

The Forum Defendant Rule in Arkansas



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For those of us interested in or practicing in commercial civil litigation, removal of a case from state court to federal court is a regular event. It also is an important strategic event for defendants because of perceived tactical advantages of a federal forum, such as the following: (a) a more defendant-friendly jury pool; (b) more favorable jury rules;² (c) greater familiarity of defendant's counsel's with federal court and greater familiarity of plaintiff's counsel with state court;³ and (d) a perceived higher cost of federal court that defendants may be able to bear more easily than plaintiffs.⁴

But what happens when a defendant who is a citizen of the forum state tries to remove on diversity grounds? Section 1441(b) of the removal statute prohibits removal in such a case under what has come to be known as the Forum Defendant Rule. Under this rule, removal to federal court on diversity grounds is prohibited if any one of the defendants in the action is a citizen of the state in which the action was filed.⁵

The reason for the rule is obvious: the traditional justification for invocation of federal jurisdiction in diversity cases is to provide to out-of-state litigants a forum seen as less bi-

1. Assistant Professor of Law, University of Arkansas. I thank the students in my Federal Jurisdiction (fall 2006) and Civil Procedure (fall 2006) classes for their insights on this issue in class discussion. A more robust discussion of the issues in this article focusing generally on the jurisdictional/procedural character of removal will appear in Scott Dodson, *In Search of Removal Jurisdiction*, 102 NW. U. L. REV. (forthcoming 2008).

2. Compare FED. R. CIV. P. 48(1) (requiring unanimous jury verdicts) with ARK. R. CIV. P. 48 ("Where as many as nine out of twelve jurors in a civil case agree upon a verdict, the verdict shall be returned as the verdict of such jury. The parties may, however, stipulate that a jury shall consist of any number less than twelve and that a verdict or finding of a stated majority thereof shall be taken as the verdict or finding of the jury.").

3. See 16 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE § 107.04, at 107-25 (3d ed. 2006).

4. See Gregory M. Cesarano & Daniel R. Vega, *So You Thought a Remand was Imminent? Post-Removal Litigation and The Waiver of the Right to Seek a Remand Grounded on Removal Defects*, 74 FLA. B.J. 22, 23-24 (2000).

5. 28 U.S.C. § 1441(b).

ased towards them. The Forum Defendant Rule preserves the narrowness of this justification by prohibiting an in-state defendant from invoking federal diversity jurisdiction.

I. The Issue

What is less obvious, however, is whether the Forum Defendant Rule is jurisdictional or procedural. This is an important question. If removal in violation of the Forum Defendant Rule never confers subject-matter jurisdiction in the federal district court, the lack of jurisdiction can be raised at any time prior to final judgment, can be raised by any party or the court *sua sponte*, and is not subject to waiver or estoppel.⁶ In short, if the Forum Defendant Rule is jurisdictional, then a case removed in violation of the rule must be remanded to state court immediately, at any time and regardless of the circumstances.

In contrast, if removal in violation of the Forum Defendant Rule is not jurisdictional, the defect must be raised by the plaintiff within thirty days of removal.⁷ If the defect is not raised within that time, the defect is waived, and the plaintiff is stuck in federal court.⁸

The question is of critical importance in practice. If the rule is procedural, then the burden is on the plaintiff to recognize the defect within a short time frame. Yet, often, a determination of citizenship for diversity purposes is far from clear.⁹ If the defendant invokes diversity jurisdiction as a basis for removal simply by alleging non-forum citizenship in its removal papers, the plaintiff may have no basis for challenging the defendant's assertion of non-forum citizenship until discovery, well after the thirty day remand window for procedural defects has expired.¹⁰

6. *See id.* § 1447(c) (“If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.”); *Ins. Corp. of Ire., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982) (stating that jurisdictional defects may be raised at any time, by any party or the court *sua sponte*, and irrespective of waiver or estoppel).

7. *See* 28 U.S.C. § 1447(c) (“A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal . . .”).

8. *See* *Rexford v. Brunswick-Balke-Collender Co.*, 228 U.S. 339, 344 (1913) (holding that a defect in removal procedure can be waived).

9. For example, a corporation is a citizen of its state of principal place of business, *see* 28 U.S.C. § 1332(c)(1), a determination that is often difficult to make, *compare, e.g., Kelly v. U.S. Steel Co.*, 284 F.2d 850 (3d Cir. 1960) (using the “muscle test” to determine principal place of business citizenship), *with* *Scot Typewriter Co. v. Underwood Corp.*, 170 F. Supp. 862 (S.D.N.Y. 1959) (using the “nerve center test” to determine principal place of business citizenship), *with* *Harris v. Black Clawson Co.*, 961 F.2d 547 (5th Cir. 1992) (using a “total activity test”). Often, the very determination of whether an organizational defendant is a corporation or a partnership is itself a question requiring extensive discovery. *See, e.g., Lincoln Prop. Co. v. Roche*, 126 S. Ct. 606, 612 & n.4 (2005) (acknowledging as “understandable” the plaintiffs’ confusion about a real estate defendant’s organizational status).

10. This is precisely what occurred in *Lively v. Wild Oats Markets, Inc.*, 456 F.3d 933 (9th Cir. 2006), discussed below.

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II. The Circuit Split

The U.S. Courts of Appeals are split over whether the Forum Defendant Rule is proce-

dural or jurisdictional. At least seven circuits have characterized the rule as procedural.¹¹ The most recent is the Ninth Circuit, in *Lively v. Wild Oats Markets, Inc.*¹²

11. See *Farm Constr. Servs., Inc. v. Fudge*, 831 F.2d 18, 22 (1st Cir. 1987); *Woodward v. D.H. Overmyer Co.*, 428 F.2d 880, 882-83 (2d Cir. 1970) (Friendly, J.); *Korea Exch. Bank v. Trackwise Sales Corp.*, 66 F.3d 46, 48-51 (3d Cir. 1995); *In re Shell Oil Co.*, 932 F.2d 1518, 1523 (5th Cir. 1991); *Hurley v. Motor Coach Indus. Inc.*, 222 F.3d 377, 380 (7th Cir. 2000); *Lively v. Wild Oats Markets, Inc.*, 456 F.3d 933 (9th Cir. 2006); *Am. Oil Co. v. McMullin*, 433 F.2d 1091, 1095 (10th Cir. 1970).

I say “at least” seven because two other circuits, the Sixth and Eleventh Circuits, appear to follow the procedural characterization as well, but the existence of contrary authority within the respective circuit makes this conclusion uncertain.

The Sixth Circuit, in *Handley-Mack Co. v. Godchaux Sugar Co.*, 2 F.2d 435 (6th Cir. 1924), seemed clearly to articulate a procedural, waivable characterization of the forum defendant rule. *Handley-Mack*, 2 F.2d at 437 (“[W]e find no holding of the Supreme Court that a removal by a nonresident defendant . . . is vital to the jurisdiction of the District Court to hear the case, in the sense that the court has no discretion but to remand it, in spite of the original jurisdiction to hear it and long-continued acquiescence by the parties, as well as the court’s trial and decision thereunder.”). However, courts in the Sixth Circuit have declined to cite *Handley-Mack* in subsequent, unpublished opinions, and have, with one exception, reached the contrary conclusion in them. See *Dellinger v. Atlas Techs., Inc.*, 9 F.3d 107, No. 92-2091, 1993 WL 43648, at *1 (6th Cir. Oct. 28, 1993) (holding the forum defendant rule to be jurisdictional and controlling even though the plaintiff did not raise it in his remand motion or on appeal); *Lindsey v. Ky. Med. Investors, Ltd.*, No. Civ.A.05-116-DLB, 2005 WL 2281607, at *2 & n.3 (E.D. Ky. Sept. 19, 2005) (raising the issue *sua sponte* because the Rule’s “application impacts the Court’s subject matter jurisdiction” and remanding the case because of the defect); *Gilbert v. Choo-Choo Partners II, LLC*, No. 1:05-CV-99, 2005 WL 1719907, at *2 (E.D. Tenn. July 22, 2005) (characterizing a removal in violation of the forum defendant rule as a “lack of subject matter jurisdiction”). *But see Plastic Moldings Corp. v. Park Sherman Co.*, 606 F.2d 117, 119 n.1 (6th Cir. 1979) (“The case was not properly removable because the removing defendant . . . is a resident of the state in which the action was brought However, the case was within the District Court’s original [diversity] jurisdiction . . . , and Plastic Moldings’ acquiescence in the removal waived any objection it might have had in this regard.”).

The Eleventh Circuit, in *Borg-Warner Leasing v. Doyle Electric Co.*, 733 F.2d 833 (11th Cir. 1984), held that removal in violation of the forum defendant rule “was a technical flaw that did not go to the subject matter jurisdiction of the court. Because Borg-Warner’s action fell within the original diversity jurisdiction of the federal district court, the procedural defect under the removal statute was waivable by the parties. . . . We conclude that waiver occurred since this case proceeded without objection to consideration on the merits.” *Borg-Warner*, 733 F.2d at 834 n.2. In 1998, the Eleventh Circuit again addressed the forum defendant rule, but in a confusing footnote, characterized it both as waivable and as jurisdictional: “First, that removal of a case with resident defendants is a procedural defect does not render that defect meaningless; rather, the defect is *waivable*, and in this case the plaintiffs have not waived their objection Second, [in considering whether to remand because of this defect or dismiss under the doctrine of *forum non conveniens*.] . . . [i]mportant jurisdictional questions cannot be ignored merely because they are difficult. To do otherwise would allow defendants to evade the statutory requirements of § 1441(b) and allow federal courts to make significant dispositive rulings in a case over which the federal courts may lack jurisdiction.” *Pacheco de Perez v. AT&T Co.*, 139 F.3d 1168, 1372 n.4 (11th Cir. 1998). Finally, in 1999, the Eleventh Circuit, in dicta developed in the course of discussing the legislative history of the removal statute, intimated that Congress meant to subsume § 1441(b) defects under the non-jurisdictional language of § 1447(c). See *Snapper, Inc. v. Redan*, 171 F.3d 1249, 1258 (11th Cir. 1999). It is no wonder that district courts within the Eleventh Circuit are split on the question. *Compare Elias v. The Am. Nat’l Red Cross*, 271 F. Supp. 2d 1370, 1373 (N.D. Ala. 2003) (holding the rule jurisdictional), *with Murphy v. Aventis Pasteur, Inc.*, 270 F. Supp. 2d 1368, 1374 (N.D. Ga. 2003) (holding the rule non-jurisdictional).

The Fourth Circuit has not confronted the issue, but district courts within that circuit have uniformly considered the rule to be non-jurisdictional. See *Ada Liss Group v. Sara Lee Branded Apparel*, No. 1:06CV610, 2007 WL 634083, at *4 (M.D.N.C. Feb. 26, 2007) (holding “that the forum defendant rule is procedural rather than jurisdictional”); *Sherman v. Sigma Alpha Mu Fraternity*, 128 F. Supp. 2d 842, 846 (D. Md. 2001) (considering the defect to be discretionary, not jurisdictional); *Ravens Metal Prods., Inc. v. Wilson*, 816 F. Supp. 427, 429 (S.D. W. Va. 1993) (“The defect at issue in the present action does not affect the existence of subject matter jurisdiction in this Court. That Defendant is a citizen of the forum state is a procedural defect in removal Plaintiff has waived by failing to object within the 30-day period prescribed by § 1447(c).”).

12. 456 F.3d 933 (9th Cir. 2006).

**A. The Ninth Circuit's Approach:
*Lively v. Wild Oats Markets***

Lively filed a personal injury action against Wild Oats in California state court seeking damages for a slip and fall accident that occurred in one of Wild Oats' California stores.¹³ Wild Oats removed on the basis of diversity, ostensibly under 28 U.S.C. § 1441(a),¹⁴ because Lively was a citizen of New York and Wild Oats was incorporated in Delaware with, according to its removal papers, its principal place of business in Colorado.¹⁵

Federal court was preferable to Wild Oats and detrimental to Lively for a number of reasons. First, California requires only a three-fourths jury majority for a verdict, whereas the federal rules require unanimity.¹⁶ Second, the district jury pool was likely to be more business-friendly than the county pool.¹⁷ Other strategic reasons may have animated Lively's decision to file in state, as opposed to federal, court.¹⁸ Lively, however, having no reason to doubt the Wild Oats' claims of its own citizenship (and no evidence

on which to base any doubt), did not object to the removal,¹⁹ and the case proceeded to discovery.

During discovery, the district court determined that Wild Oats' principal place of business was California, not Colorado.²⁰ It therefore held a show cause hearing to determine whether removal was improper under the Forum Defendant Rule of § 1441(b).²¹ By this time, however, the thirty day window for remand for procedural defects had expired, and thus remand was only available for lack of subject matter jurisdiction.²² Wild Oats argued that the Forum Defendant Rule was procedural, rather than jurisdictional, and thus could only have been the basis for a remand by motion within thirty days of removal.²³ The district court disagreed and remanded the case for lack of subject matter jurisdiction.²⁴

The Ninth Circuit reversed, concluding that the Forum Defendant Rule is procedural on three grounds.²⁵ First, the court determined that the legislative history of § 1447(c) supported its procedural character.²⁶ Section

13. *Id.* at 936.

14. I say "ostensibly" because Wild Oats referred to § 1441(b) in its removal papers even though § 1441(b) does not grant authority for removal based on diversity. *Id.*

15. *Id.*

16. Appellee's Response, *Lively v. Wild Oats Markets, Inc.*, Case No. 04-56682, at 3.

17. *Id.* at 3.

18. *See supra* text accompanying notes 2-4.

19. *Lively v. Wild Oats Markets, Inc.*, 456 F.3d 933, 936 (9th Cir. 2006).

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* at 937.

25. The Ninth Circuit also concluded that it had jurisdiction to review the district court's remand order under § 1447(d). *Id.* at 937-38.

26. *Id.* at 939.

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1447(c) characterizes various defects of removal. As originally written, the statute provided that remand must be made at any time if the case was “removed improvidently and without jurisdiction.”²⁷ In 1988, Congress changed that language to provide that “any defect in removal procedure” must be made within thirty days of removal, but that remand must be made at any time if the court “lacks subject matter jurisdiction.”²⁸ Finally, in 1996, Congress adopted the current language, which provides for remand only within thirty days of removal for “any defect other than lack of subject matter jurisdiction.”²⁹ The Ninth Circuit, surveying these transformations, concluded that Congress’s substitution of “defect other than lack of subject matter jurisdiction” for “defect in removal procedure” represented a narrowing of defects that should be considered “jurisdictional.”³⁰ The court concluded that that narrowing excluded the Forum Defendant Rule from the jurisdictional realm, though it did not explain why.³¹

The Ninth Circuit’s legislative history argument merely begs the question. It is true that § 1447(c)’s iterations demonstrate an attempt to broaden the category of non-jurisdictional defects subject to its thirty-day remand window, but it does not and has never attempted to define which defects are jurisdictional and which are not.³² The conclusion of the Ninth Circuit, that the broadening of the non-jurisdictional category encompassed

the forum defendant rule, does not logically follow from the changes of § 1447(c) unless the forum defendant rule was seen as non-jurisdictional in the first place, the very question presented.³³

Second, the Ninth Circuit concluded that a procedural characterization of the Forum Defendant Rule comported with the Rule’s purpose.³⁴ The court noted that removal based on diversity jurisdiction is intended to protect out-of-state defendants from possible prejudices in state court, and that the need for this protection is absent when the removing defendant is in-state.³⁵ The court reasoned that a procedural characterization of the Forum Defendant Rule would return to the plaintiff the ultimate choice of forum because the plaintiff could either move to remand to state court (within the 30-day window) or choose to stay in federal court by not moving to remand within the thirty days.³⁶ By contrast, reasoned the Ninth Circuit, a jurisdictional characterization of the Forum Defendant Rule would allow the court to remand the case to state court even if the plaintiff preferred to remain in federal court.³⁷

This argument seems backwards. Even assuming that the purpose of the forum defendant rule is to protect the plaintiff’s preferred choice of forum, a jurisdictional characterization promotes this purpose far more than a procedural characterization. A jurisdictional rule would require remand back to

27. 28 U.S.C. § 1447(c) (1948).

28. 28 U.S.C. § 1447(c) (1988).

29. 28 U.S.C. § 1447(c) (1996).

30. *Lively*, 456 F.3d at 939.

31. *Id.*

32. *See Dodson*, *supra* note 1.

33. *See id.*

34. *Lively*, 456 F.3d at 939.

35. *Id.* at 940.

36. *Id.*

37. *Id.*

the plaintiff's preferred forum in all cases, whereas a procedural rule would require remand only if the plaintiff timely moved for remand within thirty days of removal.³⁸ True, as the Ninth Circuit pointed out, a jurisdictional characterization will require remand even if the plaintiff prefers federal court, but it seems extremely unlikely that a plaintiff, having initially chosen state court over federal court, would later prefer to litigate in the defendant's choice of forum.³⁹

Third, the Ninth Circuit relied upon the fact that eight other circuit courts had held similarly.⁴⁰ It also relied upon a Supreme Court case, *Grubbs v. General Electric Credit Corp.*,⁴¹ which held that where a removed case is tried on the merits without objection and the federal court enters judgment, the jurisdictional issue on appeal is not whether removal was proper, but whether the district court would have had original jurisdiction over the case.⁴² The Ninth Circuit reasoned that the Supreme Court's comment that the defect could not be raised *after* judgment, contrary to most defects of subject matter jurisdiction, suggested that the Supreme Court

considered removal defects to be procedural, not jurisdictional.⁴³

Grubbs, however, is irrelevant, though the Ninth Circuit's confusion is understandable. *Grubbs* dealt with two separate defects and stands for two separate propositions regarding them, neither of which have to do with the process of characterizing rules as jurisdictional or procedural: (1) a jurisdictional defect will not void a judgment if it is "cured," i.e., the court obtains jurisdiction, by the time it enters judgment; and (2) nonjurisdictional defects can be overcome by countervailing prudential considerations such as economy, efficiency, and finality.⁴⁴ In line with these two positions, the Court has reaffirmed that "if, at the end of the day and case, a jurisdictional defect remains uncured, the judgment must be vacated."⁴⁵ Thus, the fact that a non-jurisdictional defect could not be raised for the first time on appeal is an unremarkable statement. It does not answer the question of whether the forum defendant rule should be characterized as jurisdictional or procedural.⁴⁶

38. See Dodson, *supra* note 1.

39. See *id.*

40. *Lively*, 456 F.3d at 940.

41. 405 U.S. 699 (1972).

42. *Id.* at 702.

43. *Lively*, 456 F.3d at 941-42.

44. See *Grupo Dataflux v. Atlas Global Group, L.P.*, 541 U.S. 567, 573-74 (2004) (stating that dismissal of the defendant cured the jurisdictional defect, and that the statutory defect of failing to comply with the time of removal rules was overridden—rather than cured—by prudential considerations); *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 73 (1996) ("The **jurisdictional** defect was cured, *i.e.*, complete diversity was established before the trial commenced. . . . [What remained was] a statutory flaw—[the] failure to meet the § 1441(a) requirement that the case be fit for federal adjudication at the time the removal petition is filed." (emphasis in original)).

45. *Caterpillar*, 519 U.S. at 76-77 (emphasis omitted).

46. See Dodson, *supra* note 1.

**B. The Eighth Circuit's Approach:
*Hurt v. Dow Chemical***

Standing alone against the tide of circuit courts is the Eighth Circuit. In *Hurt v. Dow Chemical Co.*,⁴⁷ then Chief Judge Richard Arnold held that the Forum Defendant Rule is a jurisdictional defect that can be raised at any time by any party. There, Hurt, an Illinois citizen, filed suit in Missouri state court against Dow Chemical, a citizen of Delaware, and Rose Exterminator, a citizen of Missouri, for personal injuries resulting from exposure to the pesticide Dursban.⁴⁸ Dow manufactured the pesticide, and Rose applied it to Hurt's workplace.⁴⁹ Hurt claimed that both defendants were liable for failing to warn her, and that Rose was additionally liable for failing to use ordinary care in applying the pesticide.⁵⁰

The defendants removed, claiming both federal question and diversity jurisdiction.⁵¹ Hurt filed an amended complaint in federal court but then moved to remand to state court, asserting that the case had been improperly removed.⁵² The district court denied the motion, holding removal on both grounds

was proper and that Hurt had waived any non-jurisdictional objection.⁵³ Hurt appealed.

The Eighth Circuit reversed and remanded. The court first held that federal question jurisdiction was lacking.⁵⁴ It then addressed the diversity issue. The court noted that because complete diversity existed among the parties, Hurt could have filed the case in federal court under the court's original jurisdiction of § 1332.⁵⁵ Here, however, Hurt did not invoke the original jurisdiction of the federal courts; rather, the defendants invoked federal jurisdiction through removal.⁵⁶

The Eighth Circuit reasoned that jurisdiction of the lower federal courts, both original and removal, is entirely a creature of statute. If one of the statutory requirements is not met, the district court lacks jurisdiction.⁵⁷ Because removal was precluded here by § 1441(b), the Eighth Circuit concluded, the district court lacked removal jurisdiction and should have granted the remand motion.⁵⁸

Hurt's resort to formalism does not jive well with its own precedent, for longstanding Eighth Circuit caselaw holds the 30-day time requirement for removal to be a nonjurisdictional procedural bar.⁵⁹ If *Hurt's* formalistic

47. 963 F.2d 1142 (8th Cir. 1992).

48. *Id.* at 1143.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 1143-44.

53. *Id.* at 1144.

54. *Id.* at 1144-45.

55. *Id.* at 1145.

56. *Id.*

57. *Id.*

58. *Id.* *Hurt* did not make the textual argument that § 1441(b) is an exception to the jurisdictional grant in § 1441(a) and therefore is likely a jurisdictional provision rather than a procedural one. See Brian W. Portugal, Comment, *More than a Legal Nicety: Why the Forum Defendant Rule of 28 U.S.C. Section 1441(b) is Jurisdictional*, 56 BAYLOR L. REV. 1019, 1034-36 (2004).

59. See, e.g., *Koehnen v. Herald Fire Ins. Co.*, 89 F.3d 525, 528 (8th Cir. 1996); *Nolan v. Prime Tanning Co.*, 871 F.2d 76, 78 (8th Cir. 1989).

sylogism is to hold water on its own, it must also deem the time bar to removal to be jurisdictional. *Hurt's* unwillingness to explain formal justifications for the differences or to adopt a more functional approach undermines *Hurt's* persuasiveness.⁶⁰

Nevertheless, just last year the Eighth Circuit reaffirmed *Hurt* in *Horton v. Conklin*,⁶¹ in which three new judges noted the contrary views of the other circuits but nevertheless adhered to *Hurt* as "the better rule."⁶² Thus, even after the statutory amendments in 1996, which, according to at least one court, resolved the split,⁶³ the Eighth Circuit continues to characterize the Forum Defendant Rule as jurisdictional.

C. The Potential for Resolution of the Circuit Split

Three events could resolve this split, though each is doubtful. First, the Eighth Circuit, recognizing the trend of its sister circuits, could reconsider the result in *Hurt*. That event seems unlikely because only the court sitting *en banc*, and not just a subsequent panel, can overrule prior Eighth Circuit pan-

el decisions.⁶⁴ It seems particularly unlikely now because the Eighth Circuit voted not to rehear *en banc Horton v. Conklin*, the case reaffirming *Hurt*.⁶⁵

Second, Congress could amend § 1441(b) to clarify that the Forum Defendant Rule is not a jurisdictional provision. To my knowledge, that event is not imminent.

Third, the Supreme Court could resolve the circuit split. Although the Court has recognized that it has not decided the question,⁶⁶ simple mathematics suggest that the likelihood of the Court granting review in any case is small,⁶⁷ and the likelihood that the Court will grant certiorari to hear a case involving this issue is particularly unlikely because the Court recently declined to review both *Horton*⁶⁸ and *Lively*.⁶⁹

III. The Future for Arkansas Attorneys and Courts

Thus, for now, the law in Arkansas federal courts is clear under *Hurt* and *Horton*: the Forum Defendant Rule is a jurisdictional requirement that, if violated, requires remand whenever it is raised.

60. See Dodson, *supra* note 1.

61. 431 F.3d 602 (8th Cir. 2005).

62. *Id.* at 605.

63. See Snapper, Inc. v. Redan, 171 F.3d 1249, 1258 (11th Cir. 1999); cf. *Lively*, 456 F.3d at 939 (relying on the legislative changes as one basis for holding the rule to be non-jurisdictional).

64. See *United States v. Prior*, 107 F.3d 654, 660 (8th Cir.1997); *Campbell v. Purkett*, 957 F.2d 535, 536 (8th Cir.1992) (per curiam).

65. *Horton*, 431 F.3d 602, reh'g & reh'g *en banc* den. (8th Cir. Feb. 9, 2006).

66. See *Lincoln Prop. Co. v. Roche*, 546 U.S. 81 n.6 (2005) (recognizing that the Court has not resolved the issue).

67. The Supreme Court granted review in only 63 of the 1671 cases docketed in the 2005-06 Term, under 4%. See Bureau of National Affairs, *United States Law Week's Supreme Court Today*, 2005-2006 Term in Review 01, 75 U.S.L.W. 3016 (2006), available at <http://ippubs.bna.com/ip/bna/lwt.nsf/8525640a0057f2b0852563930058d16c/f999c7d96a74b8b8852571c40050df4e?OpenDocument>.

68. See *Waugh v. Horton*, ___ U.S. ___, No. 05-1419, 2006 WL 1268712 (U.S. Oct. 2, 2006) (denying certiorari).

69. See *Lively v. Wild Oats Markets, Inc.*, ___ U.S. ___, No. 06-748, 2007 WL 506065 (U.S. Feb. 20, 2007) (denying certiorari). In the interests of full disclosure, I was one of the attorneys assisting Ms. Lively on her petition for certiorari, along with Jeff Fisher and Pam Karlan of the Stanford Law School Supreme Court Litigation Clinic, Amy Howe of Howe & Russell, P.C., and Lenny Tavera of Lowle, Denison, Smith & Tavera, LLP.

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Arkansas attorneys should consider carefully the jurisdictional nature of the Forum Defendant Rule in cases removed from Arkansas state court to federal court. As a practical matter, the jurisdictional nature of the rule means that plaintiffs need not fear the thirty-day remand requirement for procedural defects under § 1447(c). Accordingly, those who do not wish to be in federal court may wish to seek broad discovery relevant to the basis for diversity jurisdiction invoked by the defendants.

On the flip side, attorneys for defendants must recognize that the citizenship of their clients may be subject to greater scrutiny in discovery. However, a defendant may wish to raise the jurisdictional issue itself if it determines at a later date that its true principal place of business is in Arkansas.

In addition to litigants, federal district courts in Arkansas must maintain vigilance

over their subject-matter jurisdiction in removed cases. Because the Eighth Circuit has held the Forum Defendant Rule to be jurisdictional, federal district courts in Arkansas may wish to hold a hearing on the citizenship of the defendant if at any point in a removed proceeding the court believes that a defendant is actually a citizen of Arkansas.

Conclusion

In sum, the Forum Defendant Rule, jurisdictional in the Eighth Circuit, holds unique incentives and pressures for litigants in a case removed to Arkansas federal court. Both litigants and federal district courts should be vigilant in recognizing the unique issues raised by the forum defendant rule so that tardy invocation of the rule, leading to unfairness and wasted time and resources, does not occur.