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THIRD-PARTY REMOVAL OF AN ENTIRE CASE: WHO CAN REMOVE, WHO CANNOT

Pursuant to section 1441 of the Judicial Code,¹ a defendant may remove an entire civil case² from a state court to a federal court provided a removable claim exists that is separate from and independent of an otherwise nonremovable claim.³ The separate and independent claim requirement of section 1441(c) deters a plaintiff from adding unrelated claims to prevent the

1. 28 U.S.C. § 1441 (1982). Section 1441 of the Judicial Code (§ 1441) provides for removal in state civil actions of claims over which a federal district court would have had original jurisdiction. *See id.*; *see also id.* § 1442 (permitting removal from state court to federal court of suits against federal officers); *id.* § 1443 (permitting removal from state court to federal court of civil rights suits); *id.* § 1444 (permitting removal from state court to federal court of suits against United States); *id.* § 1445 (listing nonremovable actions); *id.* § 1446 (outlining procedure for removal); *id.* § 1447 (outlining procedure after removal); *id.* § 1448 (outlining procedure for service of process after removal). *See generally* 1A J. MOORE & B. RINGLE, MOORE'S FEDERAL PRACTICE ¶ 0.156[1], at 15-19 (1983-84 Cum. Supp.) (discussing history of removal jurisdiction).

The basic principles governing a federal court's federal question jurisdiction, diversity of citizenship jurisdiction, and the jurisdictional amount apply to cases a defendant attempts to remove from a state court to a federal court. 28 U.S.C. § 1441(b) (1982). Federal district courts have jurisdiction over actions arising under the Constitution and federal laws. 28 U.S.C. § 1331(a) (1982); *see Gully v. First Nat'l Bank in Meridian*, 299 U.S. 109, 112 (1936) (federal right or immunity must be essential element of plaintiff's case to constitute federal question). *See generally* 1A MOORE'S FEDERAL PRACTICE, *supra*, ¶ 0.168[2], at 539-40 (criticizing language in *Gully v. First Nat'l Bank in Meridian* for failing to distinguish between constitutional and statutory removal power). Federal district courts also may exercise original jurisdiction over controversies between citizens of different states. 28 U.S.C. § 1332(a) (1982). The constitutional basis for diversity jurisdiction appears in Article III, § 2 of the United States Constitution. *See* U.S. CONST. art. III, § 2 (Congress has power to bestow upon federal courts authority to preside over controversies between parties of diverse state citizenship). Formerly, federal courts required complete diversity to exercise federal jurisdiction when a suit involved more than two parties. *See Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 267-68 (1806) (each plaintiff must be able to sue each defendant for complete diversity to exist). Complete diversity, however, is not constitutionally mandated and minimal diversity is permissible. *See State Farm Fire & Casualty Co. v. Tashire*, 386 U.S. 523, 530-32 (1967) (federal jurisdiction attaches when two or more claimants are of diverse citizenship regardless of citizenship of rival claimants). The amount in controversy must exceed \$10,000 for diversity jurisdiction to apply. 28 U.S.C. § 1332(a) (1976). *But see id.* § 1331(a) (1982) (no minimum amount-in-controversy requirement exists for federal question jurisdiction).

2. 28 U.S.C. § 1441(c) (1982). Pursuant to § 1441(c) a defendant may remove an entire case without limiting removal to certain claims. *Id.*; *see infra* notes 130-34 and accompanying text (discussing constitutionality of removing entire case from state court to federal court); *see also infra* notes 153-54 and accompanying text (most courts allowing third-party removal of entire case remand principal claim to state court).

3. 28 U.S.C. § 1441(e) (1982). A defendant's right to remove a civil case from a state court to a federal court is entirely statutory. *See Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 349 (1816) (Constitution does not provide expressly for removal); *Libhart v. Santa Monica Dairy Co.*, 592 F.2d 1062, 1064 (9th Cir. 1979) (courts derive removal jurisdiction from statutory authorization of Congress). Article III, § 2 of the United States Constitution provides the constitutional basis for a statute governing removal. *See* U.S. CONST. art. III, § 2 (grant to Congress of power to regulate business of federal courts). A provision for removal has existed since the

defendant from removing a case to federal court.⁴ The Supreme Court has held that no separate and independent claim exists when a plaintiff seeks relief for a single wrong resulting from an "interlocked series of transactions."⁵ While the Supreme Court has addressed the applicability of the separate and independent requirement of section 1441(c) to cases involving the plaintiff and

Judiciary Act of 1789. 1 Stat. 73, c. 20, § 12 (1789). Congress established removal jurisdiction to protect nonresident defendants from the local prejudices of state courts by enabling defendants to litigate certain controversies in a neutral, federal forum. See Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 91-92 (1923) (fear that states would not enforce federal laws prompted changes in removal jurisdiction during nineteenth century); see also 28 U.S.C. § 1441(a), (b) (1982) (only defendants may remove action from state to federal courts). Congress has questioned whether federal forums actually are neutral. See H.R. REP. No. 308, 80th Cong., 1st Sess. 1-2 (1947) reprinted in Reviser's Note, 28 U.S.C. § 1441(c) (1982) (provisions for removal because of prejudice or local influence no longer apply). Between 1875 and 1887, plaintiffs and defendants could remove an action from a state court to a federal court. See 18 Stat. 470, c. 137 § 2 (1875) (jurisdictional amount of \$500 was only restriction to removal). In 1887, however, Congress limited the removal right to defendants. See 24 Stat. 552 (1887), corrected 25 Stat. 433 (1888).

A state's removal provisions cannot control the removal provisions of the federal statute. See *Chicago, Rock Island & Pac. R.R. Co. v. Stude*, 346 U.S. 574, 580 (1954) (definition of defendant for removal purposes is federal matter). The burden is on the defendant to show that removal is proper. See *B., Inc. v. Miller Brewing Co.*, 663 F.2d 545, 549 (5th Cir. 1981) (party urging federal jurisdiction bears burden of showing propriety of removal). In cases with joint defendants, all defendants must join in petition to remove. See *Bradley v. Maryland Casualty Co.*, 382 F.2d 415, 419 (8th Cir. 1967) (federal statute treats plural defendants collaterally); see also 28 U.S.C. § 1441(a) (1982) (providing for removal by joint defendants).

4. See Lewin, *The Federal Courts' Hospitable Back Door—Removal of "Separate and Independent" Non-Federal Causes of Action*, 66 HARV. L. REV. 423, 426 (1953) (plaintiff may not defeat removal by joining nonremovable claim). If § 1441(c) did not provide for the removal of an entire case when removable and nonremovable claims coexist in the case, a plaintiff could defeat the defendant's right of removal simply by joining a claim over which a federal court does not have jurisdiction. See *Continental Resources & Mineral Corp. v. Continental Ins. Co.*, 546 F. Supp. 850, 852 (S.D. W.Va. 1982) (purpose of § 1441(c) is to enable defendant to remove case despite plaintiff's joinder of otherwise nonremovable claim).

For a defendant to remove an action from a state court to a federal court, the state court first must have subject matter jurisdiction over the issues involved. See *Lambert Run Coal Co. v. Baltimore & Ohio R.R. Co.*, 261 U.S. 377, 382 (1922) (federal court acquires no jurisdiction through removal if state court did not have jurisdiction). But see 1A MOORE'S FEDERAL PRACTICE, *supra* note 1, ¶ 0.157[3]-[2], at 60 (federal courts should not always apply rigid dismissal rule when state court does not have original jurisdiction prior to removal). A federal court exercises original jurisdiction, not appellate jurisdiction, over issues in a case that defendant removes to federal court. See *Freeman v. Bee Mach. Co.*, 319 U.S. 448, 452 (1942) (federal law governs proceeding in removed cases). All petitions for removal go directly to federal court. See 28 U.S.C. § 1446(a) (1982) (defendants seeking removal must file petition with federal district court); see also 1A MOORE'S FEDERAL PRACTICE, *supra* note 1, ¶ 0.168[2], at 537 (federal courts determine removability). See generally 14 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3721, at 520 (1976 & Supp. 1982) (discussing differences between removal jurisdiction and original jurisdiction).

5. See *American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 14 (1951) (defendants' failure to compensate plaintiff for fire loss under insurance policy constituted single wrong and therefore no separate and independent claim existed). In *American Fire & Casualty Co. v. Finn*, a Texas citizen sued two out-of-state insurance companies and a Texas insurance agent in Texas state

the original defendant, confusion remains over whether a third-party defendant⁶ may remove an entire case from a state court to a federal court pursuant to the separate and independent claim requirement of section 1441(c).⁷

Federal third-party practice permits a defendant to join another party who is or may be liable for all or part of the plaintiff's claim against the original defendant.⁸ Third-party practice enables the original defendant, as a third-party plaintiff, to implead into the action a potentially liable third party who then becomes the third-party defendant.⁹ The purpose of impleader is to avoid circuity of actions.¹⁰ By disposing of several related claims in one action, courts reduce multiplicity of litigation and increase the likelihood of consistent results.¹¹ The federal third-party practice rule is rule 14 of the Federal Rules of Civil Procedure, which permits a defendant to implead into a suit

court claiming damages for loss of insured property. *Id.* at 7-8. The insurance companies removed the case to federal court. *Id.* The Supreme Court held that the insurance companies improperly removed the case to federal court. *Id.* at 13-16. The Court held that no claim or cause of action separate from and independent of the state claim existed in the controversy because the plaintiff suffered a single wrong. *Id.* at 14. The single wrong to the plaintiff was the failure to pay compensation for lost property, regardless of which defendant was liable. *Id.* at 14-15. In denying removal, the Court attached significant weight to the facts that the damages arose from a single incident and that each of the three claims the plaintiff asserted involved substantially the same facts and transactions. *Id.* at 14-16.

6. See *infra* notes 8-12 and accompanying text (defining third-party defendant and discussing third-party practice in general).

7. See *Harper v. Sonnabend*, 182 F. Supp. 594, 595 (S.D.N.Y. 1960) (third-party claim was not removable because claim was not separate and independent). In *Harper v. Sonnabend*, the court noted that the field of third-party removal "luxuriates in riotous uncertainty." *Id.*; see 14 FEDERAL PRACTICE AND PROCEDURE, *supra* note 4, § 3724, at 643-45 (neither Congress nor Supreme Court has addressed whether third-party claims are removable to federal court).

8. FED. R. CIV. P. 14(a); see *Lasa Per L'Industria Del Marmo Societa Per Azioni v. Alexander*, 414 F.2d 143, 146 (6th Cir. 1969) (impleader enables courts to adjudicate rights of all parties in one action). *But see United States Fidelity and Guar. Co. v. Perkins*, 388 F.2d 771, 773 (10th Cir. 1968) (court must prohibit impleader when third-party complaint requires court to try issues not involved in main claim without serving any convenience).

9. See, e.g., *Equilease Corp. v. Jefferson Bank*, 88 F.R.D. 208, 209 (E.D. Pa. 1980) (defendant bank impleaded bank's vice president for liability on letter of credit, alleging that vice president conspired with others to defraud bank); *Wanta v. Powers*, 478 F. Supp. 990, 992 (M.D. Pa. 1979) (defendant trucking company impleaded third-party defendant from whom defendant had leased truck involved in accident, alleging that third-party defendant may be liable for indemnification of plaintiff's claim pursuant to lease agreement); *Goldstein v. Compudyne Corp.*, 45 F.R.D. 467, 468 (S.D.N.Y. 1968) (defendant manufacturer of jet testing machine impleaded plaintiff's employer, alleging that third-party defendant employer was liable to plaintiff for injuries plaintiff sustained in machine explosion because employer operated machine negligently and failed to employ proper personnel).

10. See *Colton v. Swain*, 527 F.2d 296, 299 (7th Cir. 1975) (impleader promotes public policy against unnecessary adjudications); *American Export Lines, Inc. v. Revel*, 262 F.2d 122, 124-25 (4th Cir. 1958) (impleader saves time and cost of duplicating evidence by enabling parties to assert claims and defenses in one action); see also *American Fidelity & Casualty Co. v. Greyhound Corp.*, 232 F.2d 89, 92 (5th Cir. 1956) (courts must balance policy of avoiding duplication of actions against prejudice third-party defendant might suffer).

11. See *United States v. Grasso*, 380 F.2d 749, 751 (5th Cir. 1967) (use of impleader reduces litigation by enabling court to adjudicate issues with basically same facts in one suit).

other defendants who are or may be liable to the original defendant for all or part of the original defendant's liability to the plaintiff.¹² Numerous states fashion their third-party practice rules after rule 14 by limiting impleader to parties who are or may be liable to the defendant only.¹³ Some state legislatures, however, have not incorporated the federal rule language verbatim into their state's third-party practice rule, resulting in different standards for impleader in state and federal courts.¹⁴ Nonetheless, in third-party removal cases, the state's third-party practice controls because the third-party plaintiff impleads the third-party defendant into state court.¹⁵ Once under the jurisdiction of the state court, the third-party defendant must rely on section 1441 to remove the case to federal court.¹⁶

While section 1441(c) clearly permits removal of an entire case by the original defendant, a distinct split of authority among the federal courts exists regarding whether a third-party defendant can remove an entire case from a state court to a federal court.¹⁷ Only one federal court of appeals has addressed whether a third-party defendant can remove an entire case from a state court to a federal court under section 1441.¹⁸ In *Carl Heck Engineers*,

12. See, e.g., ALA. R. CIV. P. 14(a) (impleader is proper only if third-party defendant is or may be liable to original defendant); ARK. R. CIV. P. 14(a) (same); DEL. SUPER. CT. CIV. R. 14(a) (same); FLA. R. CIV. P. 1.180(a) (same); GA. CODE ANN. § 9-11-14(a) (1982) (same); KAN. R. CIV. P. 60-214(a) (same); KY. R. CIV. P. 14.01 (same); MD. R. P. 315(a) (same); N.Y. CIV. PRAC. LAW § 1007 (McKinney 1976) (same); N.C. R. CIV. P. 14(a) (same); TENN. R. CIV. P. 14.01 (same); VA. SUP. CT. R. 3:10 (same); W. VA. R. CIV. P. 14(a) (same); see also LA. CODE CIV. PROC. ANN. art. 1111 (West 1960) (defendant may implead third-party defendant who is or may be liable to defendant for principal demand).

13. FED. R. CIV. P. 14(a); see *Novinger v. E.I. DuPont deNemours & Co.*, 89 F.R.D. 588, 594 (M.D. Pa. 1981) (pursuant to federal impleader rule defendant may not implead third-party defendant on basis that third-party defendant is solely liable to plaintiff). But see *infra* note 14 (listing state rules permitting impleader when third-party defendant is independently liable to plaintiff).

14. See, e.g., Hawaii Rev. Stat. § 663-17 (1976) (defendant may implead person not party to action who is or may be liable to defendant or to plaintiff); TEX. R. PRAC. 38(a) (same); PA. R. CIV. P. 2252(a) (defendant may implead person who may or may not be party to action who is liable to defendant or to plaintiff).

15. See *United States Nat'l Bank in Johnstown v. H. & D. Leasing, Inc.*, 299 Pa. Super. 422, 423-24, 445 A.2d 826, 827-28 (1982) (state impleader rule enabled defendant truck owners to implead insurance company in bank's suit for repayment of loan); *Smith, Kline & French Laboratories v. Just*, 126 Ga. App. 643, 644-45, 191 S.E.2d 632, 636-37 (1972) (state impleader rule enabled physician whom plaintiff sued for wrongful death to implead pharmaceutical manufacturer based on breach of implied warranty of safety and fitness for intended use).

16. See *supra* notes 1-3 and accompanying text (discussing removal of case from state court to federal court under § 1441).

17. 1A MOORE'S FEDERAL PRACTICE, *supra* note 1, ¶ 0.167[10], at 510-11. Professor Moore argues that a removal statute limits the right of removal to claims the plaintiff joins on the theory that the plaintiff should control the case. *Id.* at 511-12; see *infra* notes 73-77 and accompanying text (discussing view that only removable claims are claims plaintiff joins in original complaint).

18. See *Carl Heck Eng'rs, Inc. v. Lafourche Parish Police Jury*, 622 F.2d 133, 136-37 (5th Cir. 1980) (permitting third-party removal of entire case); see also *Marsh Inv. Corp. v. Langford*, 652 F.2d 583, 584 (5th Cir. 1981) (per curiam) (affirming district court's decision to allow third-party removal), *cert. denied*, 454 U.S. 1163 *sub. nom.* *Ponchartrain State Bank v. Marsh Inv. Corp.* (1982). But see *Westwood Dev. Co. v. Higley*, 266 F.2d 555, 558 (5th Cir. 1959) (claim

Inc. v. Lafourche Parish Police Jury,¹⁹ the Fifth Circuit Court of Appeals held that a third-party defendant's removal of an entire case was proper because the controversy between the original defendant and the third-party defendant was separate from and independent of the main claim.²⁰ In *Carl Heck*, the plaintiff, Carl Heck Engineers, Inc., entered into a contract with the defendant, Lafourche, to supply Lafourche with engineering services in connection with a road construction project.²¹ Lafourche entered into a contract with the third-party defendant, Maryland Casualty Company, whereby Maryland Casualty agreed to hold Lafourche harmless from liabilities to parties asserting liens against funds Lafourche retained on Lafourche's contract with Lambert, the general contractor.²² Lambert subsequently abandoned the road project, causing a delay in the completion of the road project.²³ The delay in the road construction work prompted Carl Heck to sue Lafourche for breach of contract in a Louisiana state court.²⁴ Lafourche, as a third-party plaintiff, impleaded Maryland Casualty, seeking indemnification against Carl Heck's claims.²⁵ Maryland Casualty removed the entire action to the United States District Court for the Eastern District of Louisiana.²⁶ Lafourche argued that Maryland Casualty improperly had removed the case to federal court and moved to remand the entire case to state court.²⁷ The district court, however, held that removal was proper because Lafourche's third-party claim would be removable to federal court if Lafourche had sued on that claim alone.²⁸

On appeal, the Fifth Circuit upheld the district court's decision that removal was proper, despite a lack of diversity of citizenship between the plaintiff and

against impleaded third-party defendant was not removable because claim was merely notice to defend and did not constitute "cause of action" within meaning of § 1441(c); 28 U.S.C. § 1441(c) (1982) (providing for removal of separate and independent claim or cause of action).

19. 622 F.2d 133 (5th Cir. 1980).

20. *Id.* at 136.

21. *Id.* at 134. In *Carl Heck Eng'rs, Inc. v. Lafourche Parish Police Jury*, the defendant agreed to pay the plaintiff liquidated damages if the contractor caused delay in the completion of a road construction project. *Id.*

22. *Id.* In *Carl Heck*, the third-party defendant secured the contract between the defendant and the contractor for the construction and repair of certain roads by paying a performance bond. *Id.* After the contractor defaulted, the third-party defendant assumed the contractor's obligations. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* at 134-35; see LA. CODE CIV. PROC. ANN. art. 1111 (West 1960) (authorizing impleader of third-party defendant). The Louisiana impleader statute enables a defendant to implead a third-party defendant if the third-party defendant is liable to the plaintiff. See *Rouley v. State Farm Mut. Auto. Ins. Co.*, 235 F. Supp. 786, 794 (W.D. La. 1964) (Louisiana impleader rule has same meaning as federal impleader rule).

26. 622 F.2d at 135. In *Carl Heck*, the Fifth Circuit held that the entire case was removable to federal court but that the district court properly exercised discretion under § 1441(c) to sever the claims and remand the plaintiff's original cause of action to the state court so that removal did not defeat the plaintiff's choice of forum. *Id.* at 135-36; see 28 U.S.C. § 1441(c) (1982) (providing court with discretion to remand claims not otherwise within jurisdiction of federal court).

27. 622 F.2d at 135.

28. *Id.* at 137.

the third-party plaintiff.²⁹ The Fifth Circuit held that the district court would have had jurisdiction over the case if third-party plaintiff Lafourche had sued third-party defendant Maryland Casualty on the indemnity claim alone because Lafourche and Maryland Casualty were diverse parties.³⁰ Pursuant to section 1441(b), a defendant not residing in the state in which a plaintiff brings an action may remove a case to a federal court to protect the defendant from a possibly prejudicial state court.³¹ The Fifth Circuit asserted that while Lafourche's claim for indemnity against Maryland Casualty was not unrelated to plaintiff Carl Heck's claim for breach of contract, Lafourche's indemnity claim was sufficiently independent of Carl Heck's claim under section 1441(c) to warrant removal because the two claims involved distinct contractual obligations.³² The *Carl Heck* court held that removal was proper because Lafourche's claim against Maryland Casualty for indemnity presented a real controversy that parties often litigate in suits containing no ancillary claims.³³

Although the Fifth Circuit is the only federal circuit court of appeals to examine third-party removal, several federal district courts have addressed the issue of whether a third-party defendant may remove an entire case from a state court to a federal court.³⁴ As in *Carl Heck*, most courts permitting a third-party defendant to remove an entire case from a state court to a federal court rely on section 1441(c).³⁵ For example, in *Ford Motor Credit Co. v. Aaron-Lincoln Mercury, Inc.*,³⁶ the United States District Court for the Northern District of Illinois upheld a third-party defendant's removal of a case from a state court to a federal court because the third-party claim was separate from and independent of the plaintiff's original complaint.³⁷ In *Ford Motor*

29. *Id.* at 134; *see id.* at 134 n.4 (plaintiff and defendant were citizens of Louisiana).

30. *Id.* at 136; *see* 28 U.S.C. § 1441(b) (1982) (grant of federal jurisdiction in diversity cases); *see also supra* note 1 (discussing federal diversity jurisdiction).

31. 28 U.S.C. § 1441(b) (1982).

32. 622 F.2d at 136. In *Carl Heck*, the Fifth Circuit affirmed the district court's grant of summary judgment for the third-party defendant because the contract between the third-party plaintiff and the third-party defendant did not require the third-party defendant to indemnify the third-party plaintiff under Louisiana law. *Id.* at 136-37; *see* Louisiana Public Works Act, LA. REV. STAT. ANN. § 38:2242 (West 1980) (engineer must be employee of contractor to be eligible to receive funds due to contractor).

33. 622 F.2d at 136.

34. *See infra* note 35 (citing federal district courts permitting third-party removal); *infra* note 54 (citing federal district courts denying third-party removal).

35. *See, e.g.,* Columbia Gas Co. v. Statewide Hi-Way Safety, Inc., 94 F.R.D. 182, 182-84 (D.N.J. 1982) (third-party claim for insurance fraud was separate from and independent of plaintiff's wrongful death claim); Peturis v. Fendley, 496 F. Supp. 203, 204-05 (S.D. Ala. 1980) (third-party claim for conversion of insurance proceeds was separate from and independent of plaintiff's claim for breach of warranty); Ted Lokey Real Estate Co. v. Gentry, 336 F. Supp. 741, 742-43 (N.D. Tex. 1972) (claim that third-party defendant failed to pay taxes third-party defendant had collected from third-party plaintiff was separate from and independent of plaintiff's claim for sums defendant owed plaintiff).

36. 563 F. Supp. 1108 (N.D. Ill. 1983).

37. *Id.* at 1111-12.

Credit Co., the Ford Motor Credit Corporation sued a franchisee in an Illinois state court alleging that the franchisee breached a financing contract.³⁸ The franchisee, as a third-party plaintiff, then brought a third-party claim against the Ford Motor Company, alleging that Ford had used false statements to induce the franchisee to purchase a Ford dealership franchise.³⁹ Ford removed the case to federal district court.⁴⁰ To decide whether the district court could exercise jurisdiction over the case, the court raised the issue of removability sua sponte.⁴¹ The district court explained that the course of conduct by which Ford induced the franchisee to enter into the dealership contract was separate from the credit corporation's conduct in lending the franchisee money because Ford's liability did not depend upon the result in the action between Ford Motor Credit and the franchisee.⁴² The court, therefore, maintained that the third-party claim against Ford was separate from and independent of the principal claim against the credit corporation within the meaning of section 1441(c).⁴³ The *Ford Motor Credit Co.* court held that because the third-party plaintiff's fraudulent misrepresentation claim was separate from and independent of the plaintiff's claim on the financing contract, removal was proper.⁴⁴

The separate and independent claim language of section 1441(c) also served as the basis for third-party removal in *Bond v. Doig*.⁴⁵ In *Bond*, the plaintiffs sued Doig in the Superior Court of New Jersey for damages after Doig's boat, on which the plaintiffs were sailing, capsized.⁴⁶ When Doig's insurance carrier, Reliance Insurance Company, refused to defend Doig and denied coverage,

38. *Id.* at 1109. In *Ford Motor Credit Co. v. Aaron-Lincoln Mercury, Inc.*, the plaintiff and defendant were citizens of Illinois. *Id.* The defendant could not remove the case to federal court because diversity of citizenship did not exist and the case did not involve a federal question. *Id.*; see 28 U.S.C. § 1441(b) (1982) (provision for removal jurisdiction in cases dealing with diversity of citizenship or federal questions); see also *supra* note 1 (discussing federal question and diversity jurisdiction).

39. 563 F. Supp. at 1109. In addition to alleging that the Ford Motor Company unlawfully had induced the franchisee to purchase a Ford dealership, the franchisee in *Ford Motor Credit Co.* alleged that Ford had violated the Illinois Franchise Disclosure Act when selling the franchise. *Id.*; see Franchise Disclosure Act, ILL. ANN. STAT. ch. 121½, §§ 701-740 (Smith-Hurd 1984) (providing for full disclosure of interests in franchise prior to sale).

40. 563 F. Supp. at 1109.

41. *Id.* at 1109-10; see FED. R. CIV. P. 12(b)(1) (court decides whether subject matter jurisdiction exists).

42. 563 F. Supp. at 1111. In *Ford Motor Credit Co.*, the court held that the determination of Ford's liability regarding the false representations did not depend on the resolution of the contract action between the credit company and the franchisee. *Id.* Furthermore, the *Ford Motor Credit Co.* court noted that Ford would have been able to remove the action to federal court if the franchisee had sued Ford before the credit company had sued the franchisee. *Id.* at 1114.

43. *Id.* at 1111.

44. *Id.*

45. 433 F. Supp. 243 (D.N.J. 1977).

46. *Id.* at 244. In *Bond v. Doig*, Doig offered to take a group of members of the American Association of Retired Persons for a ride around a lake in Doig's boat. *Id.* Doig charged \$2 per person. *Id.* Approximately 20 persons accepted Doig's offer for a ride in the boat, which

Doig impleaded Reliance as a third-party defendant.⁴⁷ Thereafter, Reliance removed the entire case to the United States District Court for the District of New Jersey.⁴⁸ The plaintiffs moved to remand the case to state court.⁴⁹ The *Bond* court noted that when Doig filed a third-party complaint against Reliance, a controversy arose over whether Doig's policy covered the accident.⁵⁰ The controversy, the court asserted, was the proper subject for a declaratory judgment remedy in an action between Doig and Reliance alone.⁵¹ The court noted that frequently an insured brings a declaratory judgment action to determine the limits of an insurance policy even though the insured is not a defendant in any pending litigation.⁵² The court, therefore, held that the third-party claim on the insurance contract was separate from and independent of the plaintiffs' negligence claims because the parties to the insurance contract could have litigated the insurance-related issues independently of the negligence-related issues.⁵³

Despite the Fifth Circuit Court of Appeals' declaration that a third-party defendant can remove an entire case from a state court to a federal court, most federal district courts have decided that third-party claims are not removable.⁵⁴ The majority of courts opposing third-party removal of an entire case base their reasoning on the theory that courts should construe jurisdic-

normally held only 11 or 12 people. *Id.* Three lawsuits followed as a result of the boat's capsizing. *Id.*

47. *Id.* In *Bond*, Doig obtained a policy to insure his vessel. *Id.* The insurance carrier refused to cover the accident because the policy contained a clause stating that the insured would not use the vessel for hire without the consent of the insurer. *Id.*

48. *Id.* In *Bond*, the insurance carrier removed the case to federal court on the basis of diversity of citizenship. *Id.*; see 28 U.S.C. § 1441(b) (1982) (providing for removal of controversy between diverse parties). The insurance carrier in *Bond* was a citizen of Pennsylvania and Doig was a citizen of either New York or New Jersey. 433 F. Supp. at 244. Doig's citizenship is unclear because Doig slept on his vessel, which he moored on the New York side of Greenwood Lake, but Doig also owned real estate in New Jersey. *Id.*

49. 433 F. Supp. at 244.

50. *Id.* at 249.

51. *Id.* Under the Federal Declaratory Judgment Act parties may seek declarations of their rights. 28 U.S.C. § 2201 (1976); see FED. R. Civ. P. 57 (procedure for obtaining declaratory judgment must conform to Federal Rules of Civil Procedure). The United States Constitution, however, limits declaratory judgments in federal courts to actual controversies. U.S. CONST. art. III, § 2. A party need not have suffered a loss to sustain a declaratory judgment action. See *Peoples Bank v. Eccles*, 64 F. Supp. 811, 812 (D.D.C. 1946) (declaratory judgment action provides means for settling rights in controversy that has not reached point where party seeks coercive remedy).

52. 433 F. Supp. at 249.

53. *Id.* The *Bond* court maintained that the test for whether a claim is separate and independent is whether the parties can litigate the claim alone, without joinder or consolidation with other claims. *Id.* at 248.

54. See, e.g., *Continental Resources & Mineral Corp. v. Continental Ins. Co.*, 546 F. Supp. 850, 851 (S.D.W. Va. 1982) (third-party claim is not removable because third-party defendant is not defendant within meaning of § 1441(a)); *Knight v. Hellenic Lines, Ltd.*, 543 F. Supp. 915, 917-18 (E.D.N.Y. 1982) (§ 1441(c) restricts removal to claims plaintiff joins); *Avco-Aurora Indus. Bank v. Cline*, 459 F. Supp. 857, 858 (D. Colo. 1978) (third-party claim is ancillary and does not provide federal court with jurisdiction over main claim).

tional statutes in a way that would limit the scope of federal jurisdiction.⁵⁵ Some courts have limited the scope of federal jurisdiction by holding that a third-party defendant is not a defendant within the meaning of section 1441 and that section 1441 therefore confers the right to remove a case only on original defendants.⁵⁶ For example, in *White v. Baltic Conveyor Co.*,⁵⁷ the United States District Court for the District of New Jersey held that section 1441(a) applies only to the defendant in the original complaint and not to a third-party defendant.⁵⁸ Section 1441(a) permits a defendant to remove from a state court to a federal court any action over which the federal court has original jurisdiction.⁵⁹ In *White*, White sued the Baltic Conveyor Company in a New Jersey state court for damages resulting from injuries White sustained in a work-related accident.⁶⁰ Baltic brought a third-party complaint against Standard Accident Insurance Company, Baltic's insurance carrier, to compel Standard Accident to defend Baltic in the suit.⁶¹ The insurance carrier removed the case to federal district court and White moved to remand the case to state court, claiming that the federal court would not have had jurisdiction over the main claim without the addition of the third-party claim.⁶² The *White* court remanded the case to the New Jersey state court, noting that the insurance carrier could not remove the case to federal court pursuant to section 1441(a) because the insurer was not a named defendant in the original

55. See *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108 (1941) (Congress intended to restrict jurisdiction of federal courts by removal); see also *Hopkins Erecting Co. v. Briarwood Apartments*, 517 F. Supp. 243, 251-52 (E.D. Ky. 1981) (courts should construe § 1441 against granting federal jurisdiction when possible).

56. See, e.g., *Knight & Hellenic Lines, Ltd.*, 543 F. Supp. 915, 918 (E.D.N.Y. 1982) (limiting removal to original defendants promotes uniformity of federal jurisdiction); *Fridde v. Hardee's Food Sys., Inc.*, 534 F. Supp. 148, 149 (W.D. Ark. 1981) (policy of strict construction leads to conclusion that third-party defendants are not "defendants" within meaning of § 1441); *Garnas v. American Farm Equip. Co.*, 502 F. Supp. 349, 352 (D. N.D. 1980) (court refuses to modify § 1441 language by judicial fiat).

57. 209 F. Supp. 716 (D.N.J. 1962).

58. *Id.* at 719; see 28 U.S.C. § 1441(a) (1982) (permitting defendants to remove actions from state court to federal court provided federal court has original jurisdiction).

59. 28 U.S.C. § 1441(a) (1976).

60. 209 F. Supp. at 717-18. In *White v. Baltic Conveyor Co.*, the plaintiff sustained injuries when he caught his foot between a pulley and a chain on a conveyor. *Id.* at 718. The plaintiff alleged that the defendant had installed the conveyor negligently. *Id.*

61. *Id.* In *White*, the plaintiff and the defendant were citizens of New Jersey. *Id.* at 717-18. The third-party defendant, an insurance carrier, however, was a citizen of Michigan. *Id.* at 718; see 28 U.S.C. § 1332(c) (1982) (corporation is citizen of state of incorporation and state of corporation's principal place of business).

62. 209 F. Supp. at 718; see 28 U.S.C. § 1447(c) (1982) (district court has discretion to remand case when defendant removed case improvidently); see also *Stanhope v. Ford Motor Credit Co.*, 483 F. Supp. 275, 276 (W.D. Ark. 1980) (federal court has responsibility not to act without jurisdiction and must remand case to state court if jurisdiction is lacking); cf. *Barrett v. McDonald's of Oklahoma City*, 419 F. Supp. 792, 793 (W.D. Okla. 1976) (plaintiff could not force court to remand case by adding nondiverse parties to original complaint once removal jurisdiction based on diversity attached).

complaint.⁶³ The *White* court maintained that defining a third-party defendant as a "defendant" for purposes of section 1441(a) would be judicial legislation because section 1441(a) does not grant expressly the right of removal to third-party defendants.⁶⁴

Closely related to the *White* court's reasoning that section 1441(a) does not apply to third-party defendants is the theory that section 1441(c) limits removal only to claims the plaintiff joins rather than to claims either the plaintiff or the defendant joins.⁶⁵ In *Shaver v. Arkansas-Best Freight Systems, Inc.*,⁶⁶ the United States District Court for the Western District of Arkansas denied removal of a case from a state court to a federal court by a third-party defendant on the grounds that the plaintiff had not joined the third-party defendant in the original complaint.⁶⁷ In *Shaver*, the Shavers brought a wrongful death action in Arkansas state court against Arkansas-Best Freight Systems, Inc., seeking damages for deaths resulting from a highway accident.⁶⁸ The Shavers alleged that the defendant's negligent operation of a tractor-trailer caused the deaths of the Shavers' son, daughter-in-law, and three grandchildren.⁶⁹ Arkansas-Best filed a third-party complaint against the Fruehauf Trailer Company, claiming that Fruehauf was liable to the Shavers for the deaths of the Shavers' decedents.⁷⁰ Arkansas-Best alleged that the trailer Fruehauf had sold to Arkansas-Best was defective and that the defect was the proximate cause of the collision between the decedents' automobile and the tractor-trailer.⁷¹ Fruehauf petitioned the district court to remove the case

63. 209 F. Supp. at 722. In *White*, the third-party defendant's main assertion was that the third-party plaintiff's claim for indemnification constituted a removable separate and independent claim under § 1441(c). *Id.* at 719-22; see 28 U.S.C. § 1441(c) (1982) (defendants may remove separate and independent claims). The *White* court, however, rejected the third-party defendant's argument because the third-party defendant was not a "defendant" qualified to remove under the removal statute. 209 F. Supp. at 719-20; see 28 U.S.C. § 1441(a) (1982) (removing party must be defendant).

64. 209 F. Supp. at 719-20; see 28 U.S.C. § 1441(a) (1982) (providing removal jurisdiction for "defendants"); see also *Share v. Sears, Roebuck & Co.*, 550 F. Supp. 1107, 1108-09 (E.D. Pa. 1982) (third-party claim is not removable because third-party defendant is not "defendant" within meaning of § 1441(a)).

65. See, e.g., *Morris v. Marshall County Bd. of Educ.*, 560 F. Supp. 43, 45 (N.D. W. Va. 1983) (§ 1441(c) does not entitle third-party defendant to invoke removal jurisdiction); *Continental Resources & Mineral Corp. v. Continental Ins. Co.*, 546 F. Supp. 850, 852 (S.D. W. Va. 1982) (Congress intended removal statute to enable original defendant to remove entire case to federal court); *Lowe's of Montgomery, Inc. v. Smith*, 432 F. Supp. 1008, 1013 (M.D. Ala. 1977) (defendant's joinder of third-party claim does not invest federal court with jurisdiction over state claim); *White v. Hughes*, 409 F. Supp. 1005, 1007 (W.D. Tenn. 1975) (strict construction of removal statute precludes third-party removal).

66. 171 F. Supp. 754 (W.D. Ark. 1959).

67. *Id.* at 763.

68. *Id.* at 755.

69. *Id.* at 755-56.

70. *Id.* at 756. In *Shaver v. Arkansas-Best Freight Sys.*, the plaintiffs and the defendants were citizens of Arkansas. *Id.* at 755. The third-party defendant, however, was a citizen of Michigan. *Id.*

71. *Id.* at 756. In *Shaver*, the third-party plaintiff alleged that a defective king pin on the

to federal court pursuant to section 1441(c) on the grounds that the third-party claim that the trailer was defective was separate from and independent of the original claim that Arkansas-Best operated the tractor-trailer negligently.⁷² The *Shaver* court, however, declined to examine whether the two claims were separate and independent.⁷³ Instead, the court asserted that section 1441(c) limits the removal of separate and independent claims to situations in which the plaintiff joined additional claims.⁷⁴ The court reasoned that limiting removal to claims the plaintiff joined comports with a congressional intent to restrict removal to those claims section 1441 expressly permits.⁷⁵ The *Shaver* court held that if Congress had intended to permit third-party removal, the language of section 1441 would have indicated this intention expressly.⁷⁶ Based on the determination that section 1441(c) limits removal to claims plaintiffs join, the *Shaver* court denied Fruehauf's petition for removal.⁷⁷

While some courts have denied third-party removal either because a third-party defendant is not a defendant within the meaning of the removal statute⁷⁸ or because the plaintiff did not join the third-party claim in the original complaint,⁷⁹ many courts impliedly acknowledge a third-party defendant's right to remove but deny third-party removal on the basis of the separate and independent claim requirement of section 1441(c).⁸⁰ For example, in *Luebbe v.*

truck trailer was the proximate cause of the accident between the tractor-trailer and the automobile.
Id.

72. *Id.* at 758; see 28 U.S.C. 1441(c) (1982) (providing removal jurisdiction on basis of separate and independent claim).

73. 171 F. Supp. at 762; cf. *Share v. Sears, Roebuck & Co.*, 550 F. Supp. 1107, 1108 (E.D. Pa. 1982) (court declined to examine whether third-party claim was separate from and independent of principal claim because court decided third-party defendant was not "defendant" within meaning of § 1441(a)).

74. 171 F. Supp. at 762.

75. See *id.* at 760; see also *American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 9 (1951) (Congress intended to simplify removal requirements by amending removal statute); *infra* notes 108-15 and accompanying text (discussing congressional intent behind amendment to removal statute).

76. 171 F. Supp. at 762-63.

77. *Id.* at 763.

78. See *supra* note 56 and accompanying text (cases holding that "defendants" within meaning of § 1441 does not include third-party defendants).

79. See *supra* note 65 and accompanying text (cases holding that only claims plaintiff joins are removable).

80. See, e.g., *Soper v. Kahn*, 568 F. Supp. 398, 404 (D. Md. 1983) (third-party claim against legal publishing company for breach of warranty for fitness of intended use was not separate from and independent of plaintiff's claim against attorney for legal malpractice); *Parks v. Physicians & Surgeons Bldg. Corp.*, 324 F. Supp. 883, 884-85 (W.D. Okla. 1971) (defendant's third-party claim for indemnity was not separate from and independent of plaintiff's claim for damages resulting from malfunctioning elevator because amount of damages in third-party claim necessarily depended on outcome of main claim); *Hyde v. Carder*, 310 F. Supp. 1340, 1342 (W.D. Ky. 1970) (third-party claim for breach of warranty of fitness against bottle manufacturer was not separate from and independent of plaintiff's claim against grocer for injuries plaintiff sustained when bottle grocer had sold plaintiff exploded); see also *Chase v. North Am. Sup., Inc.*, 523 F. Supp. 378, 383 (W.D. Pa. 1981) (defendant's offering of another potentially liable defendant to plaintiff does not constitute joining separate and independent claim).

Presbyterian Hospital in New York,⁸¹ the United States District Court for the Southern District of New York denied removal of a third-party claim because the claim was not separate from and independent of the main claim.⁸² In *Luebbe*, the plaintiffs sued two physicians for medical malpractice, alleging that the doctors were negligent while performing surgery on one of the plaintiffs.⁸³ One of the doctors brought a third-party products liability suit against Codman & Shurtleff, Inc., the manufacturer of a surgical instrument the doctors used during the plaintiff's operation, alleging that Codman & Shurtleff had manufactured the instrument improperly.⁸⁴ Codman & Shurtleff, as a third-party defendant, petitioned the district court pursuant to section 1441(c) to remove the entire suit to federal court.⁸⁵ The *Luebbe* court held that the products liability suit was not separate from and independent of the medical malpractice suit because detailed evidence of the plaintiff's operation played a role in the disposition of both controversies.⁸⁶ In denying removal, the *Luebbe* court noted that the plaintiff had sustained only one injury and that rather than offering a distinct claim, the third-party claim merely added to the suit another possible cause of the plaintiff's injury.⁸⁷ The court concluded that the claims were not separate from and independent of each other because important factual issues, such as the reactions and competence of the doctors and the hospital, as well as the quality of the surgical instrument, were common to both the medical malpractice claim and the products liability claim.⁸⁸

In a decision similar to *Luebbe*, the United States District Court for the Western District of Pennsylvania refused removal of a case from a state court to a federal court because the third-party claim was not separate from and independent of the plaintiff's original claim.⁸⁹ In *Chase v. North American Systems, Inc.*,⁹⁰ the plaintiffs sued a manufacturer for damages the plaintiffs sustained when a coffee maker the defendant had manufactured allegedly caught fire, destroying the plaintiffs' home and personal property.⁹¹ The defendant manufacturer filed a third-party complaint against the manufacturer of

81. 526 F. Supp. 1162 (S.D.N.Y. 1981).

82. *Id.* at 1165.

83. *Id.* at 1163.

84. *Id.*

85. *Id.* In *Luebbe v. Presbyterian Hosp. in N.Y.*, the third-party defendant manufacturer based its right to remove the case on diversity of citizenship between the manufacturer and the third-party plaintiff doctor. *Id.* at 1164.

86. *Id.* at 1165.

87. *Id.* In *Luebbe*, the plaintiffs intended to amend their complaint to include the manufacturer of the surgical instrument as a defendant in the main claim. *Id.* at 1164. The *Luebbe* court noted that including the manufacturer in the main claim would defeat diversity jurisdiction. *Id.*; see *supra* note 1 (discussing federal diversity jurisdiction).

88. 526 F. Supp. at 1165.

89. See *Chase v. North Am. Sys., Inc.*, 523 F. Supp. 378, 382-83 (W.D. Pa. 1981) (third-party complaint was not separate from and independent of main claim because third-party complaint merely offered another defendant to plaintiff for single wrong).

90. 523 F. Supp. 378 (W.D. Pa. 1981).

91. *Id.* at 379-80. In *Chase v. North Am. Sys., Inc.*, the plaintiffs sued the defendant in

an electric can opener, asserting that the can opener, rather than the coffee maker, caused the fire.⁹² The manufacturer of the can opener, as a third-party defendant, petitioned the district court to remove the entire case to federal court.⁹³ The court noted that section 1441(c) requires that a third-party claim be both separate from and independent of the plaintiff's original complaint.⁹⁴ To be separate and independent, the court explained, the claims must involve entirely different legal issues.⁹⁵ The *Chase* court maintained that the third-party complaint merely offered another defendant to the plaintiff, and that the issues of casuation and liability were identical in both the third-party claim and the main claim.⁹⁶ The court, therefore, concluded that the third-party claim was not separate from and independent of the main claim.⁹⁷ The *Chase* court held that the case was not removable and granted the defendant's motion to remand.⁹⁸

Despite the view that section 1441 does not permit a third-party defendant to remove a case from a state court to a federal court, proponents of third-party removal assert that courts should employ removal jurisdiction to promote uniformity in the federal court system.⁹⁹ Courts permitting third-party removal typically hold that if a court does not allow removal by a third-party

Pennsylvania state court. *Id.* at 380. Despite diversity of citizenship between the Pennsylvania plaintiffs and the Ohio defendant, the defendant elected to proceed in state court rather than remove the action to federal court. *Id.*; see 28 U.S.C. § 1441(b) (1982) (provision for removal jurisdiction in diversity cases).

92. 523 F. Supp. at 380; see PA. R. Civ. P. 2252(a) (defendant may join third-party defendant who may be liable to plaintiff alone); cf. FED. R. Civ. P. 14(a) (limiting defendant's joinder of third-party defendant to those parties who may be liable to defendant for all or part of plaintiff's claim). See generally *supra* notes 8-14 and accompanying text (discussion of third-party practice).

93. 523 F. Supp. at 380. The third-party defendant in *Chase* asserted diversity of citizenship in the third-party defendant's petition to remove the case to federal court. *Id.*; see *supra* note 1 (discussing federal diversity jurisdiction).

94. 523 F. Supp. at 382-83. In *Chase*, the court noted that Congress had written § 1441(c) in the conjunctive, requiring that third-party claims be both separate and independent. *Id.* at 382; see 28 U.S.C. § 1441(c) (1982) ("separate and independent claim" may be removable); cf. *Snow v. Powell*, 189 F.2d 172, 174 (10th Cir. 1951) ("separate" means distinct and "independent" means not contingent or conditioned); *Her Majesty Indus., Inc. v. Liberty Mutual Ins. Co.*, 379 F. Supp. 658, 661 (D. S.C. 1974) (even if claims are "separate," claims are not independent when facts arise out of same transaction or incident).

95. 523 F. Supp. at 382.

96. *Id.* at 383.

97. *Id.*

98. *Id.*

99. See *Industrial Lithographic Co. v. Mendelsohn*, 119 F. Supp. 284, 286 (D.N.J. 1954) (denying third-party defendants right to remove makes removal dependent upon peculiarities of state third-party practice). But see 1A MOORE'S FEDERAL PRACTICE, *supra* note 1, ¶ 0.167[10], at 510-12 (criticizing argument that precluding third-party removal would subvert goal of uniformity of removal jurisdiction). Professor Moore urges limiting a defendant's removal right to cases in which only the plaintiff joined separate and independent claims. *Id.* at 512. Such a limitation eliminates the lack-of-uniformity problem that varied state impleader rules create. Cf. *infra* text accompanying notes 101-04 (illustrating how different state impleader rules contribute to lack of uniformity in applying removal jurisdiction).

defendant, a state's third-party practice will dictate whether a federal court has jurisdiction over a claim.¹⁰⁰ For example, if a state court interprets the state's third-party practice rule as prohibiting impleader in a particular situation, a defendant who wishes to implead a party as a third-party defendant must file a separate state suit against that party rather than include that party in the ongoing action.¹⁰¹ The second suit will be removable, provided the defendant to the second suit complies with the requirements of section 1441.¹⁰² In a state where the courts interpret the state's third-party practice rule more liberally, however, a sweeping denial of removal without regard to the circumstances of the case will preclude a third-party defendant from ever obtaining a federal forum.¹⁰³ The inconsistency that results from the existence of varied state third-party practice rules controverts the Supreme Court's policy of discouraging local law from affecting uniformity in federal removal jurisdiction.¹⁰⁴

Despite the argument that limiting removal jurisdiction yields inconsistent results, most commentators on third-party removal jurisdiction generally reject the proposition that section 1441 permits a third-party defendant to remove an entire case from a state court to a federal court.¹⁰⁵ Opponents of third-party removal rely on a Supreme Court ruling that courts should construe jurisdictional statutes against expanding federal jurisdiction by asserting that only an original defendant may remove a case involving additional claims

100. See *Carl Heck Eng'rs, Inc. v. Lafourche Parish Police Jury*, 622 F.2d 133, 135-36 (5th Cir. 1980) (using separate and independent requirement promotes uniform application of removal statute); *Motor Vehicle Casualty Co. v. Russian River County Sanitation Dist.*, 538 F. Supp. 488, 492 (N.D. Cal. 1981) (procedural accident that defendant joins party as third-party defendant instead of as original defendant prevents joined party from obtaining federal forum).

101. See *Gamble v. Central of Ga. Ry.*, 356 F. Supp. 324, 326-27 (M.D. Ala.) (explaining theory that varying state third-party practice rules will lead to differing outcomes in removal jurisdiction decisions), *rev'd on other grounds*, 486 F.2d 781 (5th Cir. 1973); see also *supra* notes 12-14 and accompanying text (discussing state impleader rules); cf. *infra* note 138 (state impleader rule cannot control federal jurisdiction).

102. See 28 U.S.C. § 1441 (1982) (general provisions for removal jurisdiction); see also *id.* § 1446 (stating procedure for removal).

103. See *supra* note 12 (listing states that design their third-party practice rules after federal rule); *supra* note 14 (listing states with third-party practice rules different from federal rule).

104. See *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 104 (1941) (courts should apply § 1441 uniformly throughout nation). But see 1A MOORE'S FEDERAL PRACTICE, *supra* note 1, ¶ 0.167[10], at 512-13 (denying third-party removal does not disrupt uniform application of § 1441).

105. See 1A MOORE'S FEDERAL PRACTICE, *supra* note 1, ¶ 0.167[10], at 511-12 (removal statute limits removal only to those claims that plaintiff joins); 14 FEDERAL PRACTICE AND PROCEDURE, *supra* note 4, § 3724, at 645-46 (courts should honor plaintiff's choice of forum); Moore & VanDercreek, *Multi-Party, Multi-Claim Removal Problems: The Separate and Independent Claim Under Section 1441(c)*, 46 IOWA L. REV. 489, 509 (1961) (§ 1441(c) applies only to claims plaintiff joins). But see Note, *Federal Practice: Removal Problems—Third-Party Defendant*, 7 OKLA. L. REV. 443, 461-63 (1954) (reasons for permitting defendant to remove suit to federal court apply to third-party defendant). See generally Comment, *Federal Jurisdiction—Removal by a Third-Party Defendant to a District Court Under § 1441 of the Judicial Code*, 37 ST. JOHNS L. REV. 373, 379 (1963) (court need not determine whether third-party claim is separate and independent because § 1441 precludes third-party defendant from removing case to federal court).

the plaintiff joined in the action.¹⁰⁶ Consequently, courts adhering to the theory of limiting federal jurisdiction generally construe section 1441 against permitting third-party removal because Congress did not provide expressly for the removal of third-party claims in section 1441.¹⁰⁷

Courts denying third-party removal also justify their decisions on the basis of a 1948 amendment to the removal statute, the stated purpose of which is to reduce the number of cases removable to federal courts.¹⁰⁸ The 1948 amendment substituted the present separate and independent claim language of section 1441(c) for the separable controversy requirement of the former removal statute.¹⁰⁹ Separable controversies involve the disputes arising between the plaintiff and various defendants when the plaintiff joins more than one defendant in one action.¹¹⁰ In substituting the separate and independent claim language of 1441(c) for the separable controversy requirement of the former removal statute, Congress required the presence of more than one cause of action for removal to be proper.¹¹¹ By restricting removal to actions involving more than one cause of action, Congress intended to limit the removal of controversies between the original parties.¹¹² While the 1948 amendment to the removal statute generally restricted removal by limiting the number of removable controversies, Congress was silent on whether the third-party removal of a case is proper.¹¹³ Moreover, a literal reading of section 1441(c)

106. See *supra* note 54 (citing cases refusing third-party removal); see also *American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 9-10 (1951) (congressional intent behind separate and independent claim requirement was to limit removal from state courts).

107. See *Chase v. North Am. Sys., Inc.*, 523 F. Supp. 378, 380 (W.D. Pa. 1981) (Congress expressly must confer removal jurisdiction on courts); *Garnas v. American Farm Equip. Co.*, 502 F. Supp. 349, 352 (D.N.D. 1980) (Congress has not indicated that § 1441 applies to third-party defendants).

108. See H.R. REP. NO. 308, 80th Cong., 1st Sess. 1-2 (1947) *reprinted in* Reviser's Note, 28 U.S.C. § 1441(c) (1976) (clarification of what constitutes separate and independent claim or cause of action should make § 1441(c) less ambiguous).

109. See *id.* (§ 1441(c) permits removal of separate cause of action but prohibits removal of separate controversy unless controversy constitutes separate and independent claim).

110. See *Twentieth Century-Fox Film Corp. v. Taylor*, 239 F. Supp. 913, 914 (S.D.N.Y. 1965) (plaintiff's joinder of claims against two defendants enabled one defendant to remove entire case to federal court). In *Twentieth Century-Fox Film Corp. v. Taylor*, Twentieth Century-Fox sued Elizabeth Taylor and Richard Burton for breach of employment contracts, basing the complaint on five separate causes of action. *Id.* at 914. Burton removed the entire case to the United States District Court for the Southern District of New York. *Id.* Twentieth Century-Fox moved to remand the case to New York State court, claiming that the claims against Burton were not separate from and independent of the claims against Taylor because one incident led to the breach of two employment contracts. *Id.* at 915. While the five causes of action represented separable controversies, the *Twentieth Century-Fox* court upheld Burton's removal because the two employment agreements constituted two separate and distinct contracts. *Id.* at 916-17.

111. See *American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 11-12 (1951) (separable controversy is no longer ground for removal unless controversy also constitutes separate and independent claim under § 1441(c)).

112. See *id.* at 10 (purpose of revision to removal statute was to abridge right of removal).

113. See C. WRIGHT, *THE LAW OF FEDERAL COURTS* § 39, at 22 (1983) (amendment to § 1441(c) achieved purpose of reducing number of removable cases); see also 28 U.S.C. § 1441 (1982) (statute does not mention third-party removal).

does not preclude a third-party defendant from removing an entire case from a state court to a federal court because the plaintiff did not join the defendant in the original claim.¹¹⁴ Congress' silence on third-party removal in the amendment to the removal statute, therefore, indicates that Congress did not intend necessarily to prohibit third-party defendants from attaining a federal forum simply because the plaintiff had not joined the third-party defendant in the original complaint.¹¹⁵

Although no indication exists that Congress intended to prohibit a third-party defendant from removing a case from a state court to a federal court, a third-party defendant nevertheless must qualify as a defendant within the meaning of section 1441(a) to meet the requirements of section 1441(c).¹¹⁶ The Supreme Court has defined a defendant as a party that has not submitted voluntarily to a court's jurisdiction.¹¹⁷ Whether a defendant submits to the

114. See *Gamble v. Central of Ga. Ry. Co.*, 356 F. Supp. 324, 330 (M.D. Ala. 1973) (Congress would have written § 1441(c) more precisely if Congress had intended to limit removal to claims plaintiff joins), *rev'd on other grounds*, 486 F.2d 781 (5th Cir. 1973). Congress' use of passive voice adds to the confusion over the construction of § 1441(c). See 28 U.S.C. § 1441(c) (1982) (providing for removal of entire case whenever separate and independent claim "is joined" with otherwise nonremovable claim); see also *Buckingham, Underwood, Barron, Wright & White v. Luckenbach Steamship Co.*, 208 F. Supp. 544, 546 (S.D. N.Y. 1962) (words "is joined with" create problem with interpreting § 1441(c)). But see Note, *Federal Procedure—Removal Denied to Impleaded Party Under 28 U.S.C. 1441(c)*, 51 MICH. L. REV. 115, 117 (1952) ("is joined" language in § 1441(c) pertains to claims plaintiff joins).

115. See Note, *Diversity Removal Where the Federal Court Would Not Have Original Jurisdiction: A Suggested Reform*, 114 U. OF PA. L. REV. 709, 710 (1966) (courts need determine only whether claim is separate and independent and not whether defendant is party courts should protect). Congress did not prohibit third-party removal in the 1948 amendment to the removal statute despite the existence of court decisions addressing whether a third-party defendant could remove an entire case to a federal court. See *Von Herwarth v. Gristede Bros.*, 20 F. Supp. 911, 912 (S.D.N.Y. 1937) (court denied third-party removal because third-party claim depended on outcome of main claim); *Summers & Oppenheim, Inc. v. Tillinghast Stiles Co.*, 19 F. Supp. 230, 231 (S.D.N.Y. 1937) (court permitted third-party removal because third-party claim presented controversy separable from main claim).

116. See *Ford Motor Credit Co. v. Aaron-Lincoln Mercury, Inc.*, 563 F. Supp. 1108, 1112 n.14 (N.D. Ill. 1983) (courts must interpret § 1441(c) by referring to § 1441(a)). Compare 28 U.S.C. § 1441(c) (1982) (§ 1441(c) does not mention which party may remove case to federal court) with *id.* § 1441(a) (§ 1441(a) specifically states "defendant" may remove) and *id.* § 1441(b) (§ 1441(b) specifically states "defendant" may remove). Pursuant to § 1441(c), a defendant may remove an entire case if one of two separate claims in the case "would be removable if sued upon alone." See *id.* § 1441(c). According to § 1441(a), only defendants may remove. *Id.* § 1441(a). To be eligible to remove a claim that "would be removable if sued upon alone," therefore, a third-party defendant must qualify as a "defendant" within the meaning of § 1441(a). See *Southland Corp. v. Estridge*, 456 F. Supp. 1296, 1301 (C.D. Cal. 1978) (§ 1441(a) requirement that only defendants may remove controls § 1441(c)).

117. See *West v. Aurora City*, 73 U.S. (6 Wall.) 139, 141 (1867) (only party that has not submitted to state's jurisdiction may remove); see also *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 106-08 (1941) (defendant's filing of counterclaim against plaintiff does not confer upon plaintiff right to remove case to federal court); cf. *Baldwin v. Perdue*, 451 F. Supp. 373, 375-76 (E.D. Va. 1978) (filing cross-claim against codefendant did not enable defendant to remove case to federal court because defendant voluntarily submitted to court's jurisdiction).

jurisdiction of a court is significant because one purpose of section 1441 is to free an out-of-state defendant from possible state-court prejudice by enabling the defendant to remove the case to a neutral federal forum.¹¹⁸ For example, the Supreme Court has held that a plaintiff-counterdefendant¹¹⁹ cannot remove a case from a state court to a federal court because the plaintiff-counterdefendant voluntarily submitted to the jurisdiction of the state court.¹²⁰ Unlike a plaintiff-counterdefendant, however, a third-party defendant does not submit voluntarily to a state court's jurisdiction and can obtain a neutral forum only through removal.¹²¹ A third-party defendant, therefore, qualifies as a defendant for purposes of removal jurisdiction.¹²²

Classifying a third-party defendant as a defendant for removal purposes necessarily rejects the conclusion the *White* court reached that removal by a third-party defendant is improper.¹²³ The *White* court denied third-party removal, asserting that a third-party defendant is not defendant within the meaning of section 1441(a).¹²⁴ Similarly, the *Shaver* court denied third-party removal because a third-party defendant is not eligible to remove a case based on section 1441(c).¹²⁵ The *Shaver* court held that the only removable claims are those claims the plaintiff made in the original complaint.¹²⁶ The rationale

118. See *supra* note 1 (removal jurisdiction protects nonresident defendants); see also *supra* note 1 (discussion of federal diversity jurisdiction). While the purpose of diversity is to protect litigants from local prejudice, some commentators have questioned the value of diversity jurisdiction. See Marsh, *Diversity Jurisdiction: Scapegoat of Overcrowded Federal Courts*, 48 BROOK. L. REV. 197, 221-30 (1982) (proposing modified doctrine of diversity jurisdiction prohibiting in-state plaintiffs from bringing diversity actions to parallel § 1441(b) and increasing jurisdictional amount to \$25,000 to reflect inflationary changes); Rowe, *Abolishing Diversity Jurisdiction: Positive Side Affects and Potential for Further Reforms*, 92 HARV. L. REV. 963, 969-70 (1979) (abolishing diversity jurisdiction would reduce choice-of-law problems in federal court).

119. See FED. R. CIV. P. 13(a) (counterdefendant is plaintiff defendant sues in counterclaim). A counterclaim is a claim the defendant in a case files against the plaintiff. *Id.* A counterclaim must arise out of the transaction or occurrence constituting the subject matter of the plaintiff's claim. *Id.*

120. See *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108 (1941) (Congress did not intend to reserve removal right to some plaintiffs and not to others); see also *Coastal Air Serv., Inc. v. Tarco Aviation Serv., Inc.*, 301 F. Supp. 586, 587-88 (S.D. Ga. 1969) (defendant's filing of counterclaim does not make case removable because plaintiffs cannot remove cases to federal court).

121. See *Ford Motor Credit Co. v. Aaron-Lincoln Mercury, Inc.*, 563 F. Supp. 1108, 1113 (N.D. Ill. 1983) (third-party defendant submits to court's jurisdiction involuntarily); see also *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 107 (1941) (plaintiff may not remove case to federal court after defendant files counterclaim against plaintiff).

122. See *supra* notes 116-20 and accompanying text (defendants do not submit to court's jurisdiction voluntarily).

123. See *supra* notes 57-64 and accompanying text (discussing *White* decision).

124. *White v. Baltic Conveyor Co.*, 209 F. Supp. 716 (D.N.J. 1962); see *supra* note 63 (third-party defendant is not qualified to remove case to federal court under § 1441).

125. *Shaver v. Arkansas-Best Freight Sys.*, 171 F. Supp. 754 (W.D. Ark. 1959); see *supra* notes 66-77 and accompanying text (discussing *Shaver* decision).

126. *Shaver v. Arkansas-Best Freight Sys.*, 171 F. Supp. 754 (W.D. Ark. 1959); see *supra* notes 74-76 and accompanying text (Congress intended to limit removable claims to claims plaintiff joined).

of the *White* court is faulty, however, since a third-party defendant qualifies as a defendant under section 1441(a) because a third-party defendant does not submit voluntarily to a state court's jurisdiction.¹²⁷ Likewise, the rationale of the *Shaver* court is faulty because removable claims include third-party claims under section 1441(c), which does not limit removable claims to claims the plaintiff joined in the original complaint.¹²⁸

Once a court establishes that a third-party defendant qualifies as a defendant within the meaning of section 1441(a) and that section 1441(c) includes third-party claims among those claims that are removable, a third-party defendant need establish only that the third-party claim meets the separate and independent claim requirement of section 1441(c) to remove the entire case to a federal court.¹²⁹ While some commentators have questioned the constitutionality of removing an entire case if a federal court lacks independent subject matter jurisdiction over the principal claim,¹³⁰ many commentators believe section 1441(c) is constitutional under the doctrine of ancillary jurisdiction.¹³¹ Ancillary jurisdiction permits a federal court to exercise jurisdiction over a claim that has no independent source of federal jurisdiction, provided the claim shares a "common nucleus of operative fact" with a claim over which a federal court has original jurisdiction.¹³² Pursuant to section 1441(a), a federal court may exercise jurisdiction over a third-party claim if the third-party claim meets the federal question or diversity of citizenship requirements of section 1441(b).¹³³ If a federal court has independent jurisdiction over the third-party claim, the

127. See *supra* notes 116-22 and accompanying text (third-party defendant qualifies as defendant for removal purposes).

128. See *supra* notes 113-15 and accompanying text (Congress did not exclude third-party claims from removable claims in § 1441).

129. 28 U.S.C. § 1441(c) (1982). In addition to qualifying as a defendant within the meaning of § 1441(a), a third-party defendant also must meet the diversity or federal question requirements of § 1441(b) to remove a case to federal court. See *supra* note 1 (requirements for defendant's removal).

130. See Lewin, *supra* note 4, at 435-37 (criticizing argument that removal of entire case is necessarily constitutional under § 1441(c) because removal of entire case was constitutional under former statute); see also Duvall, *Removal—The "Separate and Independent Claim,"* 7 OKLA. L. REV. 385, 391 (1954) (Supreme Court has not determined constitutionality of § 1441(c)).

131. See 1A MOORE'S FEDERAL PRACTICE, *supra* note 1, ¶ 0.163[3], at 317-19 (broad construction of Article III of Constitution aids constitutionality of § 1441(c)); Cohen, *Problems in the Removal of a "Separate and Independent Claim or Cause of Action,"* 46 Minn. L. Rev. 1, 25 (1961) (liberal joinder rules suggest constitutionality of § 1441(c)); Moore & VanDerCreek, *supra* note 105, at 497-98 (doctrine of ancillary jurisdiction permits removal of entire case to federal court even when case involves one federal question claim and one state claim between citizens of same state). See generally Wills & Boyer, *Proposed Changes in Federal Removal Jurisdiction and Procedure*, 9 OHIO ST. L.J. 257, 268 (1948) (proposing that federal court's retention of entire case after removal be mandatory rather than discretionary).

132. See *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966) (court has power to hear entire case if plaintiff ordinarily would try both federal and nonfederal claims in one proceeding); see also *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 371 n.10 (1978) (Supreme Court acknowledged that "common nucleus of operative fact test" may apply to diversity cases as well as federal question cases).

133. See 28 U.S.C. § 1441(a) (1982) (providing removal jurisdiction to defendants); *Id.* § 1441(b) (removal jurisdiction requires federal question or diversity).

federal court may exercise ancillary jurisdiction over the principal claim arising from a common nucleus of operative fact without violating the Constitution.¹³⁴

While the constitutionality of removing an entire case pursuant to section 1441(c) no longer is in doubt among the courts, some courts differ over whether a third-party claim is sufficiently separate from and independent of the principal claim to warrant removal to a federal court under section 1441(c).¹³⁵ Whether a third-party claim is separate from and independent of the main claim, therefore, is crucial to a court's removal decision.¹³⁶ Some courts have held that a third-party practice rule requiring that a third-party defendant be liable to the original defendant for some or all of the plaintiff's claim against the defendant necessarily precludes a third-party claim from being separate from and independent of the principal claim.¹³⁷ A state court's decision that impleader was proper under the state's procedural rules, however, does not control federal jurisdiction over the third-party claim.¹³⁸ A federal court, therefore, must decide on the facts of the case whether a third-party claim is separate from and independent of the main claim.¹³⁹

In determining whether a third-party claim is separate from and independent of the main claim, courts traditionally look to the role of the third-party defendant in the case.¹⁴⁰ If a case involves a single wrong for which the plaintiff seeks relief, courts prohibit third-party removal on the theory that the

134. See *United Mine Workers v. Gibbs*, 383 U.S. 715, 725-26 (1966) (Supreme Court delineated constitutional limits of federal power). Once a federal court has established the power to hear a claim, the court must examine the specific statute governing jurisdiction to decide if the court may exercise jurisdiction over the claim. See *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 372 (1978) (both Constitution and congressional acts can limit federal jurisdiction). A federal court may exercise jurisdiction over an ancillary nonfederal claim if Congress has not negated jurisdiction expressly or impliedly. See *Aldinger v. Howard*, 427 U.S. 1, 18 (1976) (statutory law can limit federal jurisdiction over nonfederal claims).

135. See *infra* notes 143-45 (citing cases permitting removal based on separate and independent claims); cf. *Augenti v. Cappellini*, 30 Fed. R. Serv. 2d (Callaghan) 382, 384-85 (M.D. Pa. 1980) (third-party claim necessarily depends on outcome of main claim).

136. See *infra* notes 140-46 and accompanying text (distinction between active and passive liability is test for deciding whether third-party claim is separate from and independent of main claim).

137. See *Southeast Mortgage Co. v. Mullins*, 514 F.2d 747, 749 (5th Cir. 1975) (third-party practice rules permit impleader only when third-party claim depends on outcome of main claim); *United States v. Joe Grasso & Son, Inc.*, 380 F.2d 749, 751 (5th Cir. 1967) (defendant can not maintain separate and independent claim against impleaded party).

138. See U.S. CONST. art. III, § 2 (grant of federal jurisdiction is within power of Congress); cf. FED. R. CIV. P. 82 (federal procedural rules do not extend or limit federal jurisdiction). But see Note, *Third-Party Removal Under Section 1441(c)*, 52 *FORDHAM L. REV.* 133, 151 (1983) (state decisions that impleaded claims are not separate and independent control federal jurisdiction).

139. See *supra* notes 19-53 and accompanying text (discussing examples of separate and independent claims in cases in which courts permitted removal).

140. See *supra* notes 19-53 & 80-98 and accompanying text (discussing cases in which court decided whether third-party defendant could remove on basis of separate and independent claim); see also *Chase v. North Am. Sys., Inc.*, 523 F. Supp. 378, 380 (W.D. Pa. 1981) (Pennsylvania permits third-party plaintiff to implead third-party defendant on basis of third-party defendant's liability to original plaintiff).

defendant impleaded the third-party defendant as an actively liable party.¹⁴¹ Examples of an actively liable party appear in products liability cases and breach of warranty cases, where the third-party defendant has committed a wrong.¹⁴² If, however, a case involves a wrong to a plaintiff and a separate contractual agreement between the defendant and the third-party defendant, courts usually permit third-party removal on the theory that a court can preside over the dispute between the defendant and the third-party defendant without reference to the plaintiff's original claim.¹⁴³ An example of such a passively liable third-party defendant appears in insurance cases.¹⁴⁴ The independent nature of the contractual agreement enables the defendant and the third-party defendant to settle their dispute without reference to the plaintiff's original claim against the defendant.¹⁴⁵ A claim against a passively liable third-party defendant, therefore, meets the section 1441(c) requirement that parties must be able to litigate a separate and independent claim apart from any other claim in the suit to remove the entire case to federal court.¹⁴⁶

Using the separate and independent claim analysis of section 1441(c), the *Carl Heck, Ford Motor Credit Co., Bond, Luebbe*, and *Chase* courts all reached accurate conclusions.¹⁴⁷ The *Carl Heck, Ford Motor Credit Co.*, and *Bond*

141. See *Coleman v. A & D Mach. Co.*, 298 F. Supp. 234, 237 (E.D. Cal. 1969) (defendant's breach of warranty claim against third-party defendant relating to defect in machine was not separate from and independent of plaintiff's breach of warranty claim against defendant because both claims involved same defect to same machine); *Holloway v. Gamble-Skogmo, Inc.*, 274 F. Supp. 321, 323-24 (N.D. Ill. 1967) (defendant's third-party claim for indemnification against tire manufacturer was not separate from and independent of plaintiff's claim against tire retailer because defendant could not recover damages until court entered judgment for plaintiff).

142. See *Soper v. Kahn*, 568 F. Supp. 398, 400 (D. Md. 1983) (defendant attorneys impleaded legal publisher for faulty information third-party defendant published in law digest); *Luebbe v. Presbyterian Hosp. in N.Y.*, 526 F. Supp. 1162, 1163-65 (S.D.N.Y. 1981) (defendant physicians impleaded manufacturer for faulty manufacture of surgical instrument); *Manternach v. Jones County Farm Serv. Co.*, 156 F. Supp. 574, 577 (N.D. Iowa 1957) (chemical supplier could not remove chemical retailer's third-party claim for indemnification because claim was dependent upon outcome of breach of warranty action between retailer and chemical user).

143. See *Marsh Inv. Corp. v. Langford*, 494 F. Supp. 344, 350 (E.D. La. 1980) (defendant's third-party indemnification claim against insurer involved policy interpretation and therefore was not related to plaintiff's suit against defendant to cancel allegedly fraudulent mortgages), *aff'd*, 652 F.2d 583 (5th Cir. 1981); *Wayrynen Funeral Home, Inc. v. J.G. Link & Co.*, 279 F. Supp. 803, 806 (D. Mont. 1968) (third-party claim against insurer for refusal to defend was separate from and independent of plaintiff's original claim against defendant for negligence and breach of warranty under contract to design and build).

144. See *Bond v. Doig*, 433 F. Supp. 243, 248 (D. N.J. 1977) (state law enabled defendant to sue third-party defendant for declaratory judgment to determine extent of insurance policy's coverage).

145. See *Rafferty v. Frock*, 135 F. Supp. 292, 293 (D. Md. 1955) (court should keep contract-related controversy between insurer and insured separate from negligence-related controversy between plaintiff and defendant).

146. See 28 U.S.C. § 1441(c) (1982) (permitting removal of entire case if third-party claim is "removable if sued upon alone").

147. See *supra* notes 19-98 and accompanying text (discussion of cases using separate and independent claim analysis).

courts were correct in granting third-party removal because in each of these cases the dispute between the defendant and the third-party defendant involved contractual interpretations totally independent of the principal claim in the suit.¹⁴⁸ The *Luebbe* and *Chase* courts also were correct in denying third-party removal because in both cases the main claim and the third-party claim shared common issues of causation and liability.¹⁴⁹

In deciding third-party removal issues, a court necessarily balances a plaintiff's interest in selecting the forum against the third-party defendant's statutory right of removal under section 1441.¹⁵⁰ By granting third-party removal of an entire case, a court takes away the plaintiff's choice of forum.¹⁵¹ By disallowing third-party removal, a court denies the third-party defendant the right to litigate in a neutral, federal forum.¹⁵² Congress has provided a solution to this dilemma by enabling the courts to exercise discretion to retain jurisdiction over the third-party claim and remand any otherwise nonremovable claims to state court.¹⁵³ Most courts that have permitted third-party removal have remanded the plaintiff's original claim to state court.¹⁵⁴

148. See *supra* note 143 and accompanying text (contractual agreements between defendants and third-party defendants usually are separate from and independent of main claims).

149. See *supra* notes 140-42 and accompanying text (third-party claims against actively liable third-party defendants usually depend upon outcome of main claim).

150. See 14 FEDERAL PRACTICE AND PROCEDURE, *supra* note 4, § 3724, at 646 (courts should not force plaintiffs to litigate in forum that would not have had jurisdiction over cases without addition of third-party claim); cf. 28 U.S.C. § 1441(c) (1982) (defendants have right to remove cases containing separate and independent claims).

151. See 14 FEDERAL PRACTICE AND PROCEDURE, *supra* note 4, § 3724, at 646 (courts normally should honor plaintiff's choice of forum). In addition to subject-matter jurisdiction, personal jurisdiction requirements operate to limit a plaintiff's choice of forum. See *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (state court may assert personal jurisdiction over defendant only if defendant had "minimum contacts" with state). Venue also can limit a plaintiff's choice of forum. See 28 U.S.C. § 1404 (1976) (district courts may transfer actions for convenience of parties).

152. See *supra* note 1 (nonresident defendants need protection from prejudicial state courts).

153. 28 U.S.C. § 1441(c) (1982). A district court may exercise discretion to remand the nonfederal claim to the state court by mailing a certified copy of the remand order to the clerk of the state court. *Id.* § 1447(c).

154. See *Carl Heck Eng'rs, Inc. v. Lafourch Parish Police Jury*, 622 F.2d 133, 136 (5th Cir. 1980) (federal court retained jurisdiction over third-party claim for indemnity but remanded plaintiff's claim for breach of contract); *Ford Motor Credit Co. v. Aaron-Lincoln Mercury, Inc.*, 563 F. Supp. 1108, 1117 (N.D. Ill. 1983) (federal court retained jurisdiction over third-party claim of false misrepresentation but remanded plaintiff's claim for liability on financing contract). *But see* *Marsh Inv. Corp. v. Langford*, 494 F. Supp. 344, 350-51 (E.D.La. 1980) (federal court retained jurisdiction over both third-party claim for indemnity and main claim on fraudulent procurement of mortgages because defendant delayed in filing motion to remand with court). Despite the increase in procedural steps that results when a federal court retains jurisdiction over a third-party claim and remands the main claim to state court, remanding the main claim does not controvert notions of judicial economy because judicial economy considerations are significant only in dealing with trial time. See *Ford Motor Credit Co. v. Aaron-Lincoln Mercury, Inc.*, 563 F. Supp. 1108, 1115 n.27 (N.D. Ill. 1983) (parties rarely litigate question of remand). *But see* 14 FEDERAL PRACTICE AND PROCEDURE, *supra* note 4, § 3724, at 646 (increasing procedural steps subverts judicial economy).

In determining whether a third-party defendant may remove an entire case from a state court to a federal court pursuant to section 1441(c), a court must decide whether the third-party claim is separate from and independent of the plaintiff's original claim.¹⁵⁵ To make this determination, a court must examine the facts of each particular case.¹⁵⁶ A court should not refuse third-party removal simply on the basis of a mechanical, strict construction of section 1441 and the general policy of limiting access to federal courts because such strict construction will result in the denial of the right of removal by some qualified third-party defendants.¹⁵⁷ Only a court's careful analysis of the claims involved in the suit will ensure the protection of the rights of both the plaintiff and the third-party defendant.¹⁵⁸

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155. See *supra* notes 140-46 and accompanying text (discussion of actively and passively liable third-party defendants).

156. See *supra* notes 19-53 & 80-98 and accompanying text (discussing examples of separate and independent claims).

157. See *supra* notes 54-77 and accompanying text (discussion of cases construing removal statute strictly to limit access to federal courts).

158. See *supra* notes 150-54 and accompanying text (discussion of balancing of plaintiff's and third-party defendant's interests).