal office or officer or that a corporation participates in a regulated industry.'"

Id. "Direct and detailed control is established by showing strong government involvement and the possibility that a defendant could be sued in state court **as a result of the federal control**." *Id.* at 1153 (emphasis added); *see also Ryan v. Dow Chem. Co.*, 781 F. Supp. 934, 948-49 (E.D.N.Y. 1992). "The issue is not simply whether the defendant acted under federal officials but whether they are **in danger of being sued in state court based on action taken pursuant to federal direction**." *Freiberg,* 245 F. Supp. 2d at 1153 (emphasis added).

In *Kennedy,* intermediate contractors administering Medicare for the federal government were not entitled to removal under § 1442. *Kennedy v. Health Options,* 329 F. Supp. 2d 1314 (S.D. Fla. 2004). The defendant was a health insurer which provided Medicare benefits under a contract with a federal agency. *Id.* at 1318. The defendant alleged that removal was proper because the "coverage of benefits is being done in the course of administering a federal government health benefits plan and a federal agency has 'strict and comprehensive control and oversight' over [its] actions." *Id.* The Court held that the defendant's benefits determination was **not** "performed pursuant to the direct and detailed control of an officer of the United States." *Id.* "Asserting that a defendant's conduct is performed at the general direction of a federal agency does not rise to the level of removal based on 28 U.S.C. § 1442(a)(1)." *Id.* Under the defendant's argument, all cases brought against the contractors who have contracts to provide Medicare benefits would be entitled to federal jurisdiction. *Id.* The Court rejected that argument, specifically finding that there was no direct causal connection between the government contract and the decision that gives rise to Plaintiff's claim. *Id.* Having a contract with the federal government to provide federal benefits to citizens, even with detailed, comprehensive regulation, does not in itself constitute the direct, detailed control required for federal jurisdiction. *Id.*

In *Guillory,* the Court held that a security officer and security company providing security for a federal building were not entitled to removal under § 1442. *Guillory v. Ree's Contract Serv., Inc.,* 872 F. Supp. 344 (S.D. Miss. 1994). The defendant provided evidence that the federal government provided a supervisor on site, who was the "government's representative" and who had "overall responsibility for the administration of the [security] contract." *Id.* at 347. Among other things, the government contract required the contractor: to provide "trained employees at all times"; to carry out the post assignments prepared by the government's representative; to take all necessary precautionary measures to ensure safety; to perform roving patrols in accordance with the routes and schedules established in the post assignments (which were prepared by the government supervisor); and to maintain law and order on the premises. *Id.* at 347. The Court held that these actions and contractual provisions did *not* rise to the level of detailed control and detailed direction necessary to satisfy § 1442. *Id.*

Assignments prepared by the government "merely establish[ed] the minimum" requirements under the contract. *Id.* The assignments did not preclude "nor could [they] reasonably be interpreted to preclude [the defendant contractor] from exceeding those minimum requirements." *Id.* Although the contract established "some basic parameters within which [the contractor's] services are to be performed", the defendant's actions occurred under only the "general oversight of a federal officer" rather than "the type of detailed direction necessary to support removal." *Id.* at 348.

In *Berthelot*, this Court addressed the federal officer removal statute with respect to the Orleans Levee District and in relation to the levee breaches during Hurricane Katrina. *Berthelot,* 2006 WL 1984661. The Court held that, although the Orleans Levee District was a participant in the federal flood control program, it was not "acting under" a federal officer under § 1442. *Id.* at

*9. "[T]he Corps [of Engineers] did not exercise the day-to-day involvement or oversight over the floodwalls and levees maintenance that would trigger the applicability of § 1441(a)(1) [sic] . . . ." *Id.* The Corps did not provide the Orleans Levee District with the specifics as to how it was to carry out its duties under the federally-regulated flood control program. *Id.*

The defendant invoking federal officer removal must show that there was "'strong government intervention and the threat that [it would] be sued in state court' based on actions which follow federal direction." *Sheppard,* 2007 WL 1550992 at *5. If the record fails to disclose evidence that federal direction prevented the defendant from taking reasonable precautions or from acting reasonably under the circumstances, then the defendant was *not* "acting under" federal authority at the time of its negligent conduct. *Id.* at *5 (holding that Avondale was not entitled to removal where "nothing in the federal regulations prevented [it] from warning employees of the dangers of asbestos exposure.").

The most recent pronouncement in the Fifth Circuit on this doctrine was in 2020:

> Subject to the other requirements of section 1442(a), any civil action that is connected or associated with an act under color of federal office may be removed. Accordingly, we overrule *Bartel* and its progeny to the extent that those cases erroneously relied on a "causal nexus" test after Congress amended section 1442(a) to add "relating to." Henceforth, to remove under section 1442(a), a defendant must show (1) it has asserted a colorable federal defense, (2) it is a "person" within the meaning of the statute, (3) that has acted pursuant to a federal officer's directions, and (4) the charged conduct is connected or associated with an act pursuant to a federal officer's directions.

Latiolais v. Huntington Ingalls, Inc., 951 F.3d 286, 296 (5th Cir. 2020).

"In *Latiolais*, the Fifth Circuit revised its jurisprudence on the federal-officer jurisdictional test in order to "align with sister circuits ... [and] the plain language of the statute." *Par. of Plaquemines v. Riverwood Prod. Co.*, No. CV 18-5217, 2022 WL 101401, at *4 (E.D. La. Jan. 11, 2022).

"Under the new test, removal requires a defendant show four predicates: "(1) it has asserted a colorable federal defense, (2) it is a "person" within the meaning of the statute, (3) that has acted pursuant to a federal officer's directions, and (4) the charged conduct is connected or associated with an act pursuant to a federal officer's directions." *Id.*

"Federal officer removal must be predicated on the allegation of a colorable federal defense." Mesa v. California, 489 U.S. 121, 129 (1989). In order to demonstrate a colorable federal defense, however, a defendant need not assert a "clearly sustainable" defense "as section 1442 does not require a federal official or person acting under him 'to win his case before he can have it removed.' " *Id.* According to *Latiolais*, "an asserted federal defense is colorable unless it is 'immaterial and made solely for the purpose of obtaining jurisdiction' or 'wholly insubstantial and frivolous.' " *Id.*

Latiolais only explicitly overrules cases "to the extent that those cases erroneously relied on a 'causal nexus' test after Congress amended section 1442(a) to add 'relating to.' " *Id. Latiolais* effected a complete change in this prong from a "causal nexus" analysis to a "connection or association" test. Under the new test, and "[s]ubject to the other requirements of section 1442(a), any civil action that is connected or associated with an act under color of federal office may be removed." *Id.* *"*This test is, by intention, quite broad, and covers any and all acts that " 'stand in some relation; ... have bearing or concern; [or] pertain' " to acts under color of federal office." *Id.* *"*The new "connection or association" test is a broad one, greatly expanding the scope of actions which qualify under this test." *Id.*

"Removal must be predicated upon a showing that the acts forming the basis of the state suit were performed pursuant to an officer's direct orders or comprehensive and detailed

regulations." *Good,* 914 F. Supp. at 1128.[5] "By contrast, if the corporation establishes only that the relevant acts occurred under the general auspices of federal direction then it is not entitled to [federal officer] removal." *Id.* The Courts will look to whether the "federal officer directly controlled and supervised the work of [the contractor]." *Id.* at 1129. "Acting under the direction of the [federal government], however, is not the same thing as acting under the *direct and detailed control* of a federal officer." *Id.* at 1129. In *Good,* the plaintiff filed suit against a government contractor who manufactured Navy vessels for plaintiff's exposure to asbestos in the manufacturing of those vessels. *Id.* The Court found that there was no causal connection, in part, because "[n]either the notice nor the affidavit establishes that a federal officer required the use of asbestos in the design and manufacture of the [product]." *Id.* at 1130.

"Where the government has directed a contractor to do the very thing that is the subject of the claim, we have recognized this as a special circumstance where the contractor may assert a defense." *In re World Trade Ctr. Disaster Site Litigation,* 521 F.3d 169, 197 (2d Cir. 2008) (quoting *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 74 n.6 (2001)). Specifically addressing the issue of disaster relief, the Second Circuit stated:

> Without deciding its applicability in other contexts, we think that the rationale for the government contractor defense would extend to the disaster relief context due to the unique federal interest in coordinating federal disaster assistance and streamlining the management of large-scale disaster recovery projects, as evidenced by the Stafford Act. **If a federal agency orders a private contractor or City agency to implement decisions made by the federal agency, in its discretion, we think that 'the interests of the United States will be directly affected' if the contractor or City agency does not follow those orders for fear of liability.** (Citation omitted). A finding that federal agencies exercised supervision, control, and enforcement authority over non-federal entities involved

[5]*See also, Pack*, 838 F. Supp. at 1103; *Ryan*, 781 F. Supp. at 947.

> in the disaster relief efforts is essential to establishing derivative Stafford Act immunity and it is an element the district court **should not lightly presume simply because the federal government is involved in or coordinates disaster relief efforts** under the Stafford Act.

Id. at 197 (emphasis added).

While the defendant is not required to prove that its federal defense will be successful, the defendant must still prove that the federal defense "has some basis in law and fact." *Mesa,* 489 U.S. at 128; *Hilbert v. McDonnell Douglas,* 529 F. Supp. 2d 187, 196 (D. Mass. 2008). The defendant "must make a colorable showing of each element [of the government contractor defense] in order to remove the case." *Id.* at 198 (citing *Durham v. Lockheed Martin Corp*., 445 F.3d 1247,1251-52 (9th Cir. 2006)). The defendant must "allege facts that would support a colorable immunity defense if those facts were true." *Dalrymple v. Grand River Dam Auth.,* 932 F. Supp. 1311, 1313 (N.D. Okla. 1996) (quoting *State v. Ivory*, 906 F.2d 999, 1002 (4th Cir. 1990)).

The defendant can only invoke this defense if it can prove: (1) that the United States approved reasonably precise specifications; (2) the defendant complied with those reasonably precise specifications; and (3) the defendant warned the United States about the dangers in the use of the equipment that were known to the defendant but not to the United States. *Boyle v. United Tech. Corp.,* 487 U.S. 500, 512 (1988). This defense is generally traced to the Supreme Court's opinion in *Boyle*, in which the Court provided protection particularly for government contractors who manufactured military products. *Id.* "Strict adherence to the three *Boyle* conditions specifically tailored for the purpose [of the contractor defense] will ensure that the defense is limited to appropriate claims." *Bailey v. McDonnell Douglas Corp.,* 989 F.2d 794, 801 (5th Cir. 1993).

The first two requirements "assure that the suit is within the area where the policy of the "discretionary function" would be frustrated. *Boyle,* 487 U.S. at 512. Stated otherwise, the first two requirements "assure that the design feature in question was considered by a Government officer, and not merely by the contractor itself." *Id.* The third requirement is essential in order to ensure that there is no incentive for the manufacturer to withhold knowledge of risks arising from the use of that product. *Id.* The basis for the Supreme Court's analysis is that "state law which holds Government contractors liable for design defects in military equipment does in some circumstances present a 'significant conflict' with federal policy and must be displaced." *Id.* at 512. The government contractor defense is a federal common law doctrine "whereby state law is preempted in certain situations because it presents a 'significant conflict' with identifiable federal interests." *Bailey v. McDonnell Douglas Corp.,* 989 F.2d 794, 797 (5th Cir. 1993).

There must be a significant conflict between federal policy and state law even before discussing the elements of the government contractor defense. *Sheppard,* 2007 WL 1550992 at *6 (citing *Boyle,* 487 U.S. at 505-07). "If there is no conflict, if both federal policy and state law can be satisfied at the same time, the contractor may not assert the defense." *Hilbert,* 529 F. Supp. 2d at 198; *Oliver v. Oshkosh Truck Corp.,* 96 F.3d 992, 1003 (7th Cir. 1996). In a case arising from asbestos exposure during the manufacturing of military equipment for the federal government, the Court held:

> Here, there is no conflict between Defendants' federal and state duties. [The contractor's] own testimony demonstrates that **no government regulation or contract specification prevented [the defendants] from providing safety warnings** . . . . There is no conflict because Defendants **could comply with both their contractual obligations and the state-prescribed duty of care**. Thus, Defendants cannot take advantage of this defense.

Sheppard, 2007 WL 1550992 at *6 (emphasis added).

The second element of the government contractor defense requires that the defendant's work or product conform to the specifications of the government. *Trevino v. General Dynamics Corp.*, 865 F.2d 1474, 1481 (5th Cir. 1989). The government contractor defense is only available to contractors who can prove that their work was performed in accordance with government specifications. *Bynum v. FMC Corp.,* 770 F.2d 556, 564 (5th Cir. 1985). "Of course, contractors that fail to follow government specifications or otherwise mismanufacture a product are not entitled to raise that defense." *Id.* Stated otherwise, even if the government has placed standards for appropriate conduct on the contractor, the contractor can only invoke the defense if those standards were actually followed. The contractor "that is itself ultimately responsible" for the cause of the injuries will not be protected by a federal defense. *Id.* at 574.

Finally, the defendant must prove that it warned the federal government about "errors in the government specifications or dangers involved in the use of the equipment that were known to the contractor but not to the government." *Bynum*, 770 F.2d at 574. Without any evidence that the defendant possessed information about the dangers of equipment that the federal government lacked, then there is no government contractor defense available to the defendant. *Trevino,* 865 F.2d at 1481.

VI. Convention on the Recognition and Enforcement of Foreign Arbitration Awards

Arising from the recent hurricanes, many of the insurance policies at issue now contain arbitration provisions in those policies. While Louisiana state law prohibits the arbitration provisions from applying to policies in Louisiana, there is a specific window that can give rise to removal based on federal question jurisdiction. When the policy or contract involves citizens of a foreign country, the policy or contract can fall under the "Convention" of 9 USC 202 et seq. In

such instances, if the policy includes an insurer from a foreign country, the arbitration provision arguably applies, which then means that the Convention applies, and federal question gives the federal court original jurisdiction. *See City of Kenner v. Certain Underwriters at Lloyds, London,* Civ. Action 21-2064, Rec. Doc. No. 15 (E.D. La. 2/2/22). Practically speaking, this appears to be applying in cases involving Lloyd's of London policies predominantly, where there are multiple insurers, some of which are located in London and other foreign countries.

VII. Jones Act, General Maritime Law, and FELA Claims

" Jones Act claims may not be removed from state court" because the Jones Act incorporates the general provisions of the Federal Employer Liability Act ("FELA"), including 28 U.S.C. § 1445(a), which bars removal of FELA claims. *Lackey v. Atlantic Richfield Co.*, 990 F.2d 202, 207 (5th Cir. 1993). 28 U.S.C. § 1445(a) provides that "[a] civil action in any State court against a railroad or its receivers or trustees, arising under sections 1–4 and 5–10 of the Act of April 22, 1908 (45 U.S.C. 51–54, 55–60), may not be removed to any district court of the United States." Section 1445(a) directly references FELA, 45 U.S.C. §§ 51 et seq., and the Jones Act expressly incorporates the provisions of FELA in stating the "[l]aws of the United States regulating recovery for personal injury to, or death of, a railway employee apply to an action under this section." 46 U.S.C. § 30104.

This bar to removal of Jones Act claims applies even when complete diversity exists. *See Lewis v. Lewis & Clark Marine, Inc.,* 531 U.S. 438, 455 (2001) (stating that "a Jones Act claim . . . is not subject to removal to federal court even in the event of diversity of the parties."); *see also Gregoire v. Enter. Marine Servs., LLC,* 38 F. Supp. 3d 749, 765 (E.D. La. 2014) (recognizing that "Jones Act claims are not subject to removal, even if the parties are diverse.").

Before the removal statute was amended in 2011, the state of the law was that claims under general maritime law were not removable based upon "federal question" jurisdiction. *In re Dutile,* 935 F.2d 61 (5th Cir. 1991). After 2011, the Eastern District of Louisiana appears to have continued that status of the law. "[A]ll sections within the Eastern District of Louisiana to consider the issue have concluded that Congress's 2011 amendments to § 1441 do not alter the traditional rule that general maritime law claims are not removable absent an independent basis of federal jurisdiction." *Willison v. Noble Drilling,* 2:21-CV-01520 (E.D. La. 2/14/22), Rec. Doc. No. 23 (Citing *Finney v. Bd. of Commissioners of Port of New Orleans*, No. CV 21-1186, 2021 WL 5905642, at *7 n.96 (E.D. La. Dec. 14, 2021) (collecting cases) and *Alexis v. Hilcorp Energy Co.*, 493 F. Supp. 3d 497, 505 (E.D. La. 2020) (collecting cases)).