

Contractual Waiver of the Right to Remove to Federal Court: How Policy Judgments Guide Contract Interpretation

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I. INTRODUCTION

Federal statutes allow a state court defendant to remove many kinds of cases to federal court. A party may waive the right to remove, either by a procedural default during litigation, or by contractually waiving the right before litigation starts. When a court finds waiver of removal rights by contract, it often relies upon a

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venue or forum selection clause, which may not expressly mention removal. Litigation about how to interpret such clauses in the removal context has surged in recent years as awareness of the issue has spread. This article analyzes recent trends in this area, including the start and growth of a circuit split.

Part I examines when courts will employ a heightened standard that requires clear and unequivocal evidence of a party's intent to waive the right to remove, an issue on which a circuit split is developing. Part II considers the effect of forum selection language on the waiver analysis, such as a clause giving a party the right to choose the forum, or a contractual consent to the jurisdiction of a particular court. Parts III and IV review judicial treatment of seemingly minor, but substantively significant word choices in venue and forum selection clauses. Finally, Part V examines how, in addition to contract terms, the physical location of a federal courthouse may affect the analysis of whether a defendant has waived the right to remove an action from state court.²

Each aspect of this article illustrates how courts apply a general analytical framework in the context of specific policy goals. A court must, on the one hand, apply settled principles of contract interpretation, while at the same time giving weight to the policy judgments that removal statutes are strictly construed and forum selection clauses are favored. The highly practical question posed in this area—"what court should this case be in?"—also offers instructive examples of how courts approach significant theoretical and policy issues.

II. STANDARDS OF INTERPRETATION

The federal circuits are split as to the overall standard to apply when determining whether parties have contractually waived the right of removal. The Eleventh Circuit states that it applies

2. Cases that rely on several topics discussed in this article are discussed in more than one place, and for ease of reference the text of the forum selection clauses at issue may be repeated. Additionally, for easier comparison of circuit splits, district courts have been annotated as to which circuit they belong when it is not clear from the context.

"ordinary contract principles,"³ while the Fifth, Sixth, and Tenth Circuits say they require a higher standard of "clear and unequivocal" language to find waiver, although they apply that standard in distinct ways.⁴ The remaining circuits have not directly addressed this issue⁵ or are split among their district courts as to the applicable standard.⁶

3. See, e.g., *City of W. Palm Beach v. VisionAIR, Inc.*, 199 F. App'x 768, 769 (11th Cir. 2006) (per curiam) (interpreting forum selection clause to be unambiguous and therefore not construing it against the drafter); *Priority Healthcare Corp. v. Chaudhuri*, No. 6:08-CV-425-Orl-KRS, 2008 WL 2477623, at *2 (M.D. Fla. June 18, 2008) (finding the plain language of the forum selection clause to be ambiguous and therefore construing it against the drafter); *Smyrna Plumbing Co. v. MDH Builders, Inc.*, No. 107CV126 (AAA), 2008 WL 410365, at *1 (S.D. Ga. Feb. 12, 2008) (stating that ordinary contract principles govern a contractual waiver of the right to remove and expressly rejecting the "clear and unequivocal" standard).

4. See, e.g., *City of New Orleans v. Mun. Admin. Servs., Inc.*, 376 F.3d 501, 504 (5th Cir. 2004) ("A party may waive its rights by explicitly stating that it is doing so, by allowing the other party the right to choose venue, or by establishing an exclusive venue within the contract."); *Milk 'N' More, Inc. v. Beavert*, 963 F.2d 1342, 1346 (10th Cir. 1992) (stating that the clause's use of "shall" limited venue to Johnson County and thus waived the right to remove); *Regis Assocs. v. Rank Hotels (Mgmt.) Ltd.*, 894 F.2d 193, 195 (6th Cir. 1990) (stating that a party must set forth intent of such a waiver, "not the intent to rely on the statute"); *Weltman v. Silna*, 879 F.2d 425, 427 (8th Cir. 1989) (holding that clause that did not address removal did not constitute a waiver of the right to remove).

5. See, e.g., *Spenlinhauer v. R.R. Donnelley & Sons Co.*, 534 F. Supp. 2d 162, 164 (D. Me. 2008) (First Circuit district court declining to decide whether waivers of a right to removal must be clear and unequivocal).

6. Second Circuit: Compare *Hilb Rogal & Hobbs Co. v. MacGinnitie*, No. Civ.A.3:04CV1541(JCH), 2005 WL 441509, at *3 (D. Conn. Feb. 14, 2005) (stating that waiver of the right to remove to federal court must be "clear and unequivocal"), with *Wells Fargo Century, Inc. v. Brown*, 475 F. Supp. 2d 368, 371 (S.D.N.Y. 2007) (stating that "principles of contractual interpretation" are used in scrutinizing forum selection clauses). Fourth Circuit: Compare *Grubb v. Donegal Mut. Ins. Co.*, 935 F.2d 57, 59 (4th Cir. 1991) ("[D]efendant may . . . waive its . . . right to removal by demonstrating a 'clear and unequivocal' intent to remain in state court."), with *Welborn v. Classic Syndicate, Inc.*, 807 F. Supp. 388, 390-91 (W.D.N.C. 1992) (stating that contractual waivers of the right to remove do not have to be "clear and unequivocal"). Seventh Circuit: Compare *Specialty Cheese Co. v. Universal Food & Dairy Prods., Inc.*, No. 07-CV-970, 2008 WL 906750, at *3 (E.D. Wis. Apr. 1, 2008) (strongly suggesting rejection of the clear and unequivocal standard), with *Cont'l Cas. Co. v. LaSalle Re Ltd.*, 500 F. Supp. 2d 991, 994-95 (N.D. Ill. 2007) (stating that while principles of standard contract

A. "Lower" Standard

Eleventh Circuit courts have rejected the higher standard demanding clear and unequivocal waiver, and instead rely on "ordinary contract principles" to analyze a waiver issue.⁷ The principle of interpretation most frequently cited in this circuit on this point is the construction of an ambiguous clause against its drafter. Unlike cases decided under what courts in other circuits call "ordinary contract principles" (discussed *infra*), the Eleventh Circuit has not easily found waiver of the right to remove even under the "lower" standard for proving waiver. In *Priority Healthcare*, for example, the forum selection clause read in part, "[the] customer shall be subject to personal jurisdiction of the State of Florida and accept venue in Seminole County, Florida."⁸ The court found no waiver because it held this language was ambiguous and construed it against the plaintiff who drafted it.⁹

The Eleventh Circuit again found no waiver in *Global Satellite*, based on a venue clause that could amount to waiver under the "lower" contract interpretation standard as applied by other circuits.¹⁰ The clause stated, "[v]enue shall be in Broward County,

interpretation are used to decide whether a forum selection clause is enforceable, a defendant's waiver of the right to remove must be clear and unequivocal).

Courts in the Third and Ninth Circuits have not squarely addressed the issue, although some opinions hint at their positions. *Compare* *Nascone v. Spudnuts, Inc.*, 735 F.2d 763, 773-74 (3d Cir. 1984) (considering whether transfer was appropriate under a forum selection clause and noting that Utah would "examine whether the forum selection clause was reasonable or not" rather than follow the "more restrictive attitude toward forum selection clauses" of Texas and Missouri—states in the Fifth and Eighth Circuits respectively, which apply the clear and unequivocal standard), *with* *Docksider, Ltd. v. Sea Tech, Ltd.*, 875 F.2d 762, 764 (9th Cir. 1989) (failing to mention either standard, but requiring that "clear" language must designate an exclusive forum to find that the defendant waived the right to remove).

7. See, e.g., *Global Satellite Commc'n Co. v. Starmill U.K. Ltd.*, 378 F.3d 1269, 1272 (11th Cir. 2004) ("This circuit has held that the determination of whether such a clause constitutes a waiver . . . is to be determined according to ordinary contract principles, and need not meet the higher threshold of a 'clear and unequivocal' waiver.").

8. *Priority Healthcare*, 2008 WL 2477623, at *1.

9. *Id.* at *2.

10. 378 F.3d at 1272.

Florida . . . [and] [t]he parties . . . expressly waive the right to contest any issues regarding venue or in personam jurisdiction and agree in the event of litigation to submit to the jurisdiction of Broward County, Florida."¹¹ The court found that while the clause waived objections to venue and personal jurisdiction, it was "simply ambiguous" as to removal.¹² The court again construed the forum selection clause against the drafter and admonished drafters to state their objective more precisely to create an effective waiver.¹³

In one instance when a court found waiver under the Eleventh Circuit's standard, the forum selection clause provided that "the parties consent[ed] to venue in, and the exercise of jurisdiction by, the state courts located in Richmond County, Georgia and waive[d] any jurisdictional or venue rights they may have [had] otherwise."¹⁴ The Southern District of Georgia in *Smyrna Plumbing* described this clause as "much broader" than others and found waiver from the reference to "any jurisdictional rights."¹⁵

By contrast, district courts in other circuits stating that they are applying standard interpretation principles often find waiver. The Eastern District of Wisconsin,¹⁶ for example, found waiver of removal rights from a forum selection clause that said, "any suit . . . may only be brought in a court of competent jurisdiction located in Dodge County in the State of Wisconsin."¹⁷ The defendant argued that the agreement did not waive the right to remove so long as the

11. *Id.* at 1271.

12. *Id.* at 1274.

13. *Id.* at 1271-74.

14. *Smyrna Plumbing Co. v. MDH Builders, Inc.*, No. 107CV126 (AAA), 2008 WL 410365, at *1 (S.D. Ga. Feb. 12, 2008).

15. *Id.* at *2. Although the court used the word "broader," the forum selection clause was actually more specific than other cases in that circuit, referring to the selected courts by name. *Id.*

16. The Eastern District of Wisconsin is in the Seventh Circuit.

17. *Specialty Cheese Co., Inc. v. Universal Food & Dairy Prods., Inc.*, No. 07-CV-970, 2008 WL 906750, at *2-3 (E.D. Wis. Apr. 1, 2008). Notwithstanding the holding in *Specialty Cheese*, most district courts in the Seventh Circuit apply the clear and unequivocal standard. See generally *Progressive Publ'ns, Inc. v. Capital Color Mail, Inc.*, 500 F. Supp. 2d 1004, 1005 (N.D. Ill. 2007) ("[A]s our Court of Appeals regularly reminds those of us who labor in the District Court vineyards and all the rest of the legal universe, do not make precedent, so that such opinions have value only to the extent that others may find their reasoning persuasive.").

suit was first “brought” in Dodge County, but the court disagreed.¹⁸ Instead, it found that the “more plausible construction of the clause” under usual interpretative principles was waiver because the parties agreed to litigate only in the Dodge County Circuit Court.¹⁹

Likewise, the Southern District of New York²⁰ used standard principles of contract interpretation to examine a forum selection clause which stated that the defendant “expressly submit[ted] and consent[ed] to the jurisdiction of the Supreme Court of the State of New York, in the County of New York.”²¹ This language was found to waive the right to remove, in part because that was a “reasonable” interpretation of the provision.²²

B. “Higher” Standard

As with courts using the “lower” standard, courts applying the “higher” standard of clear and unequivocal waiver can do so unevenly. While the Fourth Circuit has not clearly chosen a standard, courts in that circuit that apply the clear and unequivocal standard do so rigorously and often do not find waiver. For example, in *London Manhattan Co. v. CSA-Credit Solutions of America, Inc.*, the District of South Carolina examined a forum selection clause that stated, “venue for any action or dispute under this Agreement shall be in the Courts of Charleston County, South Carolina.”²³ The court found no waiver,²⁴ even though it noted *sua sponte* that the plaintiff could have argued that the clause “set[] venue exclusively in state court such that it [would be] a waiver of Defendant’s right to

18. *Specialty Cheese*, 2008 WL 906750, at *1–2.

19. *Id.* at *2.

20. The Southern District of New York is in the Second Circuit, where the district courts have applied both the “higher” and “lower” standards without express guidance from the Second Circuit. *See supra* note 6.

21. *Wells Fargo Century Inc. v. Brown*, 475 F. Supp. 2d 368, 370 (S.D.N.Y. 2007).

22. *Id.* at 372. By contrast, examination of similarly worded clauses under the higher “clear and unequivocal” standard has at times not resulted in waiver. *See infra* Part II.B.

23. No. 2:08-cv-00465-PMD, 2008 WL 2077554, at *1 (D.S.C. May 9, 2008) (emphasis added).

24. *Id.* at *3.

remove.”²⁵ While the court said that it was not choosing the standard to apply, it noted that the “[d]efendant ha[d] not . . . waived its statutory right to remove [clearly and unequivocally.]”²⁶

Similarly, the Fourth Circuit court of the Middle District of North Carolina considered a clause in *Basu v. Robson Woese, Inc.*, which stated that “any suit shall be filed in the North Carolina General Court of Justice in Durham County or in the United States District Court for the Middle District of North Carolina and parties . . . consent to the exclusive jurisdiction and venue in said Courts.”²⁷ The court suggested that the word “or” may have supported a waiver finding if the case was first filed in state court.²⁸ Nonetheless, the court found no waiver because this argument did not satisfy the clear and unequivocal standard.²⁹

Like the courts of the Fourth Circuit, the Seventh Circuit courts apply the higher standard to find waiver. For example, in *Rochester Community School Corp. v. Honeywell, Inc.*, the Northern District of Indiana strictly applied the clear and unequivocal standard to a clause stating “the claim shall be decided by a court of competent jurisdiction of Fulton County, Indiana.”³⁰ Although no federal court sits in Fulton County, the court found no “clear and specific” waiver, stating: “had [the plaintiff] wanted to preclude litigation in federal court, it should have stated that intention more clearly.”³¹ While courts, regardless of the standard applied, have found that similarly worded clauses waive removal rights, particularly if no federal court sits in the specified county, *Rochester* found that a contractual waiver should provide for litigation to be

25. *Id.* at *1.

26. *Id.* at *3.

27. *Basu v. Robson Woese, Inc.*, No. Civ.1:03CV00098, 2003 WL 1937119, at *2–4 (M.D.N.C. Apr. 22, 2003).

28. *Id.* at *3–4.

29. *Id.* at *4.

30. *Rochester Cmty. Sch. Corp. v. Honeywell, Inc.*, No. 3:06-CV-351 RM, 2007 WL 2473464, at *3 (N.D. Ind. Aug. 27, 2007). The court’s holding was also based on the unenforceability of the addendum in which the clause was contained. *Id.* at *6. However, the court noted that “even if the Addendum were enforceable, the language of [the forum selection clause] wouldn’t warrant the granting of [Plaintiff]’s motion [to remand]” because removal rights were not waived. *Id.*

31. *Id.*

conducted in either a specifically named state court, or at the very least in "a state court."³²

Likewise, the Northern District of Illinois (also in the Seventh Circuit) found that removal rights were not waived by a clause stating "[t]he Parties hereby consent to the jurisdiction of the courts of the State of Illinois."³³ The court found that the clause contained "[no] evidence of the parties' intent to make the venue provision exclusive."³⁴ Applying the clear and unequivocal standard perhaps even more strictly than the district court in Indiana, the court further noted that waiver of the right to remove does not result from a "general" consent to the jurisdiction of a specified court.³⁵

The Sixth Circuit has uniformly adopted the clear and unequivocal waiver standard,³⁶ and its courts have followed that lead and applied it strictly. The clause before the Sixth Circuit in *Regis* stated, "[t]he interpretation and application of this Agreement shall be governed by the law of the State of Michigan and the parties hereby submit to the jurisdiction of the Michigan Courts."³⁷ *Regis* applied the clear and unequivocal standard strictly to find that "nothing in the language . . . suggests any intent on the part of anyone to waive the right of removal from state to federal court."³⁸ The court reasoned that waiver should not result from the lack of language expressing an intent to rely on the removal statute, but should be set forth expressly.³⁹

The Sixth Circuit recently confirmed its strong adherence to the "clear and unequivocal" standard in *EBI-Detroit v. City of Detroit*, where the clause at issue read, "[t]he Contractor agrees to submit to the exclusive personal jurisdiction of, and not commence any action in other than, a competent State court in Michigan."⁴⁰ Despite the express reference to state court, the court found that the

32. *Id.*

33. *Cont'l Cas. Co. v. LaSalle Re Ltd.*, 500 F. Supp. 2d 991, 993 (N.D. Ill. 2007).

34. *Id.* at 995.

35. *Id.*

36. *Regis Assocs. v. Rank Hotels (Mgmt.) Ltd.*, 894 F.2d 193, 195 (6th Cir. 1990).

37. *Id.* at 194.

38. *Id.* at 195.

39. *Id.*

40. 276 F. App'x 340, 346 (6th Cir. May 22, 2008) (internal citation omitted).

clause did not create waiver because the right to remove was not addressed in the clause, and because only the plaintiff ("The Contractor") was mentioned, not the defendant (the City of Detroit).⁴¹ The court concluded, "[a] clause that does not even mention either removal or the party seeking to remove cannot be a clear waiver of removal."⁴²

The Eighth Circuit has also adopted the clear and unequivocal standard for finding waiver of removal rights, but it is not yet clear whether its application will be as forceful as that of the Sixth Circuit. While the Eighth Circuit addressed waiver of the right to remove in *Weltman v. Silna*, it declined to discuss even the text of the forum selection clause at issue.⁴³ The court did note that while the defendants "consented to subject matter jurisdiction and venue in the state court in the City of St. Louis" in an agreement, the agreement did not address removal.⁴⁴ Stating that waiver of removal rights must be "clear and unequivocal," the court found no waiver resulting from the agreement.⁴⁵

The Eastern District of Missouri in the Eighth Circuit recently bemoaned in *Citimortgage, Inc. v. Loan Link Financial Services* that "[t]he concept of 'clear and unequivocal' is a fluid concept left up to this Court's discretion with little guidance from the Eighth Circuit."⁴⁶ The court did find a clear and unequivocal waiver based on a forum selection clause that stated in part:

[T]hat any action . . . shall be brought in St. Louis County Circuit Court or the United States District Court for the Eastern District of Missouri and each party irrevocably submits to the jurisdiction of either forum and waives the defense of an inconvenient forum . . . in such state or federal court and any other substantive or procedural rights or remedies it may have with respect to . . . any such action.⁴⁷

41. *Id.* at 346-47.

42. *Id.* at 347.

43. 879 F.2d 425, 427 (8th Cir. 1989).

44. *Id.*

45. *Id.*

46. No. 4:07CV1989SNL, 2008 WL 695392, at *2 (E.D. Mo. Mar. 12, 2008).

47. *Id.* at *1-2.

The court concluded that the parties waived the right to remove to federal court, because, had it not so held, the clause would have been “render[ed] . . . meaningless.”⁴⁸

The Tenth and Fifth Circuits have also both adopted the clear and unequivocal standard, but, unlike the Sixth and Eighth Circuits, they take a less demanding approach to its application.⁴⁹ The Tenth Circuit said that it adopted the “clear and unequivocal” standard in *Milk ‘N’ More, Inc. v. Beavert*, when it considered a forum selection clause stating, “venue shall be proper under this agreement in Johnson County, Kansas.”⁵⁰ The court found that the defendant waived the right to remove because the provision “seem[ed] reasonably clear”⁵¹—a comment that seems more fitting in an analysis under the “lower” standard of basic contract interpretation principles. The court noted that an attorney for the plaintiff had drafted the clause⁵² but declined to construe the clause against the drafter, which would likely be a threshold issue under the lower standard.

The District of Kansas followed the Tenth Circuit’s construction of the clear and unequivocal standard when it found waiver in *Red Mountain Retail Group, Inc. v. BCB, L.L.C.*⁵³ The forum selection clause stated, “any litigation shall have venue only in Wyandotte County, Kansas.”⁵⁴ The Tenth Circuit’s liberal application of the clear and unequivocal standard, and its reliance on the distinction between “county” and “judicial district,” are especially evident in this case where the federal court in Wyandotte County found waiver even though the federal court was located in the agreed-upon county.⁵⁵ The Tenth Circuit reached a similar result in *Excell v. Sterling Boiler & Mechanic, Inc.*—while the court did

48. *Id.* at *3.

49. The Tenth Circuit often distinguishes the word “county” from “judicial district” to find that use of “county” makes state court the exclusive forum. *See infra* note 175. Because venue or forum clauses often reference a county, the Tenth Circuit thus often finds that a defendant has waived the right to remove. *See infra* notes 179–83.

50. 963 F.2d 1342, 1346 (10th Cir. 1992).

51. *Id.* (emphasis added).

52. *Id.* at 1346 n.1.

53. No. 05-2557-KHV, 2006 WL 1128685, at *1–2 (D. Kan. Apr. 27, 2006).

54. *Id.* at *1.

55. *Id.* at *2.

not say what standard applied, the court found waiver based on a clause specifying that “[j]urisdiction shall be in the State of Colorado, and venue shall lie in the County of El Paso, Colorado.”⁵⁶

When district courts in the Tenth Circuit have not found waiver under that circuit’s application of the clear and unequivocal standard, the clauses at issue expressly placed venue in both the state and federal courts of a specified locale. For example, in *QFA Royalties LLC v. Bogdanova*, the District of Colorado found that a clause placing venue “in the District Court for the City & County of Denver, Colorado, or the United States District Court for the District of Colorado” did not waive the defendant’s right to remove because the federal court was an exclusive forum designated in the contract.⁵⁷

Like the Tenth Circuit, the Fifth Circuit has adopted the clear and unequivocal standard but applied it with lenience, although under a different framework than the Tenth Circuit. While the Fifth Circuit has expressly rejected the Tenth Circuit’s position that reference to a particular county makes state court the only appropriate forum,⁵⁸ the Fifth Circuit does tend to find waiver when a county is specified with no federal courthouse physically located within it.⁵⁹

Recent cases suggest that the Fifth Circuit is moving toward stronger reliance on standard principles of contract interpretation rather than requiring clear and unequivocal evidence of waiver. In an unusual application of the clear and unequivocal standard, the Fifth Circuit found waiver in *Collin County* based on a clause stating that “venue . . . shall lie exclusively in Collin County, Texas.”⁶⁰ When the case was decided, no federal courthouse was located in

56. 106 F.3d 318, 320 (10th Cir. 1997).

57. No. 06-CV-01776-LTB, 2006 WL 3371641, at *2–4 (D. Colo. Nov. 21, 2006); *see also* *Knight Oil Tools, Inc. v. Unit Petroleum Co.*, No. CIV 05-0669 JB/ACT, 2005 WL 2313715, at *10 (D.N.M. Aug. 31, 2005) (holding that a specific statement in a forum selection clause that a case may be brought in a state or federal court—either generally or a specifically named federal court—generally preserves the defendant’s right to remove to that court).

58. *See Collin County v. Siemens Bus. Servs., Inc.*, 250 F. App’x 45, 51 (5th Cir. 2007) (distinguishing Tenth Circuit case law in concluding that “use of the term ‘county’ rather than ‘district’ at the very least falls short of a clear and unequivocal waiver of federal jurisdiction”).

59. *See infra* Part IV.D.

60. *Collin County*, 250 F. App’x at 47.

that county, but plans were underway for its construction, in accordance with federal law.⁶¹ Because no federal courthouse was in the county at the time of litigation, the court, citing the higher “clear and unequivocal” standard, found that the defendant had waived the right to remove, even though in a few months there would be such a courthouse.⁶²

Most recently, the Fifth Circuit examined a forum selection clause in *Alliance Health Group LLC v. Bridging Health Options LLC*.⁶³ As in *Collin County*, the clause at issue stated, “exclusive venue for any litigation related hereto shall occur in Harrison County.”⁶⁴ Because Harrison County has a federal courthouse, the court found no waiver.⁶⁵ Notably, the court did not place great reliance on the clear and unequivocal standard, and seemed to purposefully include an analysis based on general contract principles.⁶⁶ The court’s only mention of the clear and unequivocal standard was when it quoted from *Collin County*’s “county” versus “judicial district” analysis, which did not support the court’s holding in that case.⁶⁷ Even after the court in *Alliance* followed other Fifth Circuit precedent and found that the presence of a federal court in the specified county prevented waiver, it went on to analyze “an alternative basis” for finding no waiver, invoking the *contra proferentem* doctrine and interpreting the clause against the appellant who drafted it.⁶⁸

The stated general standards for finding that a defendant has waived the right to remove are applied differently. Courts analyzing

61. *Id.* at 52–53. The federal courthouse in Plano, Collin County, Texas, opened on August 2008. Press Release, U.S. Congressman Sam Johnson, <http://www.samjohnson.house.gov/News/DocumentSingle.aspx?DocumentID=99999>.

62. *Collin County*, 250 F. App’x at 48, 52. The court noted that these facts “present[ed] a very narrow, one-time question.” *Id.* at 54.

63. 553 F.3d 397, 397 (5th Cir. 2008).

64. *Id.* at 401 (emphasis omitted).

65. *Id.*

66. *See id.* (looking to the language of the clause and noting its general lack of specificity).

67. *Id.* at 400 (citing *Collin County*, 250 F. App’x at 52 (stating that the court cannot find waiver from a distinction between use of the word “county” rather than “district” in the forum selection clause at issue)).

68. *Id.* at 402.

waiver under the “lower” standard of ordinary contract interpretation often do not find waiver, while courts using the “higher” clear and unequivocal standard can find waiver with little difficulty. Moreover, multiple courts applying the “same” standard have reached different decisions about clauses with remarkably similar language.

C. Standard Choice and Policy Judgment

The Fourth and Seventh Circuits foster a policy favoring access to federal courts in the strict application of the “clear and unequivocal” standard in determining waiver.⁶⁹ Other federal courts, however, appear to favor contractual waiver of removal regardless of whether the contract does so explicitly.⁷⁰ This approach may flow from a general disfavor of removal as a policy matter.

For example, in *Specialty Cheese, Inc. v. Universal Food and Dairy Products, Inc.*, the Eastern District of Wisconsin in the Seventh Circuit observed that prevailing law requires a narrow construction of removal statutes and that “any doubts . . . should be resolved against allowing removal.”⁷¹ The court relied on the Third Circuit’s instructions in *Foster v. Chesapeake Insurance Co.* that, especially in light of contractual rather than litigation-based waiver of removal rights, the right to remove is a constrictive rather than an expansive right.⁷² The court in *Foster* further warned that applying a high standard for finding waiver of removal rights would erode what it saw as a firmly established principle of the right to freedom of contract.⁷³

69. *See supra* Part II.B.

70. *See supra* Part II.A.

71. No. 07-CV-970, 2008 WL 906750, at *1 (E.D. Wis. Apr. 1, 2008) (citing *Wirtz Corp. v. United Distillers & Vintners N. Am. Inc.*, 224 F.3d 708, 715 (7th Cir. 2000)).

72. *Id.* at *3 (quoting *Foster v. Chesapeake Ins. Co.*, 933 F.2d 1207, 1218 n.15 (3d Cir. 1991)).

73. *Foster*, 933 F.2d at 1218 n.15. The Second Circuit and a Nevada district court in the Seventh Circuit likewise agree that the interplay of the limited jurisdiction of federal courts with the rights of states requires strict construction of removal jurisdiction, and thus any doubts against removability will waive the right to remove. *California v. Atlantic Richfield Co.*, 488 F.3d 112, 124 (2d Cir. 2007); *Jetstar, Inc. v. Monarch Sales*, 652 F. Supp. 310, 312 (D. Nev. 1987) (citing

The issue is also couched as a procedural one. Some courts hold that the removing defendant bears the burden of proving a right to remove,⁷⁴ while other courts hold that the plaintiff bears the burden to show waiver.⁷⁵ Courts across circuits, however, agree that the drafter of the forum selection clause has the burden not to leave ambiguity on the issue.⁷⁶

III. SUBSTANTIVE AGREEMENTS IN THE FORUM SELECTION CLAUSE

A. Plaintiff's Right to Choose the Forum

As the law has increasingly favored enforcement of forum selection clauses, courts have grown less skeptical about the general

Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100 (1941)); see also *Shamrock*, 313 U.S. at 107 (stating that Congress's then-recent alterations to the removal statute "indicat[ed] the Congressional purpose to narrow the federal jurisdiction on removal").

74. See, e.g., *Yakin v. Tyler Hill Camp, Inc.*, 2007 WL 3353729 (E.D.N.Y. Nov. 6, 2007) at *1 (holding that once the plaintiff has moved to remand, the removing defendant "bears the burden of demonstrating the propriety of removal").

75. See, e.g., *Global Satellite Commc'n Co. v. Starmill U.K. Ltd.*, 378 F.3d 1269, 1274 (11th Cir. 2004) (finding that forum clause was ambiguous and noting that plaintiff could have easily stated its intention precisely); *Rochester Cmty. Sch. Corp. v. Honeywell, Inc.*, No. 3:06-CV-351 RM, 2007 WL 2473464, at *6 (N.D. Ind. Aug. 27, 2007) (concluding that if the plaintiff, which had drafted the clause, had wanted to create a waiver of the defendant's right to remove, "it should have stated that intention more clearly"); *Truserv Corp. v. Prices Ilfeld Hardware, Co., Inc.*, No. 01 C 50271, 2001 WL 1298718, at *2 (N.D. Ill. Oct. 24, 2001) (finding that had the plaintiff wanted a contractual waiver of the right of removal, "it should have stated so more clearly" when it drafted the clause); *Fed. Gasohol Corp. v. Total Phone Mgmt.*, 24 F. Supp. 2d 1149, 1151 (D. Kan. 1998) (finding that "[a] declaration that jurisdiction is proper in one forum does not necessarily mean it is improper in another," and any ambiguity in the clause should have been eliminated by clearer drafting by the plaintiff).

76. See *Alliance Health Group, LLC v. Bridging Health Options, LLC*, 553 F.3d 397, 402 (5th Cir. 2008) (adopting the interpretation least favorable to the drafter and noting that the draft "easily could have eliminated any question in that regard by writing the forum-selection clause differently").

idea of contractually waiving the right to remove to federal court.⁷⁷ In particular, a clear provision giving the plaintiff the right to choose the forum for litigation can waive the defendant's right to remove. Likewise, if the forum selection clause fails to give the plaintiff the right to choose the forum, courts may use this omission as evidence that the parties did not intend a waiver of removal rights.

On the one hand, in *Continental Casualty v. LaSalle Re Ltd.*, the Northern District of Illinois in the Seventh Circuit found that a forum selection clause did not waive the right to remove, in part, because the clause at issue had only a general choice of law provision that fell short of "vest[ing] in the plaintiff the right to choose a particular court."⁷⁸ Likewise, the District Court of Maine found a clause allowing both parties to choose from one of four possible forums, in state or federal court, did not preclude removal to one of the other "chosen courts."⁷⁹ On the other hand, in *Citimortgage*, the Eastern District of Missouri in the Eighth Circuit found that the defendant waived the right to remove, precisely because the forum selection clause gave the plaintiff the right to choose the forum.⁸⁰ The court found that once the plaintiff chose a jurisdiction, the parties agreed to be bound to it.⁸¹ Since the plaintiff chose state court, the defendant had no right to then remove the case.⁸² Similarly, the Third Circuit, as well as a district court within that circuit, found waiver of removal rights based on clauses giving the plaintiffs the choice of forum.⁸³

77. See *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9-10 (1972) (noting that while forum selection clauses have historically not been favored by American courts as being contrary to public policy, they are prima facie valid and should be enforced unless unreasonable).

78. 500 F. Supp. 2d 991, 995 (N.D. Ill. 2007).

79. *Spenlinhauer v. R.R. Donnelley & Sons Co.*, 534 F. Supp. 2d 162, 163 (D. Me. 2008) (discussing a forum selection clause that does not deal with the removal issue).

80. *Citimortgage, Inc. v. Loan Link Fin. Servs.*, No. 4:07CV1989SNL, 2008 WL 695392, at *2 (E.D. Mo. Mar. 12, 2008).

81. *Id.*

82. *Id.* at *3.

83. *Foster v. Chesapeake Ins. Co.*, 933 F.2d 1207, 1219 (3d Cir. 1991); *Conn. Bank of Commerce v. Republic of Congo*, 440 F. Supp. 2d 346, 354 (D. Del. 2006). The clause in *Connecticut Bank* read "nothing shall preclude [plaintiff] from bringing any proceeding . . . in the courts of any . . . competent jurisdiction." See 440 F. Supp. 2d at 353. Another court may have found this clause ambiguous

The Fifth Circuit appears to agree with the Third Circuit that a forum selection clause that gives the plaintiff the right to choose the forum can result in the defendant's waiver of the right to remove. In *GP Plastics v. Interboro Packaging Corp.*,⁸⁴ the forum selection clause was arguably clearer regarding the plaintiff's right to choose the forum than that in *Connecticut Bank*. The clause at issue in *GP Plastics* provided that "the state or federal court of Texas selected by [the plaintiff] shall have jurisdiction over . . . [the defendant]."⁸⁵ The court held that because the clause gave the plaintiff the right to choose state or federal court, it "constitute[d] a valid waiver of Interboro's removal rights" once the plaintiff sued in state court.⁸⁶

Similarly, in *Waters v. Browning-Ferris Industries, Inc.*, the Fifth Circuit found that the defendant waived removal rights because the plaintiff bargained for the right to "irrevocably" choose the forum for any suit to be "filed and heard."⁸⁷ The clause said,

[Defendant] irrevocably (i) agrees that any such suit . . . may be brought in the courts of [the State of Texas] or the courts of the United States for [Texas], (ii) consents to the jurisdiction of each such court . . . and (iii) waives any objection it may have to the laying of venue of any such suit . . . in any of such courts.⁸⁸

The court concluded from this clause that to let the defendant remove, after the plaintiff had chosen to sue in state court, would revoke the choice of forum given to plaintiff in the contract.⁸⁹

as to whether the plaintiff really had the right to choose the forum, and such ambiguity could have been cause to construe the clause against the drafter to find that no waiver had occurred.

84. 108 F. App'x 832 (5th Cir. 2004).

85. *Id.* at 833.

86. *Id.* at 836.

87. 252 F.3d 796, 798 (5th Cir. 2001).

88. *Id.* at 797.

89. *Id.* at 798.

B. Consent to a Specific Court's Jurisdiction

The use—or omission—of limiting terms in a forum selection clause can directly affect whether a court will find that a defendant has waived its removal rights. For example, the Northern District of Illinois⁹⁰ in *Continental Casualty Co. v. LaSalle Re Ltd.*, found no waiver, in part, because the forum selection clause did not use limiting terms.⁹¹ The court noted that other forum selection clauses that required a defendant to submit to a particular court limited the defendant to that court with words such as "only."⁹² The court concluded that, without any limiting terms, the forum selection clause was only a general consent to the jurisdiction of the plaintiff's choosing, which the court found did "not adequately demonstrate a waiver of [defendant's] statutory right to remove."⁹³

In *Alliance Health Group*, the clause at issue before the Fifth Circuit contained the word "exclusive,"⁹⁴ which some courts have considered a limiting term.⁹⁵ The court found that the clause did not have enough other limiting words to keep the parties from federal court.⁹⁶ The court instructed that stronger limiting language in the clause could have helped find waiver.⁹⁷

Courts in the Second Circuit have differed in their treatment of limiting terms, or the lack thereof, in forum selection clauses. In *Rabbi Jacob Joseph School v. Province of Mendoza*, the clause at issue contained no limiting words.⁹⁸ The court in *Rabbi Jacob Joseph* took this absence further than the Fifth Circuit did in *Alliance*: Not only did New York's Eastern District say that limiting words would have helped find waiver, but it also implied that

90. The Northern District of Illinois is in the Seventh Circuit.

91. 500 F. Supp. 2d 991, 995 (N.D. Ill. 2007).

92. *Id.*

93. *Id.* at 995–96.

94. *Alliance Health Group, LLC v. Bridging Health Options, LLC*, 553 F.3d 397, 401 (5th Cir. 2008).

95. See, e.g., *Docksider Ltd. v. Sea Tech., Ltd.*, 875 F.2d 762, 763–64 (9th Cir. 1989) (treating "exclusive" as a limiting term).

96. *Alliance Health*, 553 F.3d at 401.

97. *Id.*

98. 342 F. Supp. 2d 124, 125–26 (E.D.N.Y. 2004).

limiting language is required to find waiver in the Second Circuit.⁹⁹ By contrast, the Southern District of New York in *Wells Fargo Century v. Brown* considered a forum selection clause that also lacked limiting language, but the court did not find that fact dispositive.¹⁰⁰ The clause stated that the defendant “expressly submits and consents to the jurisdiction of the Supreme Court of the State of New York, in the County of New York.”¹⁰¹ While the court found that the defendant had waived the right to remove, it based its decision on the identification of a specific court to which the defendant “expressly submit[ted] and consent[ed] to.”¹⁰² The court pointed out that limiting language, such as “‘shall’ or ‘exclusive’ in the forum selection clause, is not dispositive” of the waiver issue.¹⁰³

The Ninth Circuit, in *Docksider Ltd. v. Sea Technology, Ltd.*, found waiver in a clause that stated, “[v]enue of any action brought hereunder shall be deemed to be in Gloucester County, Virginia.”¹⁰⁴ The court noted that the clause did not contain any limiting terms like “exclusively.”¹⁰⁵ Apparently, it did not consider the word “shall” to be a limiting term. Nevertheless, the Ninth Circuit stated that the absence of a limiting term does not prevent a court from finding waiver of removal rights.¹⁰⁶

99. See *id.* at 128 (noting that courts in the Second Circuit have generally only found waiver if the forum selection clause contains explicit language evidencing waiver).

100. 475 F. Supp. 2d 368, 372 (S.D.N.Y. 2007).

101. *Id.* at 370.

102. *Id.* at 371.

103. *Id.* at 372.

104. 875 F.2d 762, 763–64 (9th Cir. 1989).

105. *Id.* at 763; see also *Wells Fargo*, 475 F. Supp. 2d at 372 (finding use of the word “shall” or “exclusive,” while often indicative of a mandatory forum clause, not dispositive, especially when coupled with clauses indicating non-exclusive jurisdiction).

106. *Docksider*, 875 F.2d at 763–64.

IV. WORD CHOICE

A. “Of” v. “In”: Waiver by Preposition

Using the prepositions “of” or “in” when designating a particular geographical location for litigation can have differing effects on the waiver analysis. Drafting a forum selection clause to place litigation in the courts “of [a named state]” often supports a finding of waiver.¹⁰⁷ If the forum selection clause places litigation in the courts “of [a named county],” however, courts are less consistent in their findings regarding waiver.¹⁰⁸ A court may be more likely to find waiver by virtue of a clause selecting courts “of” a particular county if no federal court sits in the specified county.¹⁰⁹ Presence of a federal courthouse in the specified county can change that result.¹¹⁰

If the forum selection clause is drafted to require litigation to be in a court “in [named county],” the right to remove, again, often depends on whether a federal court sits in that county.¹¹¹ The absence of a federal courthouse in the chosen county can strengthen a waiver claim, although often not as much as when the clause uses the phrase “of [named county].”¹¹²

B. “Of [named state]”

In *Dixon v. TSE International, Inc.*, the Fifth Circuit relied on the phrase “of [named state]” in a forum selection clause to find waiver.¹¹³ The forum selection clause at issue said that “[t]he Courts of Texas, U.S.A., shall have jurisdiction over all controversies with respect to . . . this Agreement, and the parties waive any other venue to which they may be entitled by virtue of domicile or otherwise.”¹¹⁴ Because the parties consented to forum in the “Courts of Texas,” the court found waiver, reasoning that “Courts of Texas” means state,

107. See *infra* Part IV.B.

108. See *infra* Part IV.C.

109. See *infra* Part IV.D.

110. See *infra* Parts IV.E, V.

111. See *infra* Parts IV.D, V.

112. See *infra* Part IV.C.

113. 330 F.3d 396, 397–98 (5th Cir. 2003).

114. *Id.* at 397 (emphasis omitted).

not federal courts.¹¹⁵ The court explained that while federal courts are *located* in particular geographic regions such as the State of Texas, they find their *origin* in the federal government and are therefore “Courts of the United States.”¹¹⁶

In *American Soda LLP v. U.S. Filter Wastewater, Inc.*, the Tenth Circuit considered “[w]hether the U.S. district courts are courts of the various states in which they are located,” as an issue of first impression.¹¹⁷ The clause stated that the “[parties] hereby submit to the jurisdiction of the courts of the State of Colorado and agree that the courts of the State of Colorado . . . shall be the exclusive forum for the resolution of any disputes.”¹¹⁸ The court looked to *Dixon* and agreed, “the federal court located in Colorado is not a court of the State of Colorado but rather a court of the *United States of America*.”¹¹⁹ The Tenth Circuit also noted limiting language in the clause that stated that Colorado state courts “shall be the *exclusive* forum.”¹²⁰ While the court acknowledged that the parties “went a step further” with this limiting language, the court also suggested that the analysis could have been complete with the “of [named state]” discussion, as it was in *Dixon*.¹²¹

In *Celerant Technology Corp. v. Overland Sheepskin Co.*, the Southern District of New York in the Second Circuit considered a forum selection clause that placed suit “exclusively in the courts of the State of New York, County of New York.”¹²² The court found that the clause “unequivocally committed” the parties to the state courts of New York.¹²³ Although the Southern District of New York sits in the named county, the court found waiver of the right to remove to that court because it is not a court “of” the State of New York.¹²⁴ As in *Dixon*, the court in *Celerant* focused its analysis on the “of [named state]” phrase, and refrained from analyzing the use

115. *Id.* (emphasis added).

116. *Id.* at 397–98.

117. 428 F.3d 921, 925 (10th Cir. 2005).

118. *Id.* at 924.

119. *Id.* at 926–27.

120. *Id.* at 924, 927 (emphasis added).

121. *Id.* at 926–27.

122. No. 06 Civ. 13457 LAK, 2007 WL 431879, at *1 (S.D.N.Y. Jan. 29, 2007) (emphasis omitted).

123. *Id.*

124. *Id.*

of “exclusively” as limiting language in the clause also favoring waiver.¹²⁵

In *Genesis Services Group, Inc. v. Culi-Services, Inc.*, the Eastern District of North Carolina in the Fourth Circuit considered a clause which read, “the exclusive forum . . . shall be the courts of the State of North Carolina,” and “venue . . . shall lie in any court of competent jurisdiction in Wake County, North Carolina.”¹²⁶ The court followed an analysis similar to those discussed above to find that the “of [named state]” language waived the defendant’s right to remove to federal court¹²⁷ and then took the discussion further. The court held that the phrase “of North Carolina” showed the parties’ intent to litigate only in state court, but added that if the clause had placed litigation “in North Carolina,” removal rights would not have been waived.¹²⁸

Recently, the Middle District of Florida in the Eleventh Circuit came to an unconventional conclusion when it considered a forum selection clause that stated, “[the parties] shall be subject to personal jurisdiction of the State of Florida and accept venue in Seminole County.”¹²⁹ Rather than analyzing the respective origins of state and federal courts, the court, in *Priority Healthcare*, found that even the language “of [named state]” did not waive the defendant’s right to remove.¹³⁰ Rather, the court found that the language that the parties would “accept venue in Seminole County” was ambiguous and should be construed against the drafter, who was requesting remand.¹³¹ That party argued that because Seminole County had no federal court, the language was not ambiguous; but

125. *Id.*

126. No. 4:98-CV-145-BO(3), 1999 WL 1939986, at *1 (E.D.N.C. Mar. 30, 1999).

127. *Id.*

128. *Id.* But see *Cont’l Cas. Co. v. LaSalle Re Ltd.*, 500 F. Supp. 2d 991, 994–96 (N.D. Ill. 2007) (notwithstanding the use of the word “of” in a clause stating the parties “consent[ed] to the jurisdiction of the courts of the state of Illinois,” finding no waiver of the right to remove based on the lack of any deference to the plaintiff’s choice of forum or any language limiting the forum to the specified jurisdiction).

129. *Priority Healthcare Corp. v. Chaudhuri*, No. 6:08-cv-425-Orl-KRS, 2008 WL 2477623, at *2 (M.D. Fla. June 18, 2008).

130. *Id.*

131. *Id.*

the court still found no waiver and dismissed the argument in a footnote.¹³²

C. “Of [named county]”

The court’s reasoning in *Priority Healthcare* is not the general rule. When a forum selection clause uses the phrase “of [named county],” waiver analysis often turns on whether a federal court sits in the specified county. Recently, in *London Manhattan*, the District of South Carolina in the Fourth Circuit considered a forum selection clause that stated that “venue . . . shall be in the Courts of Charleston County, South Carolina.”¹³³ Instead of examining the respective origins of state and federal courts, the court reasoned that because it sat in Charleston County, the defendant did not waive its right to remove to that particular federal court.¹³⁴

Along those same lines, the Eleventh Circuit, in *Global Satellite Communication Co. v. Starmill U.K. Ltd.*, considered a clause in which the parties agreed “to submit to the jurisdiction of Broward County, Florida,” but the court did not find that the “of [named county]” phrase limited the parties to state court.¹³⁵ Rather, the court found the clause too “vague and imprecise” to waive the right to remove, since the specified county contained both state and federal courts.¹³⁶

In *Rochester Community School Corp. v. Honeywell Inc.*, the Northern District of Indiana in the Seventh Circuit came to the same conclusion, but under different circumstances and without much analysis in the opinion.¹³⁷ The clause at issue stated, “the claim shall be decided by a court of competent jurisdiction of Fulton County, Indiana.”¹³⁸ Fulton County does not contain a federal courthouse.¹³⁹

132. *Id.* at *2 n.1.

133. *London Manhattan Co. v. CSA-Credit Solutions, Inc.*, No. 2:08-cv-00465-PMD, 2008 WL 2077554, at *1 (D.S.C. May 9, 2008) (emphasis omitted).

134. *Id.* at *2–3.

135. 378 F.3d 1269, 1271, 1274 (11th Cir. 2004).

136. *Id.* at 1273–74.

137. No. 3:06-CV-351 RM, 2007 WL 2473464, at *6 (N.D. Ind. Aug. 27, 2007).

138. *Id.* at *2.

139. *Id.* at *6.

Even so, the court found that nothing in the language of the clause excluded proper venue in federal court, so the defendant had not waived the right to remove.¹⁴⁰

D. “In [named county]”

When a forum selection clause requires that litigation proceed *in* a particular county, the deciding factor regarding removal rights is often whether a federal court sits in that county. The presence of a federal courthouse helps preserve the right to remove, while the absence of one can support a finding of waiver. While this general rule also applies to clauses that indicate the courts *of* a particular county, the likelihood that the right to remove will be preserved is higher with clauses using the phrase “*in* [a named county]” (discussed in this Section) as opposed to “*of* [a named county]” (discussed above).

In *Yakin v. Tyler Hill Camp, Inc.*, the Eastern District of New York in the Second Circuit considered a forum selection clause requiring that any litigation “shall be in Nassau County, New York.”¹⁴¹ When the contract was executed in 1999, a federal court sat in the specified county, but at the time of the litigation that federal court had relocated and at that point only encompassed the selected county.¹⁴² The court noted that the suit should have been allowed in either court, but because there was no longer a federal court option in that county, the court found waiver.¹⁴³ The court’s decision implied that had the federal courthouse still been located “in Nassau County” at the time of removal, removal would have been proper. This analysis is similar to the Fifth Circuit’s emphasis in

140. *Id.*

141. No. 07-CV-2444 (SJF) (WDW), 2007 WL 3353729, at *1 (E.D.N.Y. Nov. 6, 2007).

142. *Id.* at *2; see *infra* Part V (discussing a federal court being *in* versus *encompassing* a specified county).

143. See *id.* (remanding case to state court because former presence but current absence of federal courthouse created ambiguity that had to be resolved in favor of the non-drafter, the plaintiff moving for removal to state court).

Collin County on whether a federal court *currently* existed in the county at the time of litigation.¹⁴⁴

More recently, the Fifth Circuit relied upon the “in [named county]” analysis in *Alliance Health Group*.¹⁴⁵ The clause at issue required that “exclusive venue for any litigation related hereto shall occur in Harrison County, Mississippi.”¹⁴⁶ The court found that the plaintiff had not waived the right to file its lawsuit in federal court, in part, because the specified county for exclusive venue contained a federal court.¹⁴⁷ The court further pointed out that the forum selection clause did not require that courts be “of” a certain county (or state), which, if it had, presumably could change the court’s decision.¹⁴⁸ The defendant tried to persuade the court that there was no difference between the two propositions, to which the court wholeheartedly “reject[ed the] attempt to render ‘in’ and ‘of’ synonymous.”¹⁴⁹

Applying similar analysis in *Power Marketing Direct, Inc. v. Clark*, the Southern District of Ohio in the Sixth Circuit considered a clause stating that suit “shall be filed in Franklin County, Ohio”—where a federal court is located.¹⁵⁰ The court found this language lacked specificity, but the court held that the federal court’s presence in Franklin County satisfied the ordinary meaning of the clause’s language, “in Franklin County.”¹⁵¹ The court further said that a defendant’s mere consent to jurisdiction in “a particular geographic location” (which, in forum selection clauses is frequently a county)

144. See discussion *supra* notes – and accompanying text; see also *Berry v. WPS, Inc.*, No. CIV.A.H-05-2005, 2005 WL 1168412, at *2 (S.D. Tex. May 16, 2005) (finding under Fifth Circuit authority that a similar clause, stating that “jurisdiction shall lie exclusively in Houston, Harris County, Texas”—where a federal court sits—did not require litigation to be in state rather than federal court) (referring to *City of New Orleans v. Mun. Admin. Servs.*, 376 F.3d 501, 505 (5th Cir. 2004)).

145. *Alliance Health Group, LLC v. Bridging Health Options, LLC*, 553 F.3d 397, 398–402 (5th Cir. 2008).

146. *Id.* at 399.

147. *Id.* at 399–400.

148. *Id.* at 400.

149. *Id.*

150. *Power Mktg. Direct, Inc. v. Clark*, No. 2:05-CV-767, 2006 WL 1064058, at *2 (S.D. Ohio Apr. 20, 2006).

151. *Id.*

does not waive the right to remove so long as a federal court sits in that location.¹⁵²

By contrast, a district court in the Fourth Circuit found that a clause requiring litigation “in Wake County, North Carolina” resulted in waiver.¹⁵³ The analysis did not hinge on whether a federal court was in that county, however, but rather on the fact that the clause also stated that “the exclusive forum . . . shall be the courts of the State of North Carolina.”¹⁵⁴ Analyzing the “of [named state]” phrase, along the lines discussed previously, caused the court to find the federal forum was excluded.

If there is no federal court “in [the named county],” courts often find waiver. For example, the Northern District of Illinois, in *Progressive Publications, Inc. v. Capital Color Mail, Inc.*, found that the phrase “in [named county]” waived the right to remove if the selected county has no federal court in it.¹⁵⁵ The clause at issue said, “venue shall be situated in Kane County, [Illinois].”¹⁵⁶ The court found this provision waived removal rights, citing the fact that the geographical designation of Kane County, Illinois only leads to one meaning—state court—as that county has no federal court.¹⁵⁷ While the jurisdiction of the Northern District of Illinois includes Kane County, the court observed, “this District court does not rest its figurative bottom (and this Court does not rest its literal bottom) in Kane County.”¹⁵⁸

The Eastern District of Wisconsin in *Specialty Cheese* considered a forum selection clause that placed litigation “in Dodge County in the state of Wisconsin.”¹⁵⁹ The court hinted that the

152. *Id.*

153. *Genesis Servs. Group, Inc. v. Culi-Services, Inc.*, No. 4:98-CV-145-BO(3), 1999 WL 1939986, at *1–2 (E.D.N.C. Mar. 30, 1999).

154. *Id.* at *1 (emphasis added).

155. *Progressive Publ’ns, Inc. v. Capital Color Mail, Inc.*, 500 F. Supp. 2d 1004, 1005–06 (N.D. Ill. 2007).

156. *Id.* at 1005.

157. *Id.*

158. *Id.*

159. *Specialty Cheese Co. v. Universal Food & Dairy Prods., Inc.*, No. 07-CV-970, 2008 WL 906750, at *1 (E.D. Wis. Apr. 1 2008); see also *Se. Comm’n Serv., Inc. v. Allstate Tower, Inc.*, No. 4:08CV-13M, 2008 WL 1746638, at *2–3 (W.D. Ky. Apr. 14 2008) (mem.) (holding, under Sixth Circuit authority, that when “the exclusive forum . . . shall be in Henderson County, Kentucky,” there

forum selection clause could have been considered ambiguous, but instead found that because Dodge County has no federal court, the “more plausible” meaning of the “in [named county]” phrase was that the parties intended to litigate only in state court.¹⁶⁰

More than once, the Northern District of Texas¹⁶¹ has held that when a forum selection clause places litigation “in” a certain county, and that named county does not have a federal courthouse, then the defendant has contractually waived the right to remove.¹⁶² While the outcome has remained consistent, that district’s analysis of the “in [named county]” phrase has refined over time. The court held in *Greenville Electric*, that a clause stating, “[v]enue . . . shall lie in Greenville, Hunt County, Texas,” waived the defendant’s right to remove.¹⁶³ Because no federal courthouse was located in the specified location (a city in this instance), the court found no ambiguity, but rather that it was “clear” that parties intended to only litigate in state court.¹⁶⁴

A year later, the Northern District of Texas followed and expanded that holding in *Peavy*. The court considered a clause that placed litigation “only in Collin County, Texas.”¹⁶⁵ The court agreed with the reasoning from *Greenville* that the clause was a “clear” waiver because no federal courthouse sat in the specified county.¹⁶⁶ And this analysis has made its way into other circuits: Like the Northern District of Texas, the Western District of Kentucky in the Sixth Circuit found waiver based primarily on the “in [named

would not be a waiver if there was a federal court in that county, but finding waiver because there was not a federal court in that county) (emphasis omitted).

160. *Specialty Cheese*, 2008 WL 906750, at *2.

161. The Northern District of Texas is in the Fifth Circuit.

162. *E.g.*, *Greenville Elec. Util. Sys. v. N. Pac. Group, Inc.*, No. 3-01-CV-0758-BD, 2001 WL 804521, at *1–2 (N.D. Tex. July 6, 2001); *First Nat’l N. Am., LLC v. Peavy*, No. 3-02-CV-0033BD(R), 2002 WL 449582, at *1 (N.D. Tex. Mar. 21, 2002).

163. *Greenville Elec.*, 2001 WL 804521, at *1–2.

164. *Id.* at *2.

165. *Peavy*, 2002 WL 449582, at *1.

166. *Id.* at *2. The court also relied on the Tenth Circuit’s position that the designation of a county rather than a judicial district prevented federal venue. *Id.* This expanded basis for waiver, however, has not been embraced by subsequent Fifth Circuit opinions. *See Collin County v. Siemens Bus. Servs., Inc.*, 250 F. App’x 45 (5th Cir. 2007) (holding that the clause’s reference to “county” rather than “district” did not waive removal).

county]” language used in the clause: “the exclusive forum . . . shall be in Henderson County, Kentucky.”¹⁶⁷ Kentucky’s Western District concluded that such a clause clearly and unequivocally waived the plaintiff’s right to litigate in federal court because no federal court sat “in Henderson County, Kentucky.”¹⁶⁸

Some courts take a different approach to this language. For example, the forum selection clause at issue in *Priority Healthcare Corp. v. Chauduri* had both the “of [named state]” and “in [named county]” phrases,¹⁶⁹ as did the clause in *Genesis Services Group, Inc. v. Culi-Services, Inc.*¹⁷⁰ However, while the Eastern District of North Carolina¹⁷¹ in *Genesis Services* relied on the “of [named state]” phrase to find waiver,¹⁷² the Middle District of Florida¹⁷³ in *Priority Healthcare* did not find that either the phrase “of the State of Florida” or “in Seminole County” restricted the parties to state court, even though no federal court sits in that county.¹⁷⁴

E. “County” v. “Judicial District”

A similar analysis distinguishes the words “county” and “judicial district.” The Tenth Circuit in particular uses this distinction, reasoning that if a clause specifies a county, the parties likely agreed to state court, and similarly concluding that parties should reference a judicial district to best preserve the right to remove.¹⁷⁵ The Tenth Circuit in *Excell* considered a clause that

167. *Se. Comm’n Serv., Inc. v. Allstate Tower, Inc.*, No. 4:08CV-13-M, 2008 WL 1746638, at *1 (W.D. Ky. Apr. 14, 2008) (mem.).

168. *Id.*

169. *See Priority Healthcare Corp. v. Chauduri*, No. 6:08-cv-425-Orl-KRS, 2008 WL 2477623, at *1 (M.D. Fla. June 18, 2008) (including a clause providing that “customer shall be subject to personal jurisdiction of the State of Florida and accept venue in Seminole County, Florida.”).

170. *See Genesis Servs. Group, Inc. v. Culi-Servs., Inc.*, No. 4:98-CV-145-BO(3), 1999 WL 1939986, at *2 (E.D.N.C. Mar. 30, 1999) (analyzing forum selection clause’s reference to “courts of the state of North Carolina” and “in Wake County”).

171. The Eastern District of North Carolina is in the Fourth Circuit.

172. *Genesis Servs. Group, Inc.*, 1999 WL 1939986, at *2.

173. The Middle District of Florida is in the Eleventh Circuit.

174. *Priority Healthcare*, 2008 WL 2477623, at *2–3.

175. *See, e.g., Excell, Inc. v. Sterling Boiler & Mech., Inc.*, 106 F.3d 318, 321 (10th Cir. 1997) (“Because the language of the clause refers only to a specific

stated, “[j]urisdiction shall be in the State of Colorado, and venue shall lie in the County of El Paso, Colorado.”¹⁷⁶ The court found that the defendant had waived the right to remove, but not because of the reference in the clause to the jurisdiction of Colorado.¹⁷⁷ Rather, the court reasoned that the clause could not refer to federal courts because “[f]or federal court purposes, venue is not stated in terms of ‘counties,’” and hinted that to preserve the right to remove, the clause would need to refer expressly to a specific judicial district.¹⁷⁸

More recently, the District of Kansas in the Tenth Circuit applied this distinction in *Top Flight Steel, Inc. v. CRR Builders, Inc.*¹⁷⁹ The forum selection clause stated that “[v]enue . . . will be in Johnson County, Kansas.”¹⁸⁰ The court found that this language waived the right to remove because federal law describes venue by judicial districts, not counties, and said that a clause should specify venue in a judicial district to avoid waiver.¹⁸¹ The same court made the point again in *Red Mountain Retail Group v. BCB, L.L.C.*, where the clause stated, “any litigation shall have venue only in Wyandotte County, Kansas.”¹⁸² While it used reasoning familiar to the Tenth Circuit’s to find waiver because the clause referred only to a county and not a judicial district,¹⁸³ the holding is even more remarkable because the District of Kansas has a courthouse in Wyandotte County.¹⁸⁴

county and not to a specific judicial district, we conclude venue is intended to lie only in state district court.”).

176. *Id.* at 320.

177. *Id.* at 321.

178. *See id.* (relying on *Milk ‘N’ More, Inc. v. Beavert*, 963 F.2d 1342, 1346 (10th Cir. 1992) (finding that a clause stating “venue shall be proper under this agreement in Johnson County, Kansas” constituted waiver of the right to remove because language “strongly point[ed] to the state court of that county”).

179. No. 06-2498-CM, 2007 WL 1018764, at *1 (D. Kan. Apr. 2, 2007) (mem.).

180. *Id.*

181. *Id.* at *2.

182. No. 05-2557-KHV, 2006 WL 1128685, at *1 (D. Kan. Apr. 27, 2006) (mem.).

183. *Id.* at *2.

184. *See* The U.S. Department of Justice, The District of Kansas, <http://www.justice.gov/usao/ks/> (Kansas City location); Kansas Department of Transportation, County Maps, <http://www.ksdot.org/burtransplan/maps/>

Courts outside the Tenth Circuit have followed its distinction between counties and judicial districts. In *Genesis Services Group, Inc. v. Culi-Services, Inc.*, the Eastern District of North Carolina¹⁸⁵ relied on *Excell* to analyze a forum selection clause stating that “venue . . . shall lie in any court of competent jurisdiction in Wake County, North Carolina.”¹⁸⁶ In addition to comparing the words “in” and “of,” the court agreed with *Excell* that a reference to a county, with no reference to a judicial district, “evinces a clear intent that only state courts will have jurisdiction and necessarily rules out the jurisdiction of a federal court.”¹⁸⁷

The Northern District of Illinois¹⁸⁸ in *Progressive Publications, Inc. v. Capitol Color Mail, Inc.*, found waiver from a forum selection clause that stated, “venue shall be situated in Kane County, [Illinois.]”¹⁸⁹ The court relied both on the “in [named county]” analysis as discussed above (no federal court was located in the specified county) and the Tenth Circuit’s county–judicial district distinction, finding both analyses to be “fully instructive on the subject at hand and [to] strongly support remand” from the federal to the state court.¹⁹⁰

Other courts have placed less reliance on the distinction between a county and a judicial district. For example, the recent case of *Southeastern Communication*, the Western District of Kentucky¹⁹¹ applied the distinction with some reservation.¹⁹² The clause at issue stated that “the exclusive forum . . . shall be in Henderson County, Kentucky.”¹⁹³ While the bulk of the court’s analysis focused on the “in [named county]” phrase, the court cited

Mapscounties.asp (showing map of Wyandotte County including Kansas City, Kansas).

185. The Eastern District of North Carolina is in the Fourth Circuit.

186. *Genesis Servs. Group, Inc. v. Culi-Servs., Inc.*, No. 4:98-CV-145-BO(3), 1999 WL 1939986, at *1–2 (E.D.N.C. Mar. 30, 1999).

187. *Id.* (citing *Excell, Inc. v. Sterling Boiler & Mech., Inc.*, 106 F.3d 318, 321 (10th Cir. 1997)).

188. The Northern District of Illinois is in the Seventh Circuit.

189. 500 F. Supp. 2d 1004, 1005 (N.D. Ill. 2007).

190. *Id.* at 1005–06.

191. The Western District of Kentucky is in the Sixth Circuit.

192. *Se. Comm’n Serv., Inc. v. Allstate Tower, Inc.*, No. 4:08CV-13-M, 2008 WL 1746638, at *1 (W.D. Ky. Apr. 14, 2008).

193. *Id.*

the Tenth Circuit in *Excell* and said that because “[t]he clause refers to a specific county and contains no reference to the federal courts,” litigation was allowed only in state court.¹⁹⁴ Unlike other courts applying the county-judicial district distinction, however, the Kentucky district court gave primacy to the “in [named county]” phrase, suggesting that if a federal court was located in Henderson County, there would not have been a waiver,¹⁹⁵ in effect, the court made the county-judicial district analysis superfluous.

The Eleventh Circuit in *Global Satellite*, when considering a clause placing venue and jurisdiction in (and of) “Broward County, Florida,” rejected the position that by referencing a “county,” the parties exclusively designated state court.¹⁹⁶ While the court found that litigation must occur in that specified county, it also found that use of the word “county” allowed litigation in either state or federal court.¹⁹⁷ Although a “geographic unit” was specified, the word “county” did not designate a particular *forum*.¹⁹⁸ Therefore, the court found that suit could proceed in either the Seventeenth Judicial District of Florida or the Fort Lauderdale Division of the Southern District of Florida.¹⁹⁹

Until recently, courts in the Fifth Circuit frequently noted the Tenth Circuit’s county-judicial district distinction, probably because both circuits apply a “clear and unequivocal” standard overall.²⁰⁰ For example, in *Ondova Ltd. v. Manila Industries, Inc.*, the Northern District of Texas considered a forum selection clause in which the parties agreed to “the exclusive jurisdiction of any Court of competent jurisdiction sitting in and for the County of Dallas.”²⁰¹ Given that this clause required not only that the court be “in” the

194. *Id.* at *2.

195. *Id.* at *3; *see also* *Power Mktg. Direct, Inc. v. Clark*, No. 2:05-CV-767, 2006 WL 1064058, at *2 (S.D. Ohio Apr. 20, 2006) (finding reference to a particular county can be considered in a waiver analysis but does not alone waive the right to remove).

196. *Global Satellite Comm’n Co. v. Starmill U.K. Ltd.*, 378 F.3d 1269, 1271 (11th Cir. 2004).

197. *Id.* at 1273–74.

198. *Id.* at 1274.

199. *Id.* at 1272.

200. *See supra* Part II.B.

201. *Ondova Ltd. Co. v. Manila Indus., Inc.*, 513 F. Supp. 2d 762, 769 (N.D. Tex. 2007).

county but also “for” that county, the clause seems to lend itself to the “of [named county/state]” analysis, but the court did not support its holding in that way. Instead, the court stated that a federal district court is never referred to as a court “for the County of Dallas,” and that “venue in the federal system is stated in terms of judicial districts, not counties.”²⁰² Relying on the Tenth Circuit’s analysis in *Excell v. Sterling Boiler & Mechanic, Inc.*, this court adopted the position that the designation of “a particular county,” as opposed to a judicial district, left only state courts as proper venue and resulted in a waiver of the right to remove.²⁰³

The Fifth Circuit has since rejected the Tenth Circuit’s county-judicial district analysis, regardless of whether a federal courthouse sits in the designated county.²⁰⁴ In *Alliance Health Group LLC v. Bridging Health Options LLC*, the court stated that the distinction used by the Tenth Circuit “would be more persuasive were the federal courts organized in total disregard of state counties; if, for instance, federal judicial districts were defined by metes and bounds.”²⁰⁵ The court then noted that federal judicial districts are in fact defined by reference to counties, while state courts are sometimes defined by ways other than by county.²⁰⁶ The court went on to conclude that the parties had not waived the right to litigate in federal court, mainly because a federal district court was located in the selected geographic area.²⁰⁷

202. *Id.* at 773.

203. *Id.* (citing *First Nat’l N. Am., LLC v. Peavy*, No. 3-02-CV-0033BD(R), 2002 WL 449582, at *2 (N.D. Tex. Mar. 21, 2002) (holding that “where a forum selection clause merely designates a particular county, venue lies only in state courts in that county”) (citing *Excell, Inc. v. Sterling Boiler & Mech., Inc.*, 106 F.3d 318, 321 (10th Cir. 1997))); *see also* *ENSICO Int’l Inc. v. Certain Underwriters at Lloyd’s*, No. 3:07-CV-1581-O, 2008 WL 958205, at *2–3 (N.D. Tex. Apr. 8, 2008) (analyzing a forum selection clause which made “[a]ny disputes . . . subject to the exclusive jurisdiction of the Courts of Dallas County, Texas,” and finding waiver in part because reference to venue “in a particular county” required that the parties litigate only in the state courts of the selected county).

204. *Alliance Health Group, LLC v. Bridging Health Options, LLC*, 553 F.3d 397, 400–01 (5th Cir. 2008).

205. *Id.*

206. *Id.* at 401.

207. *Id.* at 401–02. This same conclusion was reached a year earlier by the Fifth Circuit in *Collin County v. Siemens Business Services, Inc.*, where, as

V. COURTS "IN" OR "ENCOMPASSING" A FORUM

Some courts, rather than parsing the specific language of a forum selection clause, look for the physical presence of a federal courthouse in the specified county. These courts require that the relevant federal court be *in* the selected county, and find that if that court merely *encompasses* the county, it falls outside the scope of the clause and bars removal.

The Fifth Circuit in *Paolino* considered a clause that mandated "exclusive jurisdiction of the courts sitting in Kendall County, Texas."²⁰⁸ While the applicable federal court encompassed Kendall County, it sat in Bexar County, and thus did not satisfy the clause.²⁰⁹ The court clarified that a "district court 'sits' where it regularly holds court, not in the potentially infinite number of places in the . . . District . . . where it *could* hold a special session."²¹⁰ The Fifth Circuit went on to emphasize in *Collin County* that courts sitting "in" a particular county should not be "lump[ed] . . . together" with courts "encompassing" a county to determine removal rights.²¹¹

Other courts, particularly in the Seventh Circuit, do not find waiver if the relevant federal court encompasses the selected county. For example, in *Rochester Community School*, the Northern District of Indiana found no waiver from a clause that read, "the claim shall be decided by a court of competent jurisdiction of Fulton County, Indiana."²¹² Even though the clause contained the phrase "of [named county]" that many courts cite to support a waiver finding,²¹³ this

mentioned above, the clause at issue stated that venue "shall lie exclusively in Collin County, Texas." 250 F. App'x 45, 47 (5th Cir. 2007). The Eastern District of Texas found that the defendant had waived the right to remove for two reasons: first, because no federal court sat in the selected county, and second, because the agreement "stated venue in terms of a county as opposed to a federal district." *Id.* The Fifth Circuit did not agree with the district court's second reason, and clarified that a distinction between the terms "county" and "district" "falls short of a clear and unequivocal waiver of federal jurisdiction." *Id.* at 52.

208. *Argyll Equities LLC v. Paolino*, 211 F. App'x 317, 318 (5th Cir. 2006).

209. *Id.* at 319.

210. *Id.* (emphasis added).

211. *Collin County*, 250 F. App'x at 52.

212. *Rochester Cmty. Sch. Corp. v. Honeywell, Inc.*, No. 3:06-CV-351 RM, 2007 WL 2473464, at *2 (N.D. Ind. Aug. 27, 2007).

213. *See supra* Part IV.C.

court reasoned that the clause did not make jurisdiction exclusive to state courts within Fulton County.²¹⁴ Thus, while no federal court sits in Fulton County, the clause did not waive the defendant's right to remove to federal courts that encompassed that county.²¹⁵ The court interpreted the phrase "of [named county]" more broadly than the phrase "in [named county]," and insinuated that had the clause required a court "in" Fulton County, the result could have been a waiver of the right to remove.²¹⁶

An earlier case from the Northern District of Illinois in the Seventh Circuit used a similar but expanded analysis. In *Truserv Corp.*, the court considered a forum selection clause which stated that "[the] Agreement shall be enforced . . . only in courts located in Cook County or any Illinois county contiguous to Cook County, Illinois."²¹⁷ The federal district court to which the action was removed was located in Winnebago County, which is not contiguous to Cook County or even any other county contiguous to Cook County.²¹⁸ Relying on a dictionary definition of "locate" as including "the limits of a place," the court reasoned that its "limits extend to and include McHenry County, which is contiguous to Cook County; thus, this division falls within the ambit of the forum selection clause."²¹⁹

VI. CONCLUSION

The law about contractual waiver of the right to remove is both practical and theoretical. The many recent cases about waiver issues have developed several instructive lines of authority.

First, the federal circuits that have considered what general standard to use are divided on what that standard should be and then on how to apply a standard once chosen. While those trends suggest that choice of an overall standard may not be that important to the

214. *Rochester Cmty. Sch. Corp.*, 2007 WL 2473464, at *2.

215. *Id.*

216. *Id.*

217. *Truserv Corp. v. Prices Ilfeld Hardware Co.*, No. 01 C 50271, 2001 WL 1298718, at *1 (N.D. Ill. Oct 24, 2001) (internal citations omitted).

218. *Id.* at *2.

219. *Id.*

ultimate result, the process of selecting a standard does give guidance through opinions on how to weigh the relevant policies. And, while the circuits have significant inconsistencies in their application of general standards, each individual circuit that has binding appellate precedent is largely consistent internally. The choice of an overall standard seems to help guide the organization of precedent within a circuit, even if it is not necessarily helpful in other circuits applying a facially similar standard.

Second, when a forum selection clause contains a substantive agreement, such as a provision giving the plaintiff the right to choose the forum, or one consenting to jurisdiction in a particular location, the policy issue before the court is sharpened to one that focuses on the principle that forum selection clauses are favored. Accordingly, there are areas of agreement across circuits about this topic.

Third, certain word choices are important to the waiver analysis. The key words include *of*, *in*, *county*, and *judicial district*. While prevailing approaches have developed about some of these terms, individual courts will readily make their own policy judgments about them when there is no binding authority. Many courts certainly find these terms helpful, but the continuing diversity of opinions suggests that their analysis is part of a broader policy evaluation.

Finally, and similarly, the presence of a federal court in a specified county is often influential on the waiver analysis. Here again, while many courts reason that the presence of a federal court in the county weighs against a waiver finding, other courts do not find that fact determinative in their view of the judicial structure. Further development of the law in all of these areas may bring more consensus, develop more diversity, or both, as the issues themselves evolve.