FRAUDULENT JOINDER PREVENTION ACT OF 2015

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION
AND CIVIL JUSTICE

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTEENTH CONGRESS

FIRST SESSION

ON

H.R. 3624

SEPTEMBER 29, 2015

Serial No. 114–44

Printed for the use of the Committee on the Judiciary

Available via the World Wide Web: http://judiciary.house.gov

U.S. GOVERNMENT PUBLISHING OFFICE

96–273 PDF WASHINGTON : 2015

For sale by the Superintendent of Documents, U.S. Government Publishing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
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SEPTEMBER 29, 2015

FRAUDULENT JOINDER PREVENTION ACT OF 2015

TUESDAY, SEPTEMBER 29, 2015

HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON THE CONSTITUTION AND CIVIL JUSTICE

COMMITTEE ON THE JUDICIARY

Washington, DC.

The Subcommittee met, pursuant to call, at 11:35 a.m., in room 2237, Rayburn Office Building, the Honorable Trent Franks (Chairman of the Subcommittee) presiding.

Present: Representatives Franks, Goodlatte, King, Cohen, and Conyers.

Staff present: (Majority) Zachary Somers, Counsel; Tricia White, Clerk; (Minority) James Park, Minority Counsel; and Veronica Eligan, Professional Staff Member.

Mr. FRANKS. The Subcommittee on the Constitution and Civil Justice will come to order. Without objection, the Chair is authorized to declare recesses of the Committee at any time.

We call today's hearing in order to consider the Fraudulent Joinder Prevention Act. This is legislation aimed at addressing an obstacle to the removal of civil litigation from state court to Federal court in diversity jurisdiction cases.

I want to thank Representative Ken Buck, a Member of the Judiciary Committee, for introducing this legislation.

Federal diversity jurisdiction exists when the plaintiff and the defendants to a lawsuit are from different states. According to the Supreme Court, "The Constitution has presumed, whether rightly or wrongly, that state attachments, state prejudices, state jealousies, and state interests might sometimes obstruct or control the regular administration of justice." Thus, the Constitution's framers created diversity jurisdiction to preserve national harmony and promote interstate commerce by ensuring that a lawsuit involving citizens of different states could be litigated in a presumably neutral Federal court rather than in a possibly biased state court.

In general, under Federal diversity jurisdiction, if a plaintiff from one state files a lawsuit against a defendant from another state in state court, the defendant may have that litigation moved from state court to Federal court. However, for more than a century, plaintiffs have attempted to defeat removal in these cases by join-

ing an in-state defendant with no real connection to the underlying claim.

In response to these attempts to wrongfully deprive defendants of their right to have their cases heard in Federal court, the Supreme Court developed the fraudulent joinder doctrine. But the Supreme Court has not clarified or elaborated on the doctrine since the early 1900's, nor has Congress stepped in to statutorily fill the void. This lack of guidance from the Supreme Court and Congress has led to poorly defined standards and inconsistent interpretations and application of the fraudulent joinder doctrine in the lower Federal courts.

For instance, some Federal judges require a showing that there is no possibility of recovery against a local defendant in order to keep the case in a Federal court. Others require an even more difficult showing that the claim be wholly insubstantial or frivolous. Still other justices or judges insist that a defendant demonstrate that there is an obvious failure to a state claim against the defendant.

All of these approaches and the others that are used are difficult to meet. In fact, current law is so heavily weighted against defendants that Federal Appeals Judge J. Harvie Wilkinson recently observed in support of congressional action to change the standards for joinder that, "There is a problem with fraudulent jurisdiction law as it exists today, and that is that you have to establish that the joinder of a non-diverse defendant is totally ridiculous, and that there is no possibility of ever recovering. That is a sham. That is corrupt. That is very hard to do. The problem is the bar is so terribly high."

To make the law more fair, the Fraudulent Joinder Prevention Act makes a modest change to existing law to ensure that defendants who are entitled to a Federal forum do not have their cases sent back to state court based on unreasonable or inconsistent standards. To accomplish this, the bill simply adds two additional sentences to the statute governing removal. Embodied in these sentences are two basic concepts: first, that Federal courts should evaluate fraudulent joinder under one uniform standard, namely whether the plaintiff states a "plausible claim for relief" against the non-diverse defendant; and second, that the Federal courts are permitted to look at evidence submitted by both the plaintiff and the defendants in making this determination.

This legislation will improve the administration of justice in the Federal courts, and it will especially help small local businesses and their owners and employees who are currently unfairly pooled into costly lawsuits by trial lawyers simply to keep cases in state court.

Small businesses are already over-burdened by litigation as it is. They should not be further weighed down by cases to which they have no real connection simply so that an enterprising attorney can game the system.

I look forward to the witnesses' testimony and any comments and suggestions they may have with regard to this legislation.

Now I would recognize the Ranking Member for his statement.

[The bill, H.R. 3624, follows:]

I

114TH CONGRESS
1ST SESSION

H. R. 3624

To amend title 28, United States Code, to prevent fraudulent joinder.

IN THE HOUSE OF REPRESENTATIVES

SEPTEMBER 28, 2015

Mr. BUCK introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To amend title 28, United States Code, to prevent fraudulent joinder.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Fraudulent Joinder Prevention Act of 2015".

SEC. 2. PREVENTION OF FRAUDULENT JOINDER.

Section 1447(c) of title 28, United States Code, is amended by adding at the end the following: "A motion for remand, and any opposition thereto, may include affidavit or other evidence showing a plausible claim for relief against each nondiverse defendant, or the lack thereof, or

indicating a good faith intention to prosecute the action against each nondiverse defendant or to seek a joint judgment, or the lack of such a good faith intent. The district court shall deny a motion to remand if it finds that the complaint does not state a plausible claim for relief against a nondiverse defendant under applicable State law or there is no good faith intention to prosecute the action against a nondiverse defendant or to seek a joint judgment.".

○

Mr. COHEN. Thank you, Mr. Chair.

Well, you can't claim that this Committee just deals with political issues. We don't get into all those meaty things like Planned Parenthood. We take those straight to the floor. We deal with these issues that really can bore the viewing audience to death.

Thank you.

H.R. 3624, the Fraudulent Joinder Prevention Act of 2015, not even an acronym, could more properly be named the Corporate Defendant Forum Shopping Act, because it does that as well. It facilitates that in substance.

If enacted, this bill could deny plaintiffs the right to pursue state law claims in state court and instead allow defendants to choose where the plaintiffs' claims are heard. Plaintiff would not have the option of choosing their court. The bill upends a century—a century; that is a long time—of legal doctrine governing how Federal court decides whether to remand a case that was removed by an out-of-state defendant on diversity grounds and where there is at least one in-state defendant in the case.

Specifically, this bill would require a court to deny a motion to remand where the plaintiff cannot show that the addition of an in-state defendant to a case is based on a plausible state law claim against the in-state defendant or that the plaintiff has a good-faith intention to pursue such a claim against the in-state defendant or to seek a joint judgment. The bill also allows a court to consider affidavits or other evidence in making its determination. The bill raises a number of concerns.

Firstly, there is no evidence that Federal courts have failed to properly address fraudulent joinders. For 100 years, the Federal courts have applied the doctrine of fraudulent joinder, which is an exception to the requirement to complete diversity. Under this doctrine, a Federal court may retain jurisdiction based on diversity of citizenship, even when a complaint names an in-state defendant if an out-of-state defendant shows that there is no possibility that the plaintiff would be able to establish a state law claim against the in-state defendant in state court.

The party trying to remove the case to Federal court, the out-of-state defendant, has the burden of proving that Federal diversity jurisdiction is proper. While the standard has been articulated differently by different courts, they all embody the same basic principle, that as long as there is any basis for pursuing a claim against an in-state defendant, the Federal court must remand the case to state court, kind of an interesting thing. Normally, some folks on this Committee think that the states should come first, that states' rights—that things are ruled better at the local level and the state level. Not in this particular situation, because business is involved, and they prefer that the businesses have the option of getting it out of state court and into Federal court.

This standard is in keeping with the longstanding judicial recognition that constitutionally, Federal courts are courts of limited jurisdiction and should therefore construe removal statutes strictly and narrowly, something you would think would be liked by this Committee.

Tellingly, the Supreme Court has not appeared to consider it a problem that different courts articulate the doctrine of fraudulent

joinder differently, nor has it found it a problem with the way the courts have been applying the doctrine to address improper joinder. In short, after a century of application, the court has not deemed it necessary to alter the way the Federal courts deal with fraudulent joinder.

Secondly, by requiring litigation on the merits at a nascent stage of litigation, the bill will increase the complexity and costs surrounding remand motions, dissuading plaintiffs from pursuing meritorious claims, and add cost to our Federal budget, something that our children and grandchildren will have to pay for. That is a quote.

H.R. 3624 shifts the burden of proof from defendants to plaintiffs in removal cases based on diversity grounds. It also requires the application of vague and undefined standards, which invites further litigation over the meaning and scope of those standards. For instance, what constitutes a plausible claim is not simply self-evident. We know this because courts have been struggling to apply the plausibility standard with respect to pleadings in Federal courts after the *Ashcroft v. Iqbal* decision applied such a standard to pleadings under the Federal Rules of Procedure 8. That decision has produced a substantial amount of litigation and has led to increased uncertainty, complexity, and litigation costs.

There is no reason to think the same thing will not happen once such a plausibility standard is imported into the remand context, as H.R. 3624 proposes to do. Similarly, the bill's required inquiry into a plaintiff's subjective good-faith intention will result in increased litigation as the bill does not define the phrase "good faith intention," and is not used anywhere in Title 28. The increase in cost and complexity would not only drain limited resources of plaintiffs but would also burden already strained Federal judicial resources.

Finally, this bill offends federalism by denying state courts the ability to shape state law. State courts are the final authority on state procedural and substance law, and state law claims ought to be left to state courts except in narrow circumstances. This bill would further deny state courts that authority by making it easier for Federal courts to retain jurisdiction where only state law claims are at issue.

H.R. 3624 represents just the latest in a long line of attempts to deny plaintiffs access to state courts and to extend inappropriately the reach of Federal courts into state law matters. But it is good that we are not—what is it?—the hobgoblin of simple minds? Consistency. We are not in those terms. We get out of that, so that is a wonderful thing. For those reasons, I oppose the bill.

Mr. FRANKS. And I thank the gentleman.

And I now recognize the distinguished Chairman of the full Committee, Mr. Goodlatte, for 5 minutes.

Mr. GOODLATTE. Thank you, Mr. Chairman.

America's small businesses are some of the leading victims of frivolous lawsuits and the extraordinary costs that our legal system imposes. Everyday local business owners have lawsuits filed against them based on claims for which they are ultimately not responsible. These lawsuits impose a tremendous burden on small

businesses and on our economy as a whole, as America's small businesses are major drivers of the U.S. economy.

Just 2 weeks ago the House passed the Lawsuit Abuse Reduction Act to help rein in frivolous lawsuits. Enactment of that legislation will help eliminate some of the abuses that exist in the Federal legal system that harm small businesses in particular.

The bill we are examining today, the Fraudulent Joinder Prevention Act, will also help address a litigation abuse that regularly drags small businesses into court to answer for claims to which they have no real connection.

In order to avoid the jurisdiction of the Federal courts, plaintiffs' attorneys regularly join in-state defendants to the lawsuits they file in state court even if the in-state defendants' connections to the controversy are minimal or non-existent. Typically, the fraudulently joined in-state defendant is a small business or the owner or employee of a small business. Ultimately, these in-state defendants may not face any liability as a result of being named as a defendant, but that does not prevent them from having to spend money to hire a lawyer and taking valuable time away from running their businesses to deal with matters related to a lawsuit.

Plaintiffs' attorneys join these basically unconnected in-state defendants to their lawsuits because the current rules for determining whether fraudulent joinder has occurred provide little disincentive to adding an in-state defendant, no matter how frivolous the claim is against that defendant. In fact, the system actually encourages plaintiffs to fight to get their cases sent back to state court once they are removed to Federal court by providing that plaintiffs may have their attorneys' fees reimbursed if a case is remanded back to state court.

The Fraudulent Joinder Prevention Act attempts to bring some balance to a Federal court's determination over whether a case that has been removed from state to Federal court should remain in Federal court. It does this by making a modest change to the statute that governs the fraudulent joinder determination. The change is modest because it merely requires Federal judges to apply concepts to the fraudulent joinder determination that they already regularly use in other areas of the law.

The bill provides that the standard judges are to use in determining whether a defendant has been fraudulently joined is whether the plaintiff states a plausible claim for relief against an in-state defendant. This plausible claim for relief standard is already used by Federal judges in determining whether to grant motions to dismiss.

Additionally, the bill allows judges to determine whether the claims against an in-state defendant were made in good faith. Again, judges are already asked in other areas of the law to examine a party's good or bad faith.

Nothing in this bill forces a judge to decide issues in favor of a defendant or creates a new standard that Federal judges and litigants are not already familiar with.

I look forward to the witnesses' testimony on this commonsense legislative proposal and any suggestions they may have for ways this legislation can be improved.

Finally, I want to thank Representative Buck for introducing this bill to help level the playing field for defendants when questions regarding fraudulent joinder arise.

And I yield back.

Mr. FRANKS. And I thank the gentleman.

I would now yield to the Ranking Member of the Committee, Mr. Conyers from Michigan.

Mr. CONYERS. I want to thank the Chairman and welcome all the witnesses.

As with the Class Action Fairness Act, once again we consider legislation really designed to deny access to justice for potentially millions of plaintiffs seeking relief under state law in state court.

This so-called Fraudulent Joinder Prevention Act would flip on its head the century-old standard governing when a Federal court must remand cases alleging only state law claims back to state court where there is at least one in-state defendant in the case. Specifically, we amend in this bill Section 1447(c) of Title 28 to require a Federal court, when considering a motion for remand in a case that was removed from a state court to Federal court on diversity grounds, where there is also an in-state defendant, to deny such remand motion if the plaintiff has not demonstrated that there is a "plausible claim for relief against" an in-state defendant or that the plaintiff had a good-faith intention to prosecute the action against each in-state defendant, or to seek a joint judgment.

There are three problems raised with the measure before us.

The first, of course, is that the bill attempts to solve a non-existent problem. The doctrine of fraudulent joinder which Federal courts have been applying, as has been already remarked, for more than a century governs when a Federal court may ignore, for the purpose of retaining jurisdiction, an in-state defendant in a state law case that has been removed to Federal court solely on diversity grounds.

The bill's proponents claim that this legislation is necessary because the fraudulent joinder doctrine has been articulated differently by different courts, yet these are basically distinctions without a difference. All courts must consider whether there is some basis in law and fact for a plaintiff to pursue a claim against an in-state defendant. If there is, then the Federal court must remand the case back to state court.

If uniformity were truly the concern of the bill's proponents, the legislation would simply pick one of the existing articulations of the fraudulent joinder standard and codify it into law. Instead, it is clear from the bill's radical changes to longstanding jurisdictional practice that the true purpose of this measure is simply to stifle the ability of plaintiffs to have their choice of forum, and possibly even their day in court.

In addition, the bill would sharply increase the cost of litigation for plaintiffs and increase the resource burdens on Federal courts. The bill requires a court to engage in a substantial merits inquiry at a case's initial procedural stage without the benefit of any substantial discovery. This requirement would undoubtedly generate more uncertainty, more costs, more unnecessary complexity at such an early stage of the litigation.

Moreover, the bill shifts the burden of proof on a motion to remand from the defendant to the plaintiff, even though it is the defendant that is seeking the remand.

The bill also applies a vague, open-ended plausible claim standard. What constitutes a plausible claim is an open question in the remand context and would necessarily require substantial litigation and the corresponding development of a substantial body of case law.

Similarly, the bill invites substantial litigation by requiring a showing of the plaintiff's subjective good-faith intention to pursue a claim against an in-state defendant. Like "plausibility," the bill does not define the term "good-faith intention," and such a phrase is not used anywhere else in Title 28, where the bill's amendments would be codified.

All of this will have the cumulative effect of sharply increasing litigation costs for plaintiffs, possibly to the point where those with meritorious claims could be dissuaded from even filing suit, and it will strain the already limited resources of the Federal judiciary.

And finally, the amendments made by this bill would raise fundamental federalism concerns. Removal of a state court case to Federal court always implicates federalism concerns. That is why the Federal courts generally disfavor Federal jurisdiction and read removal statutes narrowly. By applying a sweeping and vaguely worded new standard to the determination of when a state court may be removed to Federal court, the bill will deny state courts the ability to decide and ultimately to shape state law.

As with many similar measures, this bill violates our fundamental constitutional structure by intruding deeply into state sovereignty. So I accordingly look forward to hearing the views of our witnesses today with respect to my concerns, and I thank the Chair.

Mr. FRANKS. And I thank the gentleman.

Without further objection, other Members' opening statements will be made part of the record.

I will now introduce our witnesses.

Our first witness is Elizabeth Milito. Ms. Milito served as Senior Executive Counsel with the National Federation of Independent Business Small Business Legal Center, a position that she has held since March of 2004. She is responsible for managing cases and legal work for the Small Business Legal Center and has testified before Congress on numerous occasions on the impact regulations in the civil justice system have on small business. Ms. Milito previously worked as a trial attorney and has an extensive background in tort, medical malpractice, employment, and labor law.

Welcome.

Our second witness is Lonny Hoffman. Professor Hoffman is the Associate Dean and Law Foundation Professor at the University of Houston Law Center. He is a specialist on procedural law in Federal courts and state courts and has authored numerous Law Review articles. Professor Hoffman has testified before Congress and lectured around the world on civil litigation subjects. He is a member of the Supreme Court of Texas' Rules Advisory Committee and Editor-in-Chief of The Advocate, a quarterly journal published by the Litigation Section of the State Bar of Texas.

Welcome, sir.

Our final witness is Cary Silverman, a partner at the law firm Shook, Hardy & Bacon in Washington, D.C. Mr. Silverman's public policy work focuses on civil justice reform, and he has published over 25 articles in prominent law journals. He regularly authors amicus briefs on behalf of national business, trade, and other advocacy groups in cases before the U.S. Supreme Court and state high courts. Mr. Silverman has testified before Congress and most state legislatures, and is an adjunct professor at the George Washington University Law School.

Now, each of the witnesses' written statements will be entered into the record in its entirety, and I would ask that each of you summarize your testimony in 5 minutes or less. To help you stay within that time, there is a timing light in front of you. The light will switch from green to yellow, indicating that you have 1 minute to conclude your testimony. When the light turns red, it indicates that the witness' 5 minutes has expired.

So before I recognize the witnesses, it is the tradition of the Subcommittee that they be sworn. So, if you would please stand and be sworn?

Do you solemnly swear that the testimony that you are about to give will be the truth, the whole truth, and nothing but the truth, so help you God?

Please be seated.

Let the record reflect that the witnesses answered in the affirmative.

I now recognize our first witness, Ms. Milito, and if you would make sure that microphone is turned on. Thank you, ma'am.

TESTIMONY OF ELIZABETH MILITO, SENIOR EXECUTIVE COUNSEL, NFIB SMALL BUSINESS LEGAL CENTER

Ms. MILITO. Thank you, Chairman Franks, Ranking Member Cohen, and distinguished Committee Members. I am happy to appear here today on behalf of the National Federation of Independent Business, which represents more small businesses than any other organization. Because litigation entails angst and great expense for small businesses, NFIB is pleased to see this Committee's attention focused on the issue of fraudulent joinder.

Fraudulent joinder remains a source of confusion and unnecessary litigation in our courts, and impacts far too many innocent small businesses. The situation unfolds as follows. Plaintiff's attorneys will name a small business such as a local pharmacy or insurance agent with little connection to the complaint in order to deny the Federal courts of jurisdiction. In many instances, the plaintiff has no intention of imposing liability on the fraudulently joined party.

With courts divided over the standard for finding that a defendant is fraudulently joined, the small business is forced to engage in protracted litigation when all they want is to be dismissed from the case entirely. Public policy should encourage plaintiffs' attorneys to prudently assess the viability of their clients' potential claims before initiating a lawsuit and discourage plaintiffs from taking unfounded or improvidently cavalier positions. Along these lines, we should aim to create strong disincentives against naming

a small business as a defendant in a case where the claim against the business is particularly weak.

This is especially so where the plaintiff's apparent motive in naming the defendant is to use the defendant as a body shield against invocation of Federal jurisdiction, or what is also referred to as fraudulent joinder.

But unfortunately, as the law currently stands, plaintiffs actually have a perverse incentive to bring weak or attenuated claims against small business defendants for the sake of defeating Federal jurisdiction. Given the tremendous costs of litigation and the inevitable risk that a plaintiff might prevail if the case goes before a sympathetic jury or an errant judge, we must also address the reality that small business defendants are rationally discouraged from vindicating their rights, and so long as this remains true, plaintiffs' attorneys will inevitably waive the benefit of pursuing a questionable defendant as outweighing the risks.

Accordingly, NFIB supports the Fraudulent Joinder Prevention Act, which would provide greater clarity in the law on removal, and reduce litigation. It would accomplish these things by requiring that a Federal court considering a motion for remand determine whether the complaint states a plausible claim for relief against the non-diverse defendant. This language would eliminate the current legal standards that strongly favor plaintiffs' motions for remand. The court would also consider whether the plaintiff has a good-faith intention to prosecute the action against the non-diverse defendant or to seek judgment against the non-diverse defendant.

This bill is straightforward and offers a simple and commonsense fix for a problem that has generated much confusion and unnecessary litigation in Federal courts at the expense of small businesses.

On behalf of America's small business owners, I thank this Subcommittee for holding this hearing and inviting me to testify. I am happy to answer your questions.

[The prepared statement of Ms. Milito follows:]

House of Representatives Committee on the Judiciary
Subcommittee on the Constitution

September 29, 2015

The Fraudulent Joinder Prevention Act of 2015

Thank you, Mr. Chairman and distinguished Committee members for inviting me to provide testimony on fraudulent joinder and the impact that it has on small businesses in America today. My name is Elizabeth Milito and I serve as Senior Executive Counsel of the National Federation of Independent Business (NFIB) Small Business Legal Center. The NFIB Small Business Legal Center (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses.

The National Federation of Independent Business (NFIB) is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses.

NFIB represents 325,000 member businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business" the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. The NFIB membership is a reflection of American small business.

Although federal policy makers often view the business community as a monolithic enterprise, it is not. Small business owners have many priorities and often limited resources. Being a small business owner means, more times than not, you are responsible for everything – NFIB members, and hundreds of thousands of small businesses across the country, do not have human resource specialists, compliance officers, or attorneys on staff. Because of their size and limited resources, uncertainty continues to be the enemy of small business owners. Small-business owners continue to rank "Uncertainty Over Economic Conditions" as a serious problem. And for a small business owner being served with lawsuit generates significant trepidation, disgust, and yes, uncertainty.

Because litigation entails angst and great expense for small businesses, NFIB is pleased to see this Committee's attention focused on the issue of fraudulent joinder. Fraudulent joinder remains a source of confusion and unnecessary litigation in our courts and impacts far too many innocent small businesses. The situation unfolds as follows: plaintiffs' attorneys will name a small business – such as a local pharmacy or insurance agent – with little connection to the complaint in order to deny the federal courts of jurisdiction. In many instances, the plaintiff has no intention of imposing liability on the fraudulently joined party. With courts divided over the standard for finding that a defendant is fraudulently joined, the small business is forced to engage in protracted litigation when all they want is to be dismissed from the case entirely.

Congress should address this problem by passing the Fraudulent Joinder Prevention Act, which would slightly amend 28 U.S.C. § 1447(c), the federal statute governing diversity jurisdiction in the federal courts. A short and straightforward bill, the Act, would require plaintiffs to show a "plausible claim for relief" against a nondiverse defendant. In evaluating fraudulent joinder, judges would be able to consider affidavits or other evidence beyond the pleadings submitted by the plaintiff, as well as whether the plaintiff has shown a good-faith intent to pursue a judgment against the nondiverse defendant. Adoption of this bill would help protect local small businesses from becoming pawns in high-stakes and high-dollar civil litigation.

Perverse Incentives for Fraudulent Joinder

While most attorneys comply with the highest ethical standards, there are instances, unfortunately, where small businesses are named as defendants because they represent convenient targets for the purpose of forum shopping. In the paradigmatic fraudulent joinder case, a plaintiff sues a nominal nondiverse/in-state defendant along with a diverse foreign defendant in an effort to make sure that its claims against its true target, the diverse defendant, stay in state court. At the time of removal, the diverse defendant is already a party, and the only question is whether the court can disregard the nondiverse/in-state defendant for purposes of assessing jurisdiction.

For instance, in the world of pharmaceutical litigation, a familiar strategy by plaintiffs is to target a local pharmacy as the diversity-destroying pawn to be a roadblock to the drug manufacturer's removal efforts.[1] Plaintiffs in these circumstances rarely intend in good faith to pursue the local independently-owned pharmacy. Rather, they usually dismiss the pharmacy once the case is remanded to state court. Some plaintiffs will even offer to dismiss the pharmacy in exchange for the drug manufacturer's stipulation to forgo removal.

In these cases, small business owners are forced to incur substantial financial costs in defending their business, they must dedicate their time and energy to the case, and they must deal with the heavy emotional toll that a wrongful suit may cause—all because they have been named as a defendant for an improper reason. Public policy should encourage plaintiffs' attorneys to prudently assess the viability of their clients' potential claims *before* initiating a lawsuit and discourage plaintiffs from taking unfounded or improvidently cavalier positions.

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[1] *See, e.g.*, *In re Rezulin Products Liability Litigation*, 133 F. Supp. 2d 272, 289 (S.D.N.Y. 2001) (local pharmacies and salespeople held fraudulently joined in prescription drug action against manufacturers); *Negrin v. Alza Corp.*, 1999 WL 144507 at *5 (S.D.N.Y. Mar. 17, 1999) (local pharmacy held fraudulently joined in prescription drug case against manufacturer); *Strickland v. Brown Morris Pharmacy, Inc.*, 1996 WL 537736 at *2 (E.D. La. Sept. 20, 1996) (local pharmacy held fraudulently joined in over-the-counter drug case against manufacturer); *see also Johnson v. Parke-Davis*, 114 F. Supp. 2d 522, 525–26 (S.D. Miss. 2000) (resident sales representatives held fraudulently joined in action against prescription drug manufacturer).

Along these lines, we should aim to create strong disincentives against naming a small business as a defendant in a case where the claim against the business is particularly weak, especially where the plaintiff's apparent motive is to use the defendant as "body-shield" against invocation of federal jurisdiction. But unfortunately, as the law currently stands, plaintiffs actually have perverse *incentive* to bring weak or attenuated claims against small business defendants for the sake of defeating federal jurisdiction.[2]

The plaintiffs' bar knows that suits are much more likely to be dismissed in federal court.[3] Accordingly, plaintiffs' attorneys usually seek to file in state court and they draft their complaints with an aim to prevent defendants from removing to federal court.[4]

On the other side of the equation, defendants prefer to be in federal court because federal courts tend to have a better grasp on the issues and the proper procedures, and because there is more predictability in federal courts.[5] Thus out-of-state defendants often seek to remove tort cases from state to federal court. They are entitled to do so under federal law, provided that there is "complete diversity" between the defendants and the plaintiff.[6] In other words, removal is allowed only where *all* of the defendants are from a different state than the plaintiff.[7] For example, a case may be removed from Kentucky state court where plaintiff is a resident and where the defendant corporations are based in New York and California.

Accordingly, an aggressive plaintiff's attorney—always employing new and ingenious forum-shopping games—has a strong incentive to find someone else to name as a defendant in the plaintiff's home state. In the foregoing example, the Kentucky plaintiff has a much better chance of prevailing if he or she can add a Kentucky defendant to the suit because this will most likely ensure that the case will remain in state court.

Knowing that the plaintiff is more likely to prevail in state court, the plaintiff's attorney has an incentive to name another defendant, even if he or she can only muster a weak or attenuated claim. And this is often going to be a local small business that had only a tangential or peripheral role in the case or controversy

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[2] *See* Melissa R. Levin and Heather K. Hays, *Fraudulent Joinder: Successful Removal of Actions to Federal Court*, Pharmaceutical & Medical Device Law Bulletin, Vol. 4, No. 4 (April, 2004).
[3] Plaintiffs' success rate is only 34 percent in federal court after removal. Matthew J. Richardson, *Clarifying and Limiting Fraudulent Joinder*, 58 Fla. L. Rev. 119, 183 (2006)
[4] John Merrill Gray, III, *Motions—Refining the Standard in Motions in Alleging Fraudulent Joinder*, 36 Am. J. Trial Advoc. 225, 231 (2012) ("Joining an in-state defendant to defeat diversity is a common tool used by parties seeking to remain in state court.").
[5] *See* Levin and Hays, *supra* at 2.
[6] *See* 28 U.S.C. § 1332(a)(1) (2005) (stating that the district courts have original jurisdiction over all cases and controversies between citizens of different states).
[7] Richardson, *supra,* at 166.

at issue because they are convenient target.[8] For example, in a typical products liability case, the plaintiff will be suing an out-of-state manufacturer on the theory that the manufacturer was negligent in designing the product. In such a case, the local merchant who sold the product is a convenient defendant—not necessarily because the plaintiff intends to hold the merchant liable so much as because the plaintiff wants to prevent the manufacturer from removing the case to federal court. But, once more, we maintain that the plaintiff should not be incentivized to drag a small business owner into litigation for such a Machiavellian purpose.

In theory, the out-of-state manufacturer in such a case could seek to remove the case to federal court on the ground that the plaintiff fraudulently joined the local merchant as a defendant simply for the purpose of defeating federal jurisdiction.[9] But, this is an uphill battle for the defendant.[10] To avoid remand back to state court, the defendant must demonstrate that the plaintiff falsely or fraudulently misstated facts in adding the in-state defendant or that there is no chance of the plaintiff stating a viable claim against that defendant in state court.[11]

While the federal courts vary in how they approach this issue, the differences between the circuits pertain to deference provided to the plaintiff.[12] This means that, in the best case scenario, it is going to be hard for a defendant to prevail. Indeed, plaintiffs predominantly succeed in getting federal courts to remand these cases back to state court.[13] Courts generally remand any case if the plaintiff has a remote possibility of recovery against the in-state defendant.[14] This plaintiff-friendly standard only emboldens plaintiffs to aggressively name local defendants even when there are serious questions as to their likelihood of success in the end.

Moreover, plaintiffs are further incentivized to proceed with questionable claims—and for the purpose of avoiding federal jurisdiction—by naming local small business defendants because federal statutes prevent defendants from appealing when a federal court remands a case back to state court.[15] And, conversely, courts give plaintiffs an unfair advantage over defendants because

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[8] *See e.g.*, Gray, *supra* at 225-27 (discussing the facts of a case where out-of-state defendants were prevented from removing their case to federal court because the plaintiff also named a local landlord was as a defendant).
[9] *See* Levin and Hays, *supra* at 2.
[10] *See* Richardson, *supra* at 133-34.
[11] *Id.*
[12] *Id.*
[13] *Id.* at 134 ("The removing defendant bears a heavy burden to show fraudulent joinder, and the burden is heavy in large part because issues of both law and fact are to be resolved in favor of the plaintiff.").
[14] *Id.*
[15] *Id.* at 134 -35 (If defendants lose on the motion to remand, they are left without a remedy because the order cannot be appealed, pursuant to federal statute.) (citing 28 U.S.C. § 1447(d) (2005)).

the plaintiff can appeal if the federal court holds that the in-state defendant was inappropriately joined.[16]

Finally, federal statutes discourage defendants from challenging fraudulent joinder because the plaintiff can collect attorney's fees if the challenge fails.[17] Here again, plaintiffs are given an unfair advantage over defendants because defendants *are not* entitled to seek attorney's fees if they prevail in convincing the federal court that the in-state defendant was fraudulently joined.[18] Accordingly, plaintiffs have little to lose and much to gain from naming another defendant—even if they are climbing out on a limb in doing so. Federal statutes have thus created all of the wrong incentives here.

The Fraudulent Joinder Prevention Act – A Solution for Small Business

To fulfill our role in representing the interests of the small business community in the nation's courts, the NFIB Legal Center filed about 70 amicus briefs on a wide spectrum of issues last year, including in cases where aggressive plaintiffs sought to set a precedent that would have exposed small business owners to new or greater liabilities in civil litigation. And we anticipate the need to continue filing in these sort of cases to defend small business interests because the plaintiffs' bar continues to push the proverbial envelop in encouraging courts to adopt expansive tort liability rules. Personal injury attorneys advocate rules that will open small businesses up to new and expanded liabilities because they are looking for more parties to hold liable and to make it easier to prevail in their cases.

For these reasons, the NFIB Legal Center encourages policy makers to mitigate and eliminate incentives driving our litigious culture. This may be accomplished to some extent through substantive reforms limiting tort liabilities or setting evidentiary and recovery standards. But, we should remember that the fundamental problem facing small business owners in these cases is a lack of financial resources necessary to successfully fend off implausible claims.

Given the tremendous costs of litigation, and the inevitable risk that a plaintiff might prevail if the case goes before a sympathetic jury or an errant judge, we must also address the reality that small business defendants are rationally discouraged from vindicating their rights. And so long as this remains true, plaintiffs' attorneys will inevitably weigh the benefits of pursuing a questionable claim or a questionable defendant as outweighing the risks.

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[16] *Id.* at 138 ("If the motion is denied, then the order may be appealed after final judgment, and the district court may proceed to dismiss the non-diverse defendants under Rule 21.").
[17] *Id.* at 134 ("Even worse, if defendants lose on the motion to remand, the district court is empowered by federal statute to award costs to the plaintiffs.") (citing 28 U.S.C. § 1447(c)).
[18] *See* 28 U.S.C. § 1447(c) (stating that "[a]n order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal").

Accordingly, NFIB supports "The Fraudulent Joinder Prevention Act," which would discourage plaintiffs' attorneys from taking cavalier and abusive positions in litigation, provide greater clarity in the law on removal, and reduce litigation. It would accomplish these things by requiring that a federal court considering a motion for remand determine whether the complaint states a "plausible claim for relief" against the nondiverse defendant. This language would eliminate the current standards - "no possibility of recovery," "no reasonable possibility of recovery," and "reasonable basis for the claim" – that strongly favor plaintiffs' motions for remand. The court would also consider whether the plaintiff has a good faith intention to prosecute the action against the nondiverse defendant or to seek judgment against the nondiverse defendant. The bill is straightforward and offers a simple and commonsense fix for a problem that has generated much confusion and unnecessary litigation in federal courts at the expense of small business.

Conclusion

On behalf of America's small business owners, I thank this Committee for holding this hearing and providing a forum to highlight the problems associated with fraudulent joinder. Lawsuits hurt small business owners, new business formation, and job creation. The cost of lawsuits for small businesses can prove disastrous, if not fatal, and threaten the growth of our nation's economy by hurting a very important segment of that economy, America's small businesses. We must work together to find and implement solutions that will stop this wasteful trend

We believe that "The Fraudulent Joinder Prevention Act" strikes the appropriate balance to protect those who are truly harmed and the many unreported victims of our nation's civil justice system – America's small businesses.

Sincerely,

Elizabeth Milito, Esq.
NFIB Small Business Legal Center

Mr. FRANKS. Thank you, Ms. Milito.

And I would now recognize our second witness, Mr. Hoffman.

If you would make sure that microphone is on.

TESTIMONY OF LONNY HOFFMAN, PROFESSOR, UNIVERSITY OF HOUSTON LAW CENTER

Mr. HOFFMAN. Chairman Franks and Ranking Member Cohen, thank you for inviting me to testify today. I have three brief but important points I want to make that I hope everyone on the Committee will consider as they are considering this legislation. I hope in particular proponents of the bill will consider them seriously.

First, as Representatives Cohen and Conyers have already pointed out, there is no need for this bill. Fraudulent joinder law is well settled. But I want to expand on that point a bit further.

Under fraudulent joinder law today, while it is certainly true that the defendant has a heavy burden to meet to show that fraudulent joinder exists, which is as it should be, that burden is hardly insurmountable. For every story of a non-diverse defendant found to have been properly joined, I can cite an equal number where the court found the plaintiff's claim had no reasonable basis under the substantive law. This makes a couple of things clear, and the first I think is that we should be wary against legislating by anecdote.

It also suggests that for those who support the bill, their real beef isn't with fraudulent joinder law or with the way that judges apply it. Instead, it is with the substantive law itself that this Congress and state legislatures have enacted to protect citizens. Courts find fraudulent joinder when the substantive law allows recovery, they find joinder proper, and they find fraudulent joinder when it does not. There is no need to change fraudulent joinder law. If opponents are unhappy with the substantive law, then that is what they need to be talking about.

Of course, they are not because they know there is not a lot of political support for taking away substantive rights. So it turns out to be much easier to talk about technical procedural reform.

Which brings me to the second point I want to make. Whatever one thinks about current law, this bill would not achieve the uniformity that is supposedly desired. One problem is, as noted earlier, the bill would force courts to determine what the word "plausible" means. This is very hard to do, and we already know this. We don't have to guess because of the Supreme Court's plausibility cases, the *Bell Atlantic v. Twombly* case in 2007, and the *Ashcroft v. Iqbal* case in 2009. These cases have spawned decisions from the lower courts almost too numerous to count. Do you know that last week the count on *Iqbal* was that there were 85,000 cases that it cited? It had become the number-one most cited case in the history of all cases being cited, and that is in less than 6 years. The record-holder that it replaced had held that position, but it took it 25 years to get there, the *Anderson v. Liberty Lobby* case. And this deluge of cases applying the Court's ambiguous plausibility test hasn't brought uniformity to pleading law. Instead, what counts as plausible varies, often greatly, from circuit to circuit.

In addition to having to figure out what "plausible" means, courts would also have to determine what the plaintiff's good faith was. But how in the world is a district judge to figure out the

plaintiff's good or bad faith only 30 days after a lawsuit has been filed, which is when the remand hearing typically takes place?

Like plausibility, this good-faith requirement is certain to lead to years of litigation, which is only going to make litigation more expensive, as Representative Cohen has already pointed out, for everyone, though I would highlight in particular for plaintiffs.

Which brings me to the third and final point I want to make. Though the bill is only a page-and-a-half long, there should be no misunderstanding that the proposed amendments would dramatically alter existing law. All other subject-matter jurisdiction doctrines that exist today, all others, recognize that any merits inquiry at the jurisdictional stage should be limited.

For example, to show that a plaintiff hasn't met the minimum amount in controversy, the defendant bears a heavy burden of showing "to a legal certainty" that the claim is really for less than $75,000. This same approach is taken with regard to Federal question jurisdiction. Only a showing by the defendant that the plaintiff's claim is "wholly insubstantial and frivolous" will dismissal be warranted. Thus, jurisdictional law consistently recognizes that judges are ill-equipped to conduct the kind of exhaustive merits inquiries at the very outset of a case that this bill would urge before there has been an opportunity for the facts to come out through discovery.

So, in sum, this legislative body should recognize, I hope, the collective judicial wisdom that fraudulent joinder law reflects and resist legislating technical procedural reforms. Instead, I want to submit, it should recall the advice given by a former Solicitor General who, when testifying against a bill a few years ago that would have reversed the courts' plausibility decisions, the *Twombly* and the *Iqbal* decisions I mentioned earlier, advised that legislators should "leave procedure to the rulemakers." That is what General Garre told the Senate Judiciary Committee, and I submit that that advice is worth remembering today.

Thank you, Chairman.

[The prepared statement of Mr. Hoffman follows:]

Prepared Statement of Lonny Hoffman

Law Foundation Professor of Law
University of Houston Law Center

Hearing on H.R. ____, the Fraudulent Joinder Prevention Act of 2015

Before the Committee on the Judiciary
Subcommittee on the Constitution and Civil Justice
United States House of Representatives

September 29, 2015

Chairman Franks, Vice-Chairman DeSantis, Ranking Member Cohen, and members of the Committee: Thank you for inviting me to testify today on H.R. ____, the Fraudulent Joinder Prevention Act of 2015.

INTRODUCTION

There is no warrant for amending 28 U.S.C. §1447. More than a century old, fraudulent joinder law is well-settled and strikes the proper balance among competing policies in how it evaluates the joinder of non-diverse defendants. With recognition that there are sound reasons for not trying to exhaustively examine the merits of the plaintiff's claims immediately after removal, courts across the circuits uniformly impose a high burden on the defendant to demonstrate that a non-diverse defendant's joinder was improper. That burden can only be met if the defendant establishes that the joinder of the diversity-destroying party in the state court action was made without a reasonable basis of proving any liability against that party. By greatly expanding the scope of the fraudulent joinder inquiry, this bill would displace the well-functioning law with wasteful adjudications that district courts are ill-equipped to undertake at the remand stage, burdening the judicial system and raising litigation costs for all parties, especially for plaintiffs on whom this bill imposes the burden of proof. Finally, by requiring that courts resolve merits inquiries that under current law are decided by state courts, the proposed amendments to §1447 raise federalism concerns.

By way of introduction, I am the Law Foundation Professor of Law at the University of Houston Law Center, where I have taught since 2001. My scholarship and teaching interests are focused on civil procedural law and the means by which that law influences judicial access. I have previously appeared twice before the House Judiciary Committee. My most recent appearance was with regard to H.R. 966, the Lawsuit Abuse Reduction Act of 2011. Before that, I testified with regard to H.R. 5281, the Removal Clarification Act of 2010. In connection with that bill, the Chairman, citing my comments at the hearing, subsequently introduced a revised version of the bill that was later enacted into law in 28 U.S.C. §1442.

I appear before this Committee in my individual capacity. As university guidelines require, I attest that my testimony is not authorized by, and should not be construed as reflecting on the position of, the University of Houston.

I. THERE IS NO NEED FOR THE PROPOSED AMENDMENTS TO §1447

In evaluating any proposed amendment to existing law, the first question should always be whether a need for change has been demonstrated. The burden properly rests with proponents of reform to show that there is a problem serious enough to justify doing something. In this instance, however, no such showing can be made.

A. Fraudulent Joinder Law Is Well-Settled And Strikes A Reasonable Balance In How Joinder Of Non-Diverse Defendants Is Evaluated

More than a century old, fraudulent joinder law is well-settled and strikes an appropriate balance among competing policies in how it evaluates the joinder of non-diverse defendants. Under the existing law, properly joined defendants are able, in appropriate cases, to effectuate their statutory right of removal to federal court. For instance, if a plaintiff's claim against a non-diverse defendant is untimely because it is barred as matter of law by the statute of limitations, the court will find that the plaintiff has not stated even a colorable claim against the resident defendant and any motion to remand will be denied. *See, e.g., In re Briscoe*, 448 F.3d 201 (3d Cir. 2006) ("If a district court can discern, as a matter of law, that a cause of action is time-barred under state law, it follows that the cause fails to present even a colorable claim against the non-diverse defendant.").

Yet, even as the existing doctrine is vital enough to address improperly joined defendants, the well-settled decisional standard also protects Article III jurisdiction by construing the removal statutes strictly; honors the presumption in favor of allowing plaintiffs to select the forum and which defendants to sue; avoids unnecessary entanglements with merits inquiries at the jurisdictional stage; and respects state courts to faithfully apply their own state law to determine the validity of claims asserted. As leading procedure scholars have put it, fraudulent joinder doctrine "tries to strike a reasonable balance among not rewarding abusive pleading by the plaintiff, the plaintiff's tactical prerogative to select the forum, and the defendant's statutory right to remove." 14B CHARLES A. WRIGHT, ARTHUR MILLER, ET. AL., FEDERAL PRACTICE AND PROCEDURE §3723 (4th ed. 2015).

Under the well-settled law, fraudulent joinder will only be found if the defendant establishes that the joinder of the diversity-destroying party in the state court action was made without a reasonable basis of proving any liability against that party.[1]

[1] *See, e.g., Pampillonia v. RJR Nabisco, Inc.*, 138 F.3d 459, 461 (2d Cir. 1998) ("In order to show that naming a non-diverse defendant is a 'fraudulent joinder' effected to defeat diversity, the defendant must demonstrate, by clear and convincing evidence, either that there has been outright fraud committed in the plaintiff's pleadings, or that there is no possibility, based on the pleadings, that a plaintiff can state a cause of action against the non-diverse defendant in state court"); *Batoff v. State Farm Ins. Co.*, 977 F.2d 848, 851 (3d. Cir. 1992) (noting that joinder is fraudulent "where there is no reasonable basis in fact or colorable grounds supporting the claim against the joined defendant"); *Marshall v. Manville Sales Corp.*, 6 F.3d 229, 222-23 (4th Cir.

Of course, with hundreds of cases to choose from (thousands, if unpublished decisions are also included), it is hardly surprising that minor variances can be found in the particular language that courts have used to describe the standard for testing proper joinder. For instance, as the collected cases in the prior footnote reflect, some courts phrase the standard for fraudulent joinder in terms of showing that the plaintiff has "no possibility" of recovery against the non-diverse defendant; others note that there must be a showing of "no reasonable basis" or "no reasonable possibility." There is no evidence, however, that these semantic differences reflect any meaningful differences in how the doctrine is applied. Indeed, as the Fifth Circuit has noted with regard to its own circuit law, "[T]he test for fraudulent joinder is whether the defendant has demonstrated that there is no possibility of recovery by the plaintiff against an in-state defendant, which stated differently means that there is no reasonable basis for the district court to predict that the plaintiff might be able to recover against an in-state defendant." *Smallwood v. Illinois Central Railroad Co.*, 385 F.3d 568, 573 (5th Cir. 2004) (en banc). The Fifth Circuit's observation makes plain the fundamental consistency of the settled doctrine. Thus, the basic framework that has been established for deciding the propriety of joinder can be readily summarized:

> [T]he removing party has the burden on the motion to remand of showing the district court that the joinder of the diversity-destroying party in the state court action was made without a reasonable basis of establishing any liability against that party and was undertaken solely to defeat the federal court's removal jurisdiction. Many courts also describe the standard as one that is deferential to the allegations in the plaintiff's complaint that can be overcome only by proof that the state's highest court would not uphold the sufficiency of the complaint on a motion to dismiss and indicate that the burden on the party seeking removal is a

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1993) ("The burden on the defendant claiming fraudulent joinder is heavy: The defendant must show that the plaintiff cannot establish a claim against the nondiverse defendant even after resolving all issues of fact and law in the plaintiff's favor. A claim need not ultimately succeed to defeat removal; only a possibility of a right to relief need be asserted."); *Alexander v. Electronic Data Systems Corp.*, 13 F.3d 940, 949 (6th Cir. 1994) (describing fraudulent joinder test as "whether there is arguably a reasonable basis for predicting that the state law might impose liability on the facts involved"); *Schur v. L.A. Weight Loss Centers, Inc.*, 577 F.3d 752, 764 (7th Cir. 2009) ("Fraudulent joinder is difficult to establish—a defendant must demonstrate that, 'after resolving all issues of fact *and law* in favor of the plaintiff, the plaintiff cannot establish a cause of action against the in-state defendant.' Framed a different way, the district court must ask whether there is 'any reasonable possibility' that the plaintiff could prevail against the non-diverse defendant") (citations omitted; emphasis in original); *In re Prempro Products Liab. Litig.*, 591 F.3d 613, 620 (8th Cir. 2010) ("When determining if a party has been fraudulently joined, a court considers whether there is any reasonable basis in fact or law to support a claim against a nondiverse defendant"); *Pacheco de Perez v. AT & T Co.*, 139 F.3d 1368, 1380 (11th Cir. 1998) ("Where a plaintiff states even a colorable claim against the resident defendant, joiner is proper and the case should be remanded to state court.").

> heavy one. These basic principles regarding the procedure on a motion to remand based on a claim of fraudulent joinder have been articulated in innumerable federal judicial opinions over the years.

13F CHARLES A. WRIGHT, ARTHUR MILLER, ET. AL., FEDERAL PRACTICE AND PROCEDURE §3641.1 (4th ed. 2015).

B. The Courts Uniformly Impose A Heavy Burden On The Defendant To Prove Fraudulent Joinder

More critical than the precise language used by courts to describe the decisional standard is the universal acknowledgement by courts that the showing required to establish fraudulent joinder is a very exacting one. Recognizing that there are sound reasons for not trying to exhaustively examine the merits of the plaintiff's claims immediately after removal, courts across the circuits uniformly impose a high burden on the defendant to demonstrate that a non-diverse defendant's joinder was improper. *See* 14B CHARLES A. WRIGHT, ARTHUR MILLER, ET. AL., FEDERAL PRACTICE AND PROCEDURE §3723 (4th ed. 2015) (noting that "the cases indicate that the burden on the party seeking removal on the basis of fraudulent joinder is a heavy one" and collecting authorities). This heavy burden on the defendant to show fraudulent joinder emanates in part from the doctrinal foundation that all doubts should be resolved in favor of remand. Justice Harlan Stone's opinion for the Court in *Shamrock Oil & Gas Corporation v. Sheets* reflects the well-established principle:

> Not only does the language of the Act of 1887 evidence the Congressional purpose to restrict the jurisdiction of the federal courts on removal, but the policy of the successive acts of Congress regulating the jurisdiction of federal courts is one calling for the strict construction of such legislation.

Shamrock Oil & Gas, 313 U.S. 100, 108 (1941). *Shamrock*'s fundamental acknowledgement of the defendant's heavy burden at removal has been repeatedly reaffirmed. *See, e.g., Syngenta Crop Protection, Inc. v. Henson*, 537 U.S. 28, 32 (2002) ("statutory procedures for removal are to be strictly construed") (citing, *inter alia*, *Shamrock Oil & Gas*). Out of this bedrock principal has come universal agreement among the courts that in evaluating fraudulent joinder the judge should resolve all disputed questions of fact and all ambiguities in the controlling law in favor of the non-removing party. *See, e.g., Carriere v. Sears Roebuck & Co.*, 893 F.2d 98, 100 (5th Cir. 1990) (noting that "all disputed questions of fact and all ambiguities in the controlling state law are resolved in favor of the nonremoving party"); *see generally* 14B CHARLES A. WRIGHT, ARTHUR MILLER, ET. AL., FEDERAL PRACTICE AND PROCEDURE §3721 (4th ed. 2015) ("[T]here is ample case support at all levels of the federal courts—the Supreme Court, the courts of appeal, and the district courts—for the proposition that removal statutes generally will be strictly construed, and that all doubts should be resolved against removal.").

As discussed further in Part III, sound reasons explain why courts do not engage in an ill-timed exhaustive review of the merits of plaintiff's allegations immediately after removal. For present purposes, the key point is simply this: any suggestion that the proposed amendments to §1447 are warranted by a lack of consistency or coherence in the case law does not withstand scrutiny. Fraudulent joinder law is well-settled and functions effectively, striking an appropriate balance among competing policies in how it evaluates the joinder of non-diverse defendants.

II. THE PROPOSED AMENDMENTS TO §1447 WILL NOT ACHIEVE THE DESIRED UNIFORMITY

Adopting the proposed statutory changes to §1447 would not, in any event, achieve the uniformity desired by the amendment's proponents. Indeed, if the amendments were to be adopted, then instead of the well-established and understood decisional law standard for judging proper joinder, it is certain that the law will become more fractured for years to come.

A. What is "Plausible"? The Proposed Amendments Offer No Guidance

A key difficulty of this bill is that it would force courts to struggle with determining what "plausible" means for purposes of deciding whether to grant remand. This can be reasonably predicted because of what is already known about the Court's plausibility doctrine from *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). These cases have spawned decisions from the lower courts almost too numerous to count. Alexander Reinert, *Measuring the Impact of Plausibility Pleading*, 101 VA. L. REV. ___ (forthcoming 2015) (noting that *Iqbal* alone has been cited "by more than 85,000 courts"). To put that number in perspective, in less than six years the *Iqbal* decision has eclipsed what previously had been the most cited case of all time, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), which took more than twenty years to achieve that mark. *See* Adam Steinman, *The Irrepressible Myth of* Celotex*: Reconsidering Summary Judgment Burdens Twenty Years After the Trilogy*, 63 WASH. & LEE L. REV. 82 (2006) (providing statistics).

The deluge of cases applying the Court's plausibility test has not brought uniformity to pleading law. Instead, what counts as plausible varies, often greatly, from circuit to circuit, which is exactly what commentators expected would happen when the Court announced this ambiguous new pleading sufficiency test. *See* Kevin Clermont and Stephen Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 823 (2010) ("[B]y inventing a foggy test for the threshold stage of every lawsuit, [the Supreme Court has] destabilized the entire system of civil litigation"); Stephen Burbank, *Pleading and the Dilemmas of "General Rules"*, 2009 WISC. L. REV. 535, 560 (2009) ("*Twombly*'s most obvious and immediate consequence has been enormous confusion and transaction costs as a result of uncertainty about the requirements it imposes and its scope of application."); Lonny Hoffman, *Burn Up the Chaff With*

Unquenchable Fire, 88 BOSTON U. L. REV. 1217, 1257 (2008) ("Virtually everyone . . . regards plausibility as an ambiguous standard"). Because each inquiry into plausibility—whether undertaken as part of Rule 12(b)(6) or a motion to remand—is fact-driven, it is unavoidable that some claims will be found implausible while others, nearly identical, will be found plausible.

Beyond plausibility's inherent ambiguities, an equally significant problem is the test's novelty. Before *Twombly* and *Iqbal*, the Court had repeated, over and again, that Rule 8 demanded only fair notice. *See, e.g., Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506 (2002). Even heightened pleading requirements (such as Rule 9, and certain statutes) offer no doctrinal analogue to the Court's plausibility pleading which demands not factual detail but "factual convincingness." *See* Clermont and Yeazell, 95 IOWA L. REV. 821, 833. Plausibility pleading has no doctrinal analogue—and courts have struggled to apply this novel test in a consistent and coherent way. *Id.* at 846 ("The Court's fact- and context-specific approach guarantees that extrapolation to new cases will remain difficult despite successive decisions."). The attempt to incorporate plausibility into jurisdictional law would raise identical difficulties to those that now plague the cacophony of Rule 12(b)(6) decisional law. Yet, the proposed amendments are oblivious to this danger and silent on how district courts are to determine whether the claims asserted against a non-diverse defendant are plausible.

In sum, then, the novelty of the doctrinal approach, along with the ambiguities inherent in judging what makes some allegations plausible and others not, means that just as "it will likely take years before any given circuit settles on a view of plausibility applicable to a wide variety of common complaints," *id.* at 845, so too will it take years—if ever—for fraudulent jurisdiction law in the circuits to settle again on consistent precedents upon which lower courts and litigants can rely.

B. The Bill Gives No Guidance For How A Court Is To Inquire Into A Plaintiff's "Good Faith" Immediately After Removal

A second way in which the proposed amendments will destabilize existing law is that the amendments, if adopted, would direct all courts to determine immediately after removal whether the plaintiff had "a good faith intention to prosecute the action against each nondiverse defendant." By contrast, under existing law the term "fraudulent" in "fraudulent joinder" has been recognized as "a term of art" that "does not require a finding of fraudulent intent." *Schwenn v. Sears, Roebuck Co.*, 822 F. Supp. 1453, 1455 (D. Minn. 1993) ("When speaking of jurisdiction, 'fraudulent' is a term of art"). As another court similarly explained, fraudulent joinder doctrine "does not reflect on the integrity of plaintiff or counsel, but is merely the rubric applied when a court finds either that no cause of action is stated against the nondiverse defendant, or in fact no cause of action exists." *AIDS Counseling & Testing Centers v. Group W Television, Inc.*, 903 F.2d 1000, 1003 (4th Cir. 1990) (internal citations omitted) (brackets and emphasis in original); *see also Barger v. Bristol-Myers Squibb Co.*, 1994 WL 69508 (D. Kan., Feb. 25, 1994) ("Fraudulent joinder is a term of art, which does not reflect on the

integrity of the plaintiff or counsel, but rather exists regardless of the plaintiff's motives when the circumstances do not offer any other justifiable reason for joining the defendant.") (citing, *inter alia*, *Lewis v. Time, Inc.*, 83 F.R.D. 455, 460 (E. D. Ca. 1979)). Rather than focusing on the plaintiff's good faith or subjective intent, current fraudulent joinder law focuses on the validity of the legal theory being asserted against the non-diverse defendant. As the Seventh Circuit has put it, "In most cases fraudulent joinder involves a claim against an in-state defendant that simply has no chance of success, whatever the plaintiff's motives." *Poulos v. Naas Foods, Inc.*, 959 F.2d 69, 73 (7th Cir. 1992).

Yet, the proposed amendments mandate that district judges will now have to make a determination of the plaintiff's "good faith intention" of bringing a viable claim against the non-diverse defendant, and they offer no guidance for how this determination is to be made. Nevertheless, the inquiry would now be mandatory—and would have to be done immediately after removal. Consider, by contrast, the only other place that removal law requires an inquiry into the plaintiff's subjective intent. In 2011, Congress amended §1446. The former version of §1446 set a hard deadline for removal of no more than one year after a case had been commenced. Codifying case law in which district courts extended the one year deadline only on a showing that the plaintiff had intentionally tried to prevent removal within the one year time limit, §1446(c)(1) was amended to permit district courts to allow removals more than one year after commencement if the plaintiff acted in "bad faith" to prevent removal. Critically, however, the inquiry into bad faith that §1446(c)(1) permits only comes after the case has been on file for at least a year. Thus, a court can consider whether the plaintiff has been pursuing its case equally against the diverse and non-diverse defendants. For instance, the plaintiff may not have sought any discovery from the non-diverse defendant while aggressively doing so against the diverse defendant. This could be regarded as evidence of the plaintiff's bad faith in naming the non-diverse defendant solely to defeat the diverse defendant's right to remove. The district judge's ability to look back at a year's worth of actual litigation activity is the critical lynchpin to this legal test that Congress authorized in §1446. By contrast, the proposed amendments to §1447 offer no guidance for how a district judge is to divine the plaintiff's "good faith" immediately after removal.

C. Further Unanswered Questions That Courts Will Struggle To Answer

Finally, the proposed amendments to §1447 will raise many other questions that courts will struggle to answer. For instance, under the proposed new statutory requirements, what is the evidentiary standard for showing a "plausible" claim for relief and that the plaintiff acted in "good faith" in bringing the action? Will it be a clear and convincing evidentiary standard? Or must plausibility and the plaintiff's subjective intent be shown by a preponderance of the evidence? Or must they be shown to a legal certainty, or beyond a reasonable doubt? Once again, although the bill mandates that courts consider evidence to establish plausibility and good faith, the proposed amendments are silent on what the evidentiary standard should be.

In sum, without providing any guidance to courts on the required factual showing to be made, the proposed amendments to §1447 are certain to lead not to harmonizing fraudulent joinder law, but fracturing it. The end result is sure to be more protracted and more costly litigation for the court system and for all parties, especially for plaintiffs on whom the proposed amendments place the burden of proof.

III. THE PROPOSED AMENDMENTS WOULD DRAMATICALLY ALTER EXISTING JURISDICTIONAL LAW

Though the bill is only a page and a half long, there should be no misunderstanding that the proposed amendments to §1447 are anything but modest; if enacted, they would dramatically alter existing jurisdictional law. Sound reasons of judicial administration explain why the courts at all levels of the federal judiciary have been steadfast in applying fraudulent joinder law so that the inquiry is appropriately limited and does not attempt to pretry the plaintiff's claims. These same policy reasons animate the limited review that courts undertake as to all other subject matter jurisdiction inquiries.

A. Courts Are Ill-Equipped To Engage In Extensive Merits Review On A Motion To Remand

Courts and commentators alike recognize that judges are ill-equipped to engage in exhaustive merits inquiries at the jurisdictional stage, before the court's jurisdiction has been established and an opportunity for factual development has been afforded to the parties and the court. As a result, the case law consistently draws a sharp contrast between existing fraudulent joinder doctrine and the more extensive merits inquiries undertaken in Rule 12(b)(6) or Rule 56. Typical is the Tenth Circuit's decision in *Montano v. Allstate Indemnity*, 2000 WL 525592 (10th Cir., Apr. 14, 2000) in which the court recognized that the fraudulent joinder standard "is more exacting than that for dismissing a claim under Fed. R. Civ. P. 12(b)(6)." *Montano*, 2000 WL 525592, at *2. "Of paramount importance," another court has said, "is that a court's inquiry . . . be closely restricted so as not to become an inquiry into the merits of a plaintiff's case." *Hill v. Olin Corp.*, 2007 WL 1431865, at *5 (S.D. Ill., May 14, 2007). Similarly, the Third Circuit has explained that under existing fraudulent joinder doctrine a court is permitted to take only "a limited look outside the pleadings [that] does not risk crossing the line between a proper threshold jurisdictional inquiry and an improper decision on the merits." *In re Briscoe*, 448 F.3d 201, 220 (3d Cir. 2006). In this same connection, a significant criticism that has been lodged against the Court's plausibility pleading doctrine is that it requires courts to engage in merits review at a time when they are ill-equipped to do so. Arthur Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 49-50 (2010) ("It seems obvious that in many contexts attempting to distinguish the frivolous from the potentially meritorious on the basis of a single pleading is a dangerously uncertain endeavor").

Moreover, there is equal reason to doubt that a plausibility test employed at the beginning of a case, whether at the Rule 12(b)(6) stage or remand stage, will be effective at filtering out nonmeritorious claims. A recent study by a mixed group of research psychologists, law professors and one federal district court judge addressed how attitudes and stereotypes affect factual decision-making in the courtroom. Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124 (2012). Drawing on extensive social psychological research, the authors observed that judges form opinions about the facts alleged by a single plaintiff based on views they already possess, in general, about similar people; and when more specific—more "individuating" information—is not available, they are unavoidably influenced even more these more general views. Moreover, although judges may be aware of—and want to resist—the tendency to draw conclusions about the individual from their general pre-existing views, the research suggests that doing so requires more than just a matter of will and good intention. Try as we might to rely on individual-specific information, numerous psychological studies show that we can be easily fooled by what is called "the illusion of individuating information." *Id.* (citing, *inter alia*, John M. Darley & Paget H. Gross, *A Hypothesis-Confirming Bias in Labeling Effects*, 44 J. PERSONALITY & SOC. PSYCOL. 20, 22–23 (1983); Vincent Y. Yzerbyt et al., *Social Judgeability: The Impact of Meta-Informational Cues on the Use of Stereotypes*, 66 J. PERSONALITY & SOC. PSYCOL. 48 (1994)).

While the risk that pre-existing attitudes and stereotypes may also lead to erroneous decisions at a later stage in the case, such as at summary judgment, that risk is lessened by the opportunity for discovery and further case development that are not available at the beginning of a case. This explains why traditional pleading doctrine credits nonconclusory allegations as true, just as fraudulent joinder law resolves all disputed questions of fact and all ambiguities in the controlling law in favor of the non-removing party. Yet, the proposed amendments to §1447 ignore that courts are ill-equipped to engage in exhaustive merits inquiries at the jurisdictional stage, before an opportunity for factual development has been afforded.

B. Mandating Extensive Merits Review At Remand Would Be Inefficient and Costly

The bill's mandated entanglements into the merits of a case at the jurisdictional stage will also raise costs significantly for the court system and all parties, especially plaintiffs on whom the bill would place the burden of proving plausibility of the claims asserted (as well as proving their good faith in bringing the claim). Courts and commentators have previously recognized that expanding the fraudulent joinder inquiry would raise litigation costs substantially. *See generally* E. Farish Percy, *Making a Federal Case of It: Removing Civil Cases to Federal Court Based on Fraudulent Joinder*, 91 IOWA L. REV. 189, 228 (2005) (noting that a Rule 12(b)(6) type inquiry for fraudulent joinder "increases the possibility of 'runaway' fraudulent joinder proceedings where courts may spend an inordinate amount of time holding evidentiary hearings and weighing other evidence only to determine there is no jurisdiction");

Mattingly v. Chartis Claims, Inc., 2011 WL 4402428, at *3 (E.D. Ky., Sept. 20, 2011) ("It is important that courts impose a heavy burden on defendants who remove on the basis of fraudulent joinder because the practice of routinely removing cases to federal court by making borderline arguments of fraudulent joinder imposes tremendous costs on plaintiffs and the court system.").

C. Requiring Extensive Merits Inquiry At The Jurisdictional Stage Would Be Inconsistent With All Other Kinds Of Subject Matter Jurisdiction Inquiries

All other subject matter doctrines recognize that the merits inquiry at the jurisdictional stage should be appropriately limited. To show that the plaintiff cannot maintain her diversity case in federal court because the amount in controversy is insufficient to satisfy the statutory grant of diversity jurisdiction, the defendant bears the heavy burden of showing "to a legal certainty that the claim is really for less than the jurisdictional amount" in order to get the case dismissed. *Saint Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 289 (1938). The same approach is taken with regard to federal question jurisdiction. Only a showing by the defendant that the plaintiff's federal claim "is wholly insubstantial and frivolous" will warrant dismissal. *Bell v. Hood*, 327 U.S. 678, 683 (1946); *see also Oneida Indian Nation of N.Y. v. County of Oneida*, 414 U.S. 661, 666 (1974) (reiterating that dismissal for lack of subject matter jurisdiction because of the inadequacy of the federal claim is proper only when the claim is "so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy").

Moreover, by shifting the burden of proof from the defendant (the party seeking federal jurisdiction in the fraudulent joinder context) to the plaintiff (the party opposing federal jurisdiction), the proposed amendments to §1447 are inconsistent with the approach taken as to all other subject matter jurisdiction inquiries, which always places the burden on the party seeking to establish federal jurisdiction. This principle lies at the bedrock of all subject matter jurisdiction examinations. *See, e.g., Kokkonen v. Guardian Life Ins. Co of Am.*, 511 U.S. 375, 377 ("It is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction"); *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 182-83 (1936) (observing that "the party allegation jurisdiction [must] justify his allegations by a preponderance of evidence").

Thus, to adopt the amendments to §1447 that this bill proposes would cause one branch of subject matter jurisdiction analysis to be wholly out of step with how all other jurisdictional inquiries are conducted. For all other kinds of subject matter jurisdiction inquiries, the burden of proof always rests with the party seeking to establish federal jurisdiction; and with all other subject matter jurisdiction inquiries, doctrinal law recognizes that the scope of the examination should be limited so that courts are not bogged down in premature, wasteful adjudications of the merits at the jurisdictional stage, before they can or should be engaged in such evaluative examination.

D. The Proposed Amendments to §1447 Also Raise Federalism Concerns

Finally, by divesting state courts of jurisdiction and deciding merits questions that state courts now routinely resolve, proponents appear deaf to the serious federalism concerns that the bill raises.

Because removal always raises federalism issues about the powers that should be left to the state courts, the removal statutes are strictly and narrowly construed, and all doubts resolved against removal. *See Univ. of South Alabama v. American Tobacco,* 168 F.3d 405, 411 (11th Cir. 1999) ("Because removal jurisdiction raises significant federalism concerns, federal courts are directed to construe removal statutes strictly.") (citing *Shamrock Oil & Gas*, 313 U.S. 100, 108-09); *Brown v. Endo Pharm., Inc.*, 38 F. Supp. 2d 1312, 1318 (S.D. Ala. 2014) ("Because removal infringes upon state sovereignty and implicates central concepts of federalism, removal statutes must be construed narrowly, with all jurisdictional doubts being resolved in favor of remand to state court."). The proposed amendments to §1447 turn these longstanding constructional presumptions on their head by directing courts to conduct the kind of merits inquiries that are normally left to state courts. *Montano v. Allstate Indemnity*, 2000 WL 525592 (10th Cir., Apr. 14, 2000) at *2 (noting that the fraudulent joinder standard "is more exacting than that for dismissing a claim under Fed. R. Civ. P. 12(b)(6); indeed, the latter entails the kind of merits determination that, absent fraudulent joinder, should be left to the state court where the action was commenced").

Moreover, when the suit is maintained in a state court, the applicable pleading standards are governed by state law—and many of those remain only a standard of fair notice, eschewing the plausibility pleading of *Twombly* and *Iqbal*. By applying a plausibility standard to fraudulent joinder claims, the proposed legislation effectively imposes federal pleading requirements on cases filed in state court, in derogation of state authority to set their own pleading rules. And what makes the intrusion on state rights particularly hard to defend is that the proposed amendments are not necessary. If a defendant suspects improper joinder, it always has the option of seeking dismissal in state court of the claims against the non-diverse defendant, and then removing the remainder of the case after dismissal. This is the preferred practice for all of the reasons outlined above, and explains why the fraudulent joinder inquiry in federal court is, and should be, appropriately circumscribed.

CONCLUSION

This legislative body should recognize the collective judicial wisdom and experience that fraudulent joinder law reflects, and resist legislating technical procedural reforms that it is ill-equipped to undertake. Prudence especially warrants restraint when there has not been the kind of rigorous doctrinal and empirical study of long-established law that such reforms demand, and the available record provides

inadequate understanding of how such reforms might affect the administration of justice.

Mr. FRANKS. And I thank the gentleman.

And we will now recognize our third witness, Mr. Silverman.

TESTIMONY OF CARY SILVERMAN, PARTNER, SHOOK HARDY & BACON L.L.P

Mr. SILVERMAN. Thank you, Mr. Chairman, Ranking Member Cohen, and distinguished Members of the Subcommittee. I appreciate the opportunity to testify today on behalf of the U.S. Chamber and the Institute for Legal Reform.

The current process by which courts decide fraudulent joinder is in need for reform. The doctrine is intended to secure the Constitution's promise of a neutral Federal forum in lawsuits involving citizens of different states. Instead, it routinely allows for manipulation and gamesmanship. Such lawsuits have a toll on people who are sued solely to keep a case in state court. It also deprives litigants of an impartial forum, sending cases to local courts where the deck may be stacked against them. And, for the Judiciary, it has resulted in confusion and unnecessary litigation.

Let me briefly explain how this works. Plaintiffs' lawyers typically want to litigate their cases in state court. That is understandable. They have an advantage there. They are likely familiar with the judges and the trial court's local procedures. And as the Founders recognized, there is a danger that local courts may inherently favor local plaintiffs, and that remains as true today as it did then.

As you explained, Mr. Chairman, when each of the defendants is from a state different from each of the plaintiffs, there is complete diversity. A defendant can then remove the case from state to Federal court. It is easy, however, for a plaintiff's lawyer to destroy complete diversity. All he needs to do is name a local person or a business as a defendant, one from the same state as the plaintiff.

The plaintiff typically has no intention of actually litigating that claim or seeking a judgment against that person when its remand of that person will likely be dismissed. The only reason that the person is included is to block the Federal court from hearing the case.

As my prepared testimony shows, this tactic often involves naming people such as local managers, salespeople, insurance claims adjusters, or others who are not typically personally liable as a defendant when the real target is their employer. It involves naming local retailers, often family businesses that have nothing to do with how a product was designed, when the real product was the manufacturer. It involves naming local pharmacies that may have sold a drug but had no involvement in developing its labeling or warnings, when the real target is the pharmaceutical maker.

Fraudulent joinder provides Federal courts with the ability to ignore the presence of a local defendant when it is named in a lawsuit only to defeat Federal jurisdiction. There are two problems, however, with how courts evaluate fraudulent joinder which brings us to this bill today.

The first is that Federal courts are all over the map as to how they decide it. My prepared testimony outlines five different approaches courts have taken. There is the "no possibility of a claim or recovery" approach, which is what one Federal circuit refers to as the "no glimmer of hope" standard. There is the "wholly and

substantial and frivolous" approach, which seems akin to Federal Rule 11, also an extremely high standard. There are some courts that consider whether there is an obvious failure to state a claim. There are others that consider whether there is a reasonable basis for the claim, or a reasonable possibility of success. Other courts simply consider whether the plaintiff does indeed state a claim, taking an approach similar to an ordinary motion to dismiss, and that which is provided in the bill.

The courts also significantly vary on the evidence they will consider, and if they will consider at all whether the plaintiff has a good-faith intent to seek a judgment against a local defendant.

So the first problem is confusion in the law. The second is that these standards range from nearly impossible to very difficult to meet. This is the case even when the claim against a local defendant is extraordinarily weak.

The Fraudulent Joinder Prevention Act will help bring clarity to the law, reduce gamesmanship and litigation, and preserve access to a neutral Federal forum. The bill does so by adopting a uniform approach, requiring a plaintiff to state a plausible claim against the local defendant. This is a standard regularly applied by Federal courts when deciding a motion to dismiss. It is a modest tweak to the standard for fraudulent joinder. It does not expand diversity jurisdiction. It is balanced. A plaintiff still gets the benefit of the doubt. Nor does it dictate any results or tilt a judge's discretion on removal one way or the other. Rather, the bill will clarify that judges have broad discretion to consider evidence when deciding fraudulent joinder such as affidavits submitted by either party, or whether there is a good-faith intent to seek recovery from the local defendant.

The result will be a more realistic assessment of whether a plaintiff has stated a viable claim against a local defendant and intends to pursue a judgment against that person. Plaintiffs with legitimate claims against a local defendant will be able to litigate in state court, and out-of-state defendants that show there is no viable claim against the local defendant will be able to have the lawsuit decided in a neutral Federal forum.

Thank you again for holding this hearing and inviting me to testify today. I welcome your questions.

[The prepared statement of Mr. Silverman follows:]

Statement of the U.S. Chamber of Commerce

BY: Cary Silverman, Partner, Shook, Hardy & Bacon L.L.P.
On Behalf of the U.S. Chamber Institute for Legal Reform

ON: The Fraudulent Joinder Prevention Act of 2015

TO: U.S. House of Representatives Committee on the Judiciary
Subcommittee on the Constitution and Civil Justice

DATE: September 29, 2015

Testimony of Cary Silverman
On Behalf of
The U.S. Chamber of Commerce and the U.S. Chamber Institute for Legal Reform
The Fraudulent Joinder Prevention Act of 2015

Chairman Franks, Ranking Member Cohen, and distinguished Members of the Subcommittee, thank you for inviting me to testify today on behalf of the U.S. Chamber of Commerce and the U.S. Chamber Institute for Legal Reform ("ILR"). The U.S. Chamber of Commerce is the world's largest business federation representing the interests of more than three million companies of all sizes, sectors, and regions, as well as state and local chambers and industry associations, and dedicated to promoting, protecting, and defending America's free enterprise system. ILR is an affiliate of the Chamber dedicated to making our nation's overall civil legal system simpler, faster, and fair for all participants. I appreciate the opportunity to testify in support of the Fraudulent Joinder Prevention Act of 2015. This bill will reduce gamesmanship in litigation and safeguard access to neutral federal courts in cases involving litigants from different states.

Litigants from Different States Should Have Access to Neutral Federal Courts

Plaintiffs' lawyers often prefer to file lawsuits and keep their cases in state courts. There, they have a home field advantage. They are familiar with the local court's rules, procedures, and practices. They may personally know, or are at least familiar with, the local judges and how the judges are likely to view the case. Plaintiffs' lawyers may also believe that a local jury is likely to side with a local plaintiff against an out-of-state business, even if unconsciously.

In many states, trial court judges are not isolated from political pressure, including the potential repercussions of dismissing a local resident's claim as baseless on voters or on plaintiffs' lawyers who are very active in local judicial elections. Richard Neely, a former Justice of the West Virginia Supreme Court of Appeals, candidly explained the pressure placed on state court judges to side with local plaintiffs:

> As long as I am allowed to redistribute wealth from out-of-state companies to in-state plaintiffs, I shall continue to do so. Not only is my sleep enhanced when I give someone else's money away, but so is my job security, because the in-state plaintiffs, their families and their friends will re-elect me. . . . It should be obvious that the in-state local plaintiff, his witnesses, and his friends, can all vote for the judge, while the out-of-state defendant can't even be relied upon to send a campaign donation.[1]

Courts in some areas of the country have developed a reputation for being particularly hostile to business defendants.[2] They may have procedures that favor plaintiffs or unduly pressure

[1] Richard Neely, The Product Liability Mess 4 (1988).

[2] *See* U.S. Chamber Inst. for Legal Reform, 2015 Lawsuit Climate Survey: Ranking the States (Sept. 2015), *at* http://www.instituteforlegalreform.com/resource/2015-lawsuit-climate-survey-ranking-the-states/. Respondents to a survey of a national sample of 1,203 in-house general counsel, senior litigators or attorneys, and other senior executives named East Texas (Jefferson County); Chicago or Cook County, Illinois; Los Angeles, California; Madison County, Illinois; and New Orleans or Orleans Parish, Louisiana as local areas with the least fair and reasonable litigation environments.

defendants to settle even meritless cases, apply an anything-goes standard for admission of expert testimony, accept novel theories of liability, or have a history of excessive verdicts. Once prominent Mississippi plaintiffs' attorney Richard (Dickie) Scruggs has called them "magic jurisdictions":

> What I call the "magic jurisdiction," . . . [is] where the judiciary is elected with verdict money. The trial lawyers have established relationships with the judges that are elected; they're State Court judges; they're popul[ists]. They've got large populations of voters who are in on the deal, they're getting their [piece] in many cases. And so, it's a political force in their jurisdiction, and it's almost impossible to get a fair trial if you're a defendant in some of these places. . . . These cases are not won in the courtroom. They're won on the back roads long before the case goes to trial. Any lawyer fresh out of law school can walk in there and win the case, so it doesn't matter what the evidence or law is.[3]

There were similar concerns at the founding of our nation. The Framers' apprehensiveness of the potential for state court bias in favor of local interests led them to establish a neutral federal tribunal.[4] They regarded the availability of the federal courts to decide cases involving citizens of different states as critical to promoting public confidence that such claims would be decided promptly, efficiently, and impartially.[5]

The federal judicial system provides a level playing field for plaintiffs and defendants from different states. Its courts apply uniform rules of civil procedure and evidence. Cases are decided by judges who are insulated from political pressure through lifetime appointment.

The Constitution provides that federal judicial power extends not only to disputes involving federal law, but also controversies "between citizens of different states."[6] This is known as "diversity jurisdiction." Based on the letter of the Constitution, federal courts could consider any case that involves citizens of different states. The U.S. Supreme Court, in an early case, confined the federal judiciary's jurisdiction to cases in which there is "complete diversity."[7] Complete diversity means that, if a lawsuit is based solely on state law, a federal court will consider it if every defendant resides in a different state than every plaintiff.

That formula for federal court jurisdiction, however, easily lends itself to abuse. All a plaintiff's lawyer needs to do to "destroy" complete diversity is name a local business or

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[3] Richard Scruggs, *Asbestos for Lunch*, Panel Discussion at the Prudential Securities Financial Research and Regulatory Conference (May 9, 2002), *in* INDUSTRY COMMENTARY (Prudential Securities, Inc., N.Y., New York), June 11, 2002, at 5; *see also* Richard Scruggs, *Tobacco Lawyers' Roundtable: A Report from the Front Lines*, 51 DEPAUL L. REV. 543, 545 (2001). Scruggs pleaded guilty to conspiracy to conspiring to bribe a local Mississippi judge in 2008, and to improperly influencing another local judge in a separate incident in 2009. *See* Emily Le Coz, *Dickie Scruggs: A 2nd Chance*, Clarion Ledger, Apr. 24, 2015.

[4] *See* The Federalist No. 80, at 486 (Alexander Hamilton) (Bantam Books, 1982).

[5] *See* 3 Joseph Story, Commentaries on the Constitution § 1685 (1833).

[6] U.S. Const. art. III, § 2.

[7] *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 267 (1806). Congress has also limited the subject matter jurisdiction of federal courts to claims involving citizens of different states in which the amount in controversy exceeds $75,000. 28 U.S.C. § 1332(a).

individual—one that is from the same state as the plaintiff—as a defendant when the real target of the lawsuit is an out-of-state company. The Supreme Court understood this and that is why it recognized an exception to the complete diversity rule for "fraudulent joinder."[8]

Current Approaches to Fraudulent Joinder Strongly Favor Plaintiffs and Allow Abuse

Fraudulent joinder allows a federal court to disregard, for jurisdictional purposes, the citizenship of a non-diverse defendant. It allows the district court to retain jurisdiction by dismissing a non-diverse defendant from the lawsuit and denying a plaintiff's motion to remand to state court.

When a defendant believes that a plaintiff has named a local person or business solely to eliminate complete diversity and avoid federal court jurisdiction, the defendant can still remove (transfer) the case from state to federal court.[9] The plaintiff will then ask the federal court to remand the case to state court based on the lack of complete diversity.[10] The out-of-state defendant will counter by raising the fraudulent joinder exception.

Courts agree that the standard for fraudulent joinder is incredibly difficult to meet. They describe the burden placed on the party asserting fraudulent joinder as "a heavy one."[11] Courts find that "all doubts about jurisdiction should be resolved in favor of remand to state court."[12]

But federal courts do not agree on the standard for fraudulent joinder,[13] and it is a source of significant confusion – even within some federal circuits.[14] The standards range from nearly impossible to very difficult for a defendant to meet.[15] Examples of these standards include:

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[8] *See Wecker v. Nat'l Enameling & Stamping Co.*, 204 U.S. 176 (1907) (first recognizing fraudulent joinder exception to complete diversity).

[9] Under federal law, a defendant must remove a civil action to federal court within 30 days of filing. 28 U.S.C. § 1446(b)(2)(B). While this requirement avoids significant involvement by a state court in a case that will ultimately be decided by a federal court, it also means that there is no possibility that the state court will decide whether there is a viable claim against the local defendant before it is removed.

[10] 28 U.S.C. § 1447.

[11] *See, e.g., Stillwell v. Allstate Ins. Co.*, 663 F.3d 1329, 1332 (11th Cir. 2011); *Batoff v. State Farm Ins. Co.*, 977 F.2d 848, 851 (3d Cir. 1992); *Green v. Amerada Hess Corp.*, 707 F.2d 201, 205 (5th Cir. 1983).

[12] *See, e.g., Barbour v. Int'l Union*, 640 F.3d 599, 605 (4th Cir. 2011).

[13] *See City of Neodesha, Kansas v. BP Corp. N. Am.*, 355 F. Supp.2d 1182, 1185-86 (D. Kan. 2005) (recognizing the "lack of definitive law" on the standard for fraudulent joinder, and recognizing conflicting law within the Tenth Circuit).

[14] Several commentators have criticized courts' divergent and frequently shifting approaches to evaluating fraudulent joinder. *See, e.g.*, Kevin L. Pratt, Note, *Twombly, Iqbal, and the Rise of Fraudulent Joinder Litigation*, 6 Charleston L. Rev. 729 (2012); Paul Rosenthal, *Improper Joinder: Confronting Plaintiffs' Attempts to Destroy Federal Subject Matter Jurisdiction*, 59 Am. U. L. Rev. 49, 64-73 (2009) ("Rather than adopting one universal approach, courts attempt to discern fraudulent joinder by applying a collection of amorphous approaches.").

[15] *See id.* at 748-55; E. Farish Percy, *Making A Federal Case of It: Removing Civil Cases to Federal Court Based on Fraudulent Joinder*, 91 Iowa L. Rev. 189, 216-17 (2005).

- **"No possibility" of a claim or recovery.** This appears to be the most common approach.[16] Under this standard, as the Fifth Circuit found, "[a] court must find there is absolutely no possibility the plaintiff will be able to establish a cause of action against the non-diverse defendant or that outright fraud exists in the plaintiff's pleading of jurisdictional facts."[17] This standard allows a federal court to retain jurisdiction in only the most blatantly deficient cases, such as where a plaintiff names a local defendant only in the caption, makes no individual allegations against them, or does not sufficiently connect the non-diverse defendant to the case.[18] In the Fourth Circuit, district courts can retain jurisdiction under this standard only when the plaintiff has no "glimmer of hope" of recovering against the local defendant.[19]

- **The claim is "wholly insubstantial and frivolous."** The Third Circuit has found that for a claim to remain in federal court, the claims asserted against the local defendant must be "not even colorable" and "wholly insubstantial and frivolous."[20] Some district courts have taken a similar frivolous claim approach, but based on Rule 11,[21] which is an even more difficult standard to meet than showing there is no viable claim.

- **"Obvious" failure of claims.** Some courts, such as those in the Ninth Circuit, find fraudulent joinder exists "[i]f the plaintiff fails to state a cause of action against a resident defendant, and the failure is obvious according to the settled rules of the state."[22]

- **Lacking a "reasonable" or "colorable" basis for the claim.** In assessing fraudulent joinder, the Seventh and Eighth Circuits have considered whether the plaintiff has provided a "reasonable basis for the claim" or has "any reasonable possibility of success" against the local defendant, under which courts resolve any doubts in favor of the plaintiff.[23] Some courts similarly have required the plaintiff to show a "colorable basis" for the claim.[24]

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[16] *See, e.g., Weidman v. ExxonMobil Corp.*, 776 F.3d 214, 218 (4th Cir. 2015); *In re 1994 Exxon Chem. Fire*, 558 F.3d 378, 385 (5th Cir. 2009); *Whitaker v. Am. Telecasting, Inc.*, 261 F.3d 196, 207 (2d Cir. 2001); *Montano v. Allstate Indemnity*, 211 F.3d 1278, 2000 WL 525592, at *2 (10th Cir. 2000); *Triggs v. John Crump Toyota, Inc.*, 154 F.3d 1284, 1287 (11th Cir. 1998); *Gottlieb v. Westin Hotel Co.*, 990 F.2d 323, 327 (7th Cir. 1993).

[17] *Green v. Amerada Hess Corp.*, 707 F.2d 201, 205 (5th Cir. 1983).

[18] *See Weidman*, 776 F.3d. at 218.

[19] *Hartley v. CSX Transp., Inc.*, 187 F.3d 422, 426 (4th Cir. 1999).

[20] *Batoff v. State Farm Ins. Co.*, 977 F.2d 848, 851 (3d Cir. 1992).

[21] *See, e.g., Nelson v. Whirlpool Corp.*, 688 F. Supp.2d 1368, 1377 (S.D. Ala. 2009); *Sellers v. Foremost Inc.*, 924 F. Supp. 1116, 1118 (M.D. Ala. 1996).

[22] *McCabe v. General Foods Corp.*, 811 F.2d 1336, 1339 (9th Cir. 1987); *see also Hunter v. Philip Morris USA*, 582 F.3d 1039, 1043 (9th Cir. 2009); *Hamilton Materials v. Dow Chem. Corp.*, 494 F.3d 1203, 1206 (9th Cir.2007); *Morris v. Princess Cruises, Inc.*, 236 F.3d 1061, 1067 (9th Cir. 2001).

[23] *See, e.g., Schur v. L.A. Weight Loss Centers, Inc.*, 577 F.3d 752, 764 (7th Cir. 2009) ("[T]he district court must ask whether there is 'any reasonable possibility' that the plaintiff could prevail against the non-diverse defendant."); *Filla v. Norfolk S. Ry. Co.*, 336 F.3d 806, 810 (8th Cir. 2003) ("[T]he district court's task is limited to determining whether

- **Failure to State a Claim.** Many courts also look to the standard for dismissing a complaint for failure to state a claim when evaluating fraudulent joinder.[25] Some courts have recently incorporated the federal *Iqbal/Twombly* pleading standard.[26] This standard requires a complaint to contain sufficient factual matter, accepted as true, to state a claim that is "plausible on its face" and that does not rely on "mere conclusory statements."[27] Other courts apply the applicable state's pleading standard. If a defendant shows claims against the local defendant fail under state law, then a federal court will deny the motion to remand to state court.

Federal circuits also vary on the extent to which the district courts are permitted or required to look beyond the allegations in the plaintiff's complaint and consider extrinsic evidence when evaluating fraudulent joinder. Many courts will "pierce the pleadings" to consider summary judgment-type evidence submitted by the parties such as affidavits and deposition testimony, but there is no uniformity as to the extent of evidence or defenses courts will consider.[28]

Finally, when the plaintiff states a claim under state law against the local defendant, some courts will consider whether the plaintiff has a good-faith intent of pursuing a judgment against that defendant.[29] Other courts disregard such evidence.[30] This is an important element because it

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there is arguably a reasonable basis for predicting that the state law might impose liability based upon the facts involved."); *see also Batoff*, 977 F.2d at 851-52 (in which the Third Circuit recited the "no reasonable basis" test, but then applied a not "wholly insubstantial and frivolous" standard); *Travis v. Irby*, 326 F.3d 644, 648 (5th Cir. 2003) (equating the "any possibility of recovery" and "reasonable basis" tests).

[24] *See, e.g., Delgado v. Shell Oil. Co.*, 231 F.3d 165, 180 (5th Cir. 2000); *Coyne v. Am. Tobacco Co.*, 183 F.3d 488, 493 (6th Cir. 1999).

[25] *See, e.g., Dutcher v. Matheson*, 733 F.3d 980, 988 (10th Cir. 2013) ("To establish [fraudulent] joinder, the removing party must demonstrate either: (1) actual fraud in the pleading of jurisdictional facts, or (2) inability of the plaintiff to establish a cause of action against the non-diverse party in state court.") (quoting *Cuevas v. BAC Home Loan Servicing, LP*, 648 F.3d 242, 249 (5th Cir. 2011)); *Studer v. State Farm Lloyds*, No. 4:1-cv-413, 2014 WL 234352, at *4 (E.D. Tex. Jan. 21, 2014) (applying federal pleading standard to determine whether plaintiff has stated a cause of action for purpose of assessing fraudulent joinder).

[26] *See, e.g., Davis v. State Farm Lloyds*, No. 3:15-CV-0596-B, 2015 WL 4475860 (N.D. Tex. July 21, 2015); *Strizic v. Nw. Corp.*, No. CV 14-40-H-CCL, 2015 WL 1275404, at *3 (D. Mont. Mar. 19, 2015); *Plascencia v. State Farm Lloyds*, No. 4:14-CV-524-A, 2014 U.S. Dist. LEXIS 135081 (N.D. Tex. Sept. 25, 2014); *Beavers v. DePuy Ortho., Inc.*, 2012 WL 1945603, at *3 (N.D. Ohio May 30, 2012); *Okenkpu v. Allstate Tex. Lloyd's*, 2012 WL 1038678, at *7 (S.D. Tex. Mar. 27, 2012); *In re Yasmin & Yaz (DROSPIRENONE) Mktg., Sales Practices & Products Liab. Litig.*, 309-MD-02100-DRH-PMF, 2010 WL 1963202, at *4 (S.D. Ill. May 14, 2010).

[27] *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

[28] *See* Percy, 91 Iowa L. Rev. at 194 (citing cases grappling with such these issues and showing the lack of uniformity in approach).

[29] *See, e.g., Boyer v. Snap-on Tools Corp.*, 913 F.2d 108, 111 (3d Cir. 1990) (holding that joinder is fraudulent "where there is no reasonable basis in fact or colorable ground supporting the claim against the joined defendant, *or* no real intention in good faith to prosecute the action against the defendant or seek a joint judgment") (emphasis added); *Abels v. State Farm Fire & Cas. Co.*, 770 F.2d 26, 32 (3d Cir. 1985) (same); *In re Diet Drugs (Phentermine, Fenflu-Ramine, Dexfenfluramine) Prods. Liab. Litig.*, 220 F.Supp.2d 414 (E.D. Pa. 2002) (finding that certain drug manufacturers, pharmacies, and doctors were fraudulently joined and finding, based on prior litigation and submitted affidavits, that plaintiffs' had no real intention good faith to seek a judgment against phentermine defendants).

addresses the common practice of naming a local defendant, which may be subject to liability, purely to defeat diversity jurisdiction. In such cases, the plaintiff has no intent of seeking recovery from what may be a small retailer or individual without significant resources.

Further stumbling blocks are put in the way of a defendant who is absolutely certain that the plaintiff has no intent of imposing liability on a fraudulently joined party because federal district courts focus on the plaintiff's complaint at the precise time the petition for removal was filed.[31] Once the case is back in state court, the out-of-state defendant typically cannot remove the case again. This is the case even if the state court immediately dismisses the claim against the local defendant.[32] A plaintiff may not even serve the local defendant, request a default judgment against a local defendant that never files an answer, seek discovery from the local defendant, or take any other action to pursue its claims against that defendant. Even if the plaintiff voluntarily drops the local defendant from the lawsuit, if the plaintiff waits until one year after the filing of the lawsuit to do so,[33] the defendant can only remove if it has evidence that the plaintiff acted in "bad faith" to prevent removal,[34] a very difficult requirement on top of the already high fraudulent joinder standard.

How the System is Abused

To avoid federal court jurisdiction, plaintiffs' lawyers have a number of go-to local defendants that they name depending on the type of lawsuit.

In insurance coverage disputes, it is commonplace for plaintiffs' lawyers to name local claims adjusters so that they may sue an out-of-state insurer in a friendly state court.[35] They have done so even when the adjuster's only role was to assess the damage claimed by the insured.[36]

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[30] *See, e.g., Triggs v. John Crump Toyota, Inc.*, 154 F.3d 1284, 1290-91 (11th Cir. 1998) ("[A] plaintiff's motivation for joining a defendant is not important so long as the plaintiff has the intent to pursue a judgment against the defendant); *Melton v. Gen. Motors Corp.*, No. 1:14-cv-0815-TWT, at 9 (N.D. Ga. July 18, 2014) (relying on *Triggs* to grant remand even when evidence showed plaintiff's target was automaker, not local auto dealership).

[31] *See Brown v. Jevic*, 575 F.3d 322, 326 (3d Cir. 2009).

[32] Ordinarily, a defendant must remove an action based on the diversity of citizenship in the initially filed complaint. 28 U.S.C. § 1446(b)(3) provides a narrow exception to this rule, providing an additional 30-day period for removal if a plaintiff files an amended complaint in which there is complete diversity of citizenship.

[33] *See* 28 U.S.C. § 1446(c)(1).

[34] Federal law prohibits defendants from removing a case to federal court more than one-year after the case is filed. 28 U.S.C. § 1446(c). Congress enacted a "bad faith" exception to this one-year bar on removal in 2011. Federal Courts Jurisdiction and Venue Clarification Act of 2011, Pub. L. No. 112-63, 125 Stat. 758 (codified at 28 U.S.C. § 1446(c)(1)). Some courts had already recognized an equitable exception along these lines to address blatant gamesmanship before Congress acted. *See, e.g., Tedford v. Warner-Lambert Co.*, 327 F.3d 423, 428-29 (5th Cir. 2003). Most federal courts, however, felt powerless to act and awaited Congress's intervention. *See* Ugo Colella & Todd Seaman, *A Primer on 'Bad Faith' in Federal Removal Jurisdiction*, Law360, Oct. 8, 2014.

[35] *See* Jennifer Gibbs, *The Wild West of Improper Joinder in North Texas*, Law360, Aug. 17, 2015 (showing that while one federal judge in Texas has developed and applied "badges of improper joinder" to deny remand to state court, other federal judges in Texas have granted remand and even awarded plaintiffs' attorneys fees).

[36] Plaintiffs' lawyers routinely offer to dismiss the adjuster at an early stage in exchange for the defendant insurer's agreement to refrain from removing the case to federal court. *See* Jennifer Gibbs, *Don't Mess With Texas Adjusters in*

In product liability lawsuits, plaintiffs' lawyers often name a local distributor (even when the state has adopted an "innocent seller" law that precludes product liability for merely selling or distributing a product made by another)[37] or a sales representative (who had no involvement in developing the product's labeling or warnings).[38] In cases targeting automakers, plaintiffs' lawyers may name local auto dealerships, alleging, for example, that the dealership serviced the vehicle or knowingly sold a dangerous product.[39]

In product liability lawsuits against pharmaceutical manufacturers, plaintiffs' lawyers have a history of naming local pharmacies. The pharmacy often faces claims premised on a general duty to warn of the risks of a drug, even though this role goes beyond a pharmacist's ordinary duty to correctly fill a prescription. During consideration of the Class Action Fairness Act ("CAFA"), Congress and the American public became familiar with the story of Hilda Bankston, the former owner of the Bankston Drug Store.[40] Her store was called "ground zero" for pharmaceutical litigation because, as the only pharmacy in plaintiff-friendly Jefferson County, Mississippi, Bankston Drug Store was named in numerous lawsuits targeting out-of-state drug makers.[41]

In personal injury lawsuits, such as slip-and-fall claims, against retailers, hotels, and other national businesses, plaintiffs' lawyers include a local store manager or employee as a defendant, even though he or she would not be personally responsible for injuries on the property.

Hail Damage Claims, Law360, Feb. 6, 2015 (finding that some judges have rejected "this transparent game" in hail damage claims).

[37] *See, e.g., Barnes v. Gen. Motors*, LLC, No. 2:14-cv-00719, 2014 WL 2999188 (N.D. Ala. July 1, 2014) (remanding product liability case claiming automakers failed to include needed airbags where plaintiff included allegation that car dealerships knowingly sold a dangerous product; court found applicability of narrow exception to state's innocent seller defense was unsettled); *Lazenby v. ExMark Manufacturing Co.*, No. 3:23-CE-82-WKW, 2012 WL 3231331, at *3 (M.D. Ala. Aug. 6, 2012) (remanding case with similar reasoning where plaintiff included claim against lawn mower distributor). Courts have also remanded product liability cases targeting pharmaceutical manufacturers that include a non-diverse distributor, even if the plaintiff directs all of its allegations against the manufacturer and does not show the named distributor actually distributed the drugs taken by the plaintiff. *See, e.g., Hatherey v. Pfizer, Inc.*, No. Civ. 2:13-00719 WBS CKD, 2013 WL 3354458, at *7-8 (E.D. Cal. July 3, 2013).

[38] Courts have reached inconsistent results in these cases. *See* Jessica Davidson Miller & Milli Kanani Hansen, *Fighting Back Fraudulent Joinder in Pharmaceutical Drug and Device Cases, RX for the Defense* (Defense Research Inst. Apr. 13, 2012) (surveying court decisions).

[39] Some courts have allowed use of this tactic to avoid federal jurisdiction even when there is evidence that the plaintiff plans to dismiss the dealership upon obtaining a settlement with the manufacturer. *See, e.g., Melton v. Gen. Motors Corp.*, No. 1:14-cv-0815-TWT, 2014 WL 3565682 (N.D. Ga. July 18, 2014) (finding in case alleging ignition defect caused fatal accident that allegation that a Georgia-based auto dealership negligently failed to diagnose defect during servicing prevented removal, even when plaintiffs had earlier settled claim with GM and dismissed action against dealership but subsequently rescinded settlement agreement and renewed negligence claim).

[40] *See* Hearing Before the Senate Comm. on Jud., S. Hrg. 107-939, 107th Cong., 2d Sess. (July 31, 2002) (testimony of Hilda Bankston).

[41] *See* Jerry Mitchell, *Jefferson County Ground Zero for Cases*, Clarion-Ledger (Jackson, Miss.), June 17, 2001, at A1; Mark Ballard, *Mississippi Becomes a Mecca for Tort Suits*, Nat'l L.J., Apr. 30, 2001, at A1.

Federal courts decide numerous motions to remand involving fraudulent joinder each year. Here are a few recent cases that illustrate the problem with the current standard and the need for reform:

- A plaintiff who sued Goodyear Tire & Rubber Company, claiming a defective tire caused his accident, also named the local auto repair shop, Ink's Firestone, where he claimed to have bought the tire. Ink's had no record of the sale and neither did the plaintiff – that is, until Goodyear removed the action to federal court. One day before the plaintiffs' lawyer filed a motion to remand the case to a Louisiana state court, his client filed an affidavit asserting that he purchased the tire from Ink's, paying cash. The competing affidavits, the federal court found, "cancelled each other out" and created a factual dispute. Although Louisiana law only subjects manufacturers to liability for product defects, the court held that it "cannot conclude that the Plaintiff does not have at least an arguably viable cause of action against [the repair shop]." It took on face value the plaintiff's assertion that the tire defect was so "obvious" that the repair shop could have spotted it. The plaintiff had "satisfied, theoretically at least, the minimal burden required to make out a claim" against Ink's.[42]

- A customer, who was injured when boxes of Christmas trees fell on him while shopping at a Wal-Mart, sued the retailer. His lawyer also named a local store manager, Carolyn Napoleon, making a bare assertion that she negligently managed the store. The retailer countered that Ms. Napoleon was merely an assistant manager and not personally responsible for customer injuries. The district court remanded the case to a New Jersey state court, finding that the retailer had not met its heavy burden to show the claim against Ms. Napoleon to be "wholly insubstantial and frivolous."[43] In a separate case against Wal-Mart, involving a slip-and-fall, a district court remanded the case to the plaintiff-friendly Circuit Court in St. Clair County, Illinois, even though Donna Thomason, the local manager named as a defendant, was not in the store at the time of the fall.[44]

- A person who tripped and fell on a sidewalk outside a Marriott Residence Inn in Philadelphia sued the hotel chain and also named the hotel's general manager at the time, William Walsh, as a defendant. The plaintiff did not allege that Mr. Walsh personally participated in any of the negligent conduct alleged to have caused her injury (as required to hold a corporate agent personally responsible under Pennsylvania law) and Mr. Walsh submitted an affidavit stating that he had no involvement in the inspection, repair, or maintenance of the sidewalk. The court refused to consider the affidavit and found a "reasonable inference" of personal participation in the complaint. It also found that Marriott failed to meet the heavy "wholly insubstantial and frivolous" claim standard. It remanded the case to the Court of Common Pleas of Philadelphia County, a jurisdiction of concern to corporate defendants.[45]

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[42] *King v. Ink's of Concordia Street, Inc.*, No. 13-2043, 2014 WL 1689932 (W.D. La. Apr. 28, 2014).

[43] *Cardillo v. Wal-Mart Stores, Inc.*, No. 14-2879, 2014 WL 7182525 (D. N.J. Dec. 15, 2014).

[44] *Lambert v. Wal-Mart Stores, Inc.*, No. 14-CV-1124-DRH-SCW, 2015 WL 264817, at *1 (S.D. Ill. Jan. 20, 2015).

[45] *Gaynor v. Marriott Hotel Servs., Inc.*, No. 13-3607, 2013 WL 4079652 (E.D. Pa. Aug. 13, 2013).

- A car accident occurred in Bristol Township, Pennsylvania, located in Bucks County, involving the plaintiff and a Dunbar armored vehicle. The plaintiff, a Pennsylvania resident, sued Dunbar (a Maryland corporation) and the driver (a New Jersey citizen). There would have been complete diversity except for the inclusion of Antoine Edwards. Mr. Edwards was a passenger in the armored vehicle–the security guard who picks up the cash. He was in the back seat at the time of the accident. Under Pennsylvania law, a passenger has no duty to protect people from the driver's negligence. However, the plaintiff asserted that Mr. Edwards was a co-driver and navigator. The court found that the plaintiff stated a "colorable claim" against the passenger by asserting that Mr. Edwards may have had authority to give orders or directions to the driver. It also remanded the case to the Court of Common Pleas of Philadelphia County.[46]

- A city in Kansas filed a lawsuit against several BP affiliates seeking one billion dollars in damages for alleged contamination in the soil and groundwater under the city. The city named one individual as a defendant, Norm Bennett, a local resident who handled community relations part-time for BP. The town's only claim against Mr. Bennett was "fraud by silence." During a state court hearing, the town's lawyer stated, "[t]he damages sought in this case are well beyond what any individual could pay. The plaintiff will be looking for British Petroleum for satisfaction of that judgment, not Mr. Bennett." The federal court found that even this statement was insufficient to show the town did not plan to proceed against Mr. Bennett. It not only remanded the case to state court, but awarded the town its legal fees.[47]

- Plaintiffs' lawyers have repeatedly named Secant Medical LLC, a Pennsylvania-based supplier of materials used in pelvic mesh devices, in lawsuits targeting the manufacturer of the devices, Ethicon. The lawyers named Secant even though a law passed by Congress in 1998, the Biomedical Access Assurance Act ("BAAA"), provides immunity to suppliers of raw materials used in medical devices to safeguard the availability of such needed components.[48] Ethicon removed the cases to federal court, arguing that Secant was fraudulently joined as it is not subject to liability under the BAAA. In 2013, the federal district court coordinating mesh cases from across the country remanded these cases to the Mass Tort Division of the Court of Common Pleas of Philadelphia County, finding it not absolutely certain that the BAAA applied.[49] After the manufacturers continued to remove additional cases filed against them, the federal court imposed sanctions on them.[50] Three months later, the state court judge to

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[46] *Accardi v. Dunbar Armored, Inc.*, No. 13-1828, 2013 WL 4079888 (E.D. Pa. Aug. 13, 2013).

[47] *City of Neodesha, Kansas v. BP Corp. N. Am.*, 355 F. Supp.2d 1182 (D. Kan. 2005). In 2006, the state trial court certified a class of all Neodesha property owners against BP. Ultimately, a Kansas jury entered a defense verdict for BP on all counts in 2007, and a Kansas appellate court affirmed last year. *City of Neodesha, Kansas v. BP Corp. N. Am.*, 334 P.3d 830 (Kan. Ct. App. Aug. 22, 2014). Mr. Bennett was no longer a defendant at the time of the verdict. It is unclear when he was dismissed from the case.

[48] The Biomaterials Access Assurance Act of 1998. Pub. L. No. 105-230 (codified at 21 U.S.C. §§ 1601 to 1606).

[49] *See In re Ethicon, Inc., Pelvic Repair Sys. Prods. Liab. Litig.*, No. 2:13-cv-26024, 2013 WL 6710345 (S.D. W. Va. Dec. 19, 2013).

[50] *Wilson v Ethicon Women's Health & Urology*, No. 2:14-cv-13542, 2014 WL 1900852 (S.D. W. Va. May 13, 2014).

> whom these cases were remanded appropriately applied the BAAA and, in a one-page order, dismissed the supplier from the case.[51]

As highly respected Judge J. Harvie Wilkinson III of the U.S. Court of Appeals for the Fourth Circuit recently recognized, "[t]here is a problem with fraudulent jurisdiction law as it exists today, I think, and that is that you have to establish that the joinder of a non-diverse defendant is totally ridiculous and that there is no possibility of ever recovering. That it is a sham. That it is corrupt. That is very hard to do.... The problem is that the bar is so terribly high."[52]

The Solution

Congress can provide greater clarity in the law and reduce gamesmanship in litigation by codifying an approach to assessing fraudulent joinder through amending the existing federal statute providing for remand to state courts, 28 U.S.C. § 1447(c). The Fraudulent Joinder Prevention Act provides just such a solution. It has three elements.

First, the bill requires federal courts to evaluate whether the plaintiff has stated a "plausible claim for relief" against the non-diverse defendant. This standard would establish parity between the standard a court typically uses to decide whether a complaint states a viable claim and decides fraudulent joinder. It is a standard that is well understood by federal judges and will not create new litigation or confusion to implement. It is an approach for evaluating fraudulent joinder already used by some federal courts.[53]

Second, the bill would make clear that federal judges can consider whether the plaintiff has a good faith intention of seeking a judgment against a non-diverse defendant.[54]

Third, the bill clarifies that federal courts can consider information beyond the four-corners of the complaint when evaluating whether the plaintiff has fraudulently joined a defendant. A plaintiff would have the opportunity to submit affidavits or other evidence beyond the pleadings to show a "plausible claim for relief" against the non-diverse defendant. A defendant would also have the opportunity to respond with affidavits or other evidence showing that the plaintiff does not have a viable claim against the local defendant or does not have a good faith intention of seeking a judgment against the local defendant.

Having a uniform standard for fraudulent joinder will benefit both plaintiffs and defendants and help the federal courts operate more predictably and fairly. The bill adopts an

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[51] *In re Pelvic Mesh Litig.*, No. 1402829, 2014 WL 4188104 (Ct. of Com. Pleas. Philadelphia County, Aug. 22, 2014).

[52] *See* Federalist Society, 2014 National Lawyers Convention, Diversity Jurisdiction from Strawbridge to CAFA – Event Video, Nov. 17, 2014, *at* http://www.fed-soc.org/multimedia/detail/diversity-jurisdiction-from-strawbridge-to-cafa-event-video (video at minute 1:08:30 to 1:10:10).

[53] *See supra* note 26.

[54] The Supreme Court has included "no intention to pursue" in its fraudulent joinder analysis. *See, e.g., Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 98 (1921) ("[T]he joinder was a sham and fraudulent—that is, . . . without any purpose to prosecute the cause in good faith against the [defendant]" and "with the purpose of fraudulently defeating the [other defendant's] right of removal."); *Chi., Rock Island & Pac. Ry. Co. v. Schwyhart*, 227 U.S. 184, 194 (1913) (explaining that courts faced with a fraudulent joinder question should evaluate "whether there was a real intention to get a joint judgment"). The Third Circuit, as discussed earlier, has done so.

approach that remains favorable to plaintiffs with legitimate claims who want their case decided in a local court. The new standard, however, will allow federal courts to decide cases where there is no viable claim against an individual or business named as a defendant only to thwart federal jurisdiction.

This bill makes only a modest change to the existing system. It does not expand the diversity jurisdiction of the federal courts. It will only impact a small subset of diversity jurisdiction cases that are removed from state court, involve multiple defendants, and require an assessment of fraudulent joinder. As such, the changes made by the bill should not significantly impact the number of cases decided in federal court. The bill does not dictate any results, nor does it tilt a judge's decision on removal one way or another. Rather, the bill simply allows judges to consider more and more relevant information in making their decisions. It will result in a more realistic examination of whether a plaintiff has stated a viable claim against a local defendant and intends to pursue a judgment against that individual or entity and reduce the opportunity for gamesmanship in our federal courts.

The bill appears to propose the type of change that federal judges should support. For example, Judge Wilkinson has commented that "making the fraudulent joinder law a little bit more realistic . . . appeals to me [and] . . . addresses some real problems."[55] He expressed support for addressing this problem by amending the removal statute "at the margins" to make it "more specific" as "exactly the kind of approach that I like because it is targeted."[56] That is precisely how the Fraudulent Joinder Prevention Act addresses this issue.

* * *

Thank you for inviting me to testify. I am happy to answer any questions you may have.

[55] *See* Federalist Society, 2014 National Lawyers Convention, Diversity Jurisdiction from Strawbridge to CAFA – Event Video, Nov. 17, 2014, *at* http://www.fed-soc.org/multimedia/detail/diversity-jurisdiction-from-strawbridge-to-cafa-event-video (video at minute 1:08:30 to 1:10:10).

[56] *Id.* (video at 1:07:30 to 1:08:30). Judge Wilkinson was responding to a suggestion to amend the statute to permit federal jurisdiction based on the "primary defendant," viewing this approach as preferable to a minimal diversity approach rooted in the Constitution.

Mr. FRANKS. Thank you, Mr. Silverman.

Thank you all for your testimony.

We will now proceed under the 5-minute rule. I will begin by recognizing myself for my 5 minutes.

My first question is to you, Ms. Milito. In his written testimony, Professor Hoffman discusses the cost he argues this bill may impose upon plaintiffs and the courts. Could you please elaborate further on the very real costs that the current fraudulent joinder standard imposes on American small businesses?

Ms. MILITO. Yes. Thank you very much for that question. In my remarks I noted that litigation brings great angst and expense to small business owners. In my time at NFIB, which is now well over 10 years, I talk with business owners too often who are named as a defendant in a lawsuit, and my discussions with them mirror the findings that the Small Business Administration found in the study they conducted a few years ago to determine what is the real impact of litigation on small businesses, and they found there are really four things. There is financial expense. There is an emotional expense. There are changes to how a business operates, including a wariness, unfortunately, that develops with their customers, and I find this when I talk with business owners too. It is who do we trust anymore? Are they going to target us? Who are the customers that I can trust there, too? And then the final thing, and this is a very real concern with small businesses in this day and age of social media, is damage to the business' reputation, and that goes back too to the financial cost, but it is kind of a separate thing too. There is real damage to a business' reputation when they are named as a defendant in litigation alongside of, say, a big pharmaceutical company, and then you have the local drugstore named too. It makes the papers, and that is a real concern for small business owners.

Thank you.

Mr. FRANKS. Thank you.

Mr. Silverman, in his testimony Professor Hoffman asserts that fraudulent joinder law is applied uniformly, with some minor variances based on semantics. Do you agree with that, that the standard Federal judges apply to decide the fraudulent joinder question is uniform across the Federal courts, and that any difference between the standard applied is merely semantics?

Mr. SILVERMAN. Mr. Chairman, I would respectfully disagree. What I have seen in my research is that even within a Federal circuit, the standard varies significantly from case to case. Even as many courts seem to follow the "no possibility of a claim" approach, those same courts go on to define that possibility very differently, whether it is a reasonable possibility, absolutely no possibility, or no glimmer of hope, and some are looking at it in the plain way of whether there is actually a claim at all.

I don't think it is just semantics. I think there is a great amount of variation that leads, I think the evidence shows, to different results. My prepared testimony cites at least three Law Review articles that recognize these significant variations and that they are a problem.

I also believe that Professor Arthur Hellman of the University of Pittsburgh School of Law submitted prepared testimony that agrees with that assessment.

Mr. FRANKS. Well, let me follow up. The Fraudulent Joinder Prevention Act essentially makes three changes regarding the Federal courts' fraudulent joinder determination. Number one, it permits judges to look at affidavits and other evidence. It creates a uniform plausible claims standard. And it requires that plaintiffs act in good faith when joining defendants to their lawsuits. Do these three changes create new legal concepts, or are they all based on concepts that Federal judges are familiar with?

Mr. SILVERMAN. All of these concepts are firmly rooted in U.S. Supreme Court jurisprudence, some of which goes back 100 years. These are concepts from existing law.

First, as to the plausibility standard, as we have discussed today, this is the same standard that Federal courts now routinely apply to determine whether the complaint states a viable claim when there is a motion to dismiss. It is a standard set by the U.S. Supreme Court that is now well understood and every day is being applied in cases. It doesn't surprise me, as the Professor has stated, that there are 85,000 cases citing this case because it comes up every single time there is a motion to dismiss, and courts know what to do with it.

As to the affidavits and other evidence, this is more a clarification or codification of existing law than a change. Most courts are already considering these materials when deciding fraudulent joinder.

With respect to good faith, the Supreme Court has said, in cases dating back to 1921 and 1931, that courts, when deciding fraudulent joinder, can look at the good faith in bringing a claim against that local defendant and seeking a judgment. This would just codify that and clarify that it applies, because not all courts are looking at it.

Mr. FRANKS. Well, thank you, Mr. Silverman.

I am now going to recognize the Ranking Member for 5 minutes for his questions.

Mr. COHEN. Thank you, Mr. Chairman.

Professor Hoffman, you teach at the University of Houston Law School?

Mr. HOFFMAN. I do. I have recently stepped down as the Associate Dean, so I should clarify the Chairman's remarks, a happy change. I am no longer the Associate Dean, and now I get to return to my regular life and not take care of everybody else's.

Mr. COHEN. You are the John Boehner of Houston, yes.

When you go back to your class, what will you tell them about this hearing and the law that we discussed and the reasons why you even think this came to a hearing in the United States Congress?

Mr. HOFFMAN. So, the issues that we talk about are exactly the issues that we talk about every day in my course, subject matter removal, pleading standards. I mean, every one of these we either have talked about or are on the syllabus to talk about. This is very familiar law.

As I tried to indicate in my remarks specifically on fraudulent joinder in terms of how old it is, courts have been applying it for a long time, and with thousands of cases it should come as no surprise that there are variances in language. I quote a Fifth Circuit case, for instance, that even goes out of its way to point out that just within that one circuit some of the courts say "no possibility," as Mr. Silverman pointed out, and others say things like "no reasonable basis" or "no reasonable possibility." And then the Fifth Circuit goes on to say those standards are interchangeable.

So maybe the thing to really drive home here is the same thing I drive home with my students, which is that procedure drives many outcomes in cases, sometimes positively, sometimes negatively. The concern that we should always have whenever we reform procedure or try to think about making reforms is whether in doing so we are changing the balance of power in some way that makes it harder. What I fear is that in a circumstance like this where the real issue is the substantive law, as I indicated earlier, that we are really focused in the wrong place.

And again, just to make one other point about that to make sure that point is clear, regardless of what the semantic standard is, Representative Cohen, with fraudulent joinder, what really happens is that when courts find that the substantive law provides a right for relief, they find there is no fraudulent joinder and they send it back. And conversely, when they find that there is no reasonable chance of recovery because the law doesn't provide a right to recover, they find appropriately that fraudulent joinder has occurred. So the action is in the substantive law. If you were to read 100 cases, I would submit that—I don't want to say 100 out of 100, but almost all of them are going to break exactly as I say.

So it raises a nice lesson for students that procedure, unfortunately or fortunately, can be important because of the power that goes in and goes behind a lot of these procedural rules.

Mr. COHEN. Thank you.

Ms. Milito, if you were a student in Professor Hoffman's class, what would you ask him about this? And when he explains that there is really no need for change in the law, that this is all based on the substantive law, then why would there even be a need to have this law to help small business?

Ms. MILITO. I would ask him about, if you will, vindicating the rights of these small business owners, the defendants in the case, who are, as I have been told by a member, wrongly accused in an action, and how can we more efficiently get to that "no reasonable chance of recovery" finding? Is there a way that we can get to the finding that Professor Hoffman just referred to quicker and in a more efficient manner in our courts without getting to discovery? Because there is one thing you learn in civil procedure: discovery can go on for a long time, and it can be very expensive. And the small business owners who I hear from who believe they are wrongly accused don't want to get to that stage of litigation. They want to get out. So that would be my question to the professor.

Mr. COHEN. And, Professor, would you respond to her now?

Mr. HOFFMAN. So, obviously, I don't agree with the substance, but I thought she said it very well, and if you were in my class I would have given you an A.

Mr. COHEN. Mr. Silverman said that there are a whole lot of differences in the different districts on this issue. Aren't there are a lot of differences in districts on other issues as well?

Mr. HOFFMAN. Certainly, and again——

Mr. COHEN. How do those normally get resolved?

Mr. HOFFMAN. The cases percolate through the system. Eventually, enough of them make it to the circuit courts, to the intermediate courts of appeals. Sometimes there is agreement within those courts, sometimes there isn't. When there isn't, once in a blue moon the Supreme Court uses one of its very, very few—it only hears about 70 cases a year nowadays, so it can't resolve all these issues, but occasionally it does.

I mean, plausibility is a good example of that. I mean, this notion that we are doing it a lot, and therefore we know what we are doing, really I think, respectfully, misses the mark. If you think about it, even if we don't engage in an empirical debate about what is or isn't going on in the lower courts, just look at the word "plausible." I mean, what does it mean for something to be plausible?

Again, going back to my class, I can tell you that if my students were here to testify, they would tell you that they are utterly baffled by what this standard is that the Court has announced, and it really got announced out of whole cloth. I mean, the test that *Twombly* announced in 2007 was essentially a brand-new test, and certainly as a matter of pleading standards was new, and the courts are struggling to figure this out. There isn't any reason to think that for plausibility, as well as for this business about good faith, that it would come out any differently if we were to incorporate it into remand law.

And, by the way, just one other point about good faith. You know, there is a nice lesson here. In 2011, Congress passed the JVCA, the Jurisdiction and Venue Clarification Act, and one of the changes that it made, an interesting point of comparison here, is they amended 1446. It used to be that a defendant could only remove a diversity case if it was within 1 year of when it had been commenced. But then there were some plaintiffs who once in a while played games and maybe would dismiss the non-diverse defendant 366 days later.

So the law got amended to say you could look at the plaintiff's bad faith after the case had been on file for a year, bad faith in keeping the case from being removed, and the Congress amended the law to put bad faith in there, but it is after a year has gone by. In other words, it gives the district judge a chance to sit back and say has the plaintiff been pursuing discovery equally against the non-diverse and diverse defendant? If they haven't, if they have basically been ignoring the non-diverse defendant, it is some pretty good evidence that maybe they aren't really targeting them.

But what this bill does is it says, literally in the first inning of the game, but even before the inning has ended, 30 days into the case, the district judge is supposed to figure out what good faith the plaintiff had, and that isn't a standard that we know, and it is one that I submit is going to cause a great deal of confusion.

Mr. COHEN. Well, thank you for your testimony, and in spite of that fact I am still going to hope that Greg Ward has a bad game when he plays Memphis. [Laughter.]

Mr. HOFFMAN. So noted.

Mr. FRANKS. I thank the gentleman, and I now yield to the gentleman from Iowa for his questions.

Mr. KING. Thank you, Mr. Chairman. I appreciate being recognized. I appreciate the testimony of the witnesses and the trouble you take to help inform this Congress.

As I listened to the testimony here this morning, I have a couple of questions along the way I would direct first to Mr. Hoffman. As I listened to your testimony, one of the points you made is that we need to be aware of legislating by anecdote. It is one of my concerns, too. When I was first elected to state office, I fell prey to that myself. And when it was pointed out to me that you can't fix every problem by legislation, it was one of the few times that I heard someone say something that immediately changed my mind on the spot. So, that matters.

However, you also mentioned that you could show as many cases on the opposite side of this argument. So anecdote matched up against anecdote, where is the preponderance of the anecdotes, in your opinion?

Mr. HOFFMAN. So, I think it is right, and I am glad you asked me that question. The standard is a high standard, so it is certainly more often the case, and depending on the circuit sometimes much more often the case, that a defendant, a non-diverse defendant who has been named is found not to have been fraudulently joined, and so the motion to remand is granted.

My point is to say it is a big litigation system. It is a big country. We have lots of cases, and I have no doubt that there are cases where judges have made a mistake on one side. My point is only that there are just as many, and I am happy to give examples. But again to your point, there is a danger if we focus only on the examples.

Mr. KING. I think instead I would go this way with it, that we are talking about justice here on the Judiciary Committee, and when we talk about justice, it is not something we do away with as far as the preponderance of the anecdotes that we have. It should be what is the best thing we can do to bring out the maximum amount of justice and equity, and I am one of those people who forbids my staff to use the word "fair," which I didn't notice anybody using this morning, because you can't define that. It has multiple utilizations and code, but there is no consistent definition of "fair." So we should be providing justice and equity.

What provides justice and equity? The other two witnesses would argue this bill does. You argue that it is too complex and we should trust the collective judicial wisdom. That is a little bit harder to swallow here in the aftermath of some of the Supreme Court decisions that have come down lately, the collective judicial wisdom.

But I would just make the point that I don't hear anyone testifying that there is any reservation about Congress' constitutional authority to write these regulations. There is no one among the panel that would make that case, is there?

Mr. HOFFMAN. No. The only point, to the extent that I have made one, Representative King, in my written testimony—I didn't say anything today—is I think there are concerns about the Federalism issues because of the nature of what happens. But I want to be

clear in that I don't think there is, for example, an Article 3 issue involved here as kind of the scope of——

Mr. KING. Okay, and that was my point. I just wanted to establish that. We don't have a disagreement on Article 3 authority.

Mr. HOFFMAN. We do not.

Mr. KING. And I certainly agree. But you made another point about the definition of the word "plausible," that it is not defined. So isn't it true that under current practice, then, "plausible" is defined by each judge? That would be some of the essence of your testimony, as I understand.

Mr. HOFFMAN. It is. The only thing I will add is, in reference to your last remarks, despite perhaps your fear of the collective judicial wisdom, the Supreme Court in both *Twombly* and *Iqbal* advised us that plausibility is determined by a judge's judicial wisdom and common sense.

Mr. KING. Which means they know it when they see it.

Mr. HOFFMAN. So perhaps proponents of the bill should pause——

Mr. KING. I think you get my point on that, Mr. Hoffman. [Laughter.]

Let me make another point, then, while we have an opportunity here. I have with me a quote from Fourth Circuit Judge J. Harvie Wilkinson, which you are apparently familiar with. He recently observed this with regard to the joinder issue: "There is a problem with fraudulent jurisdiction law as it exists today, and that is that you have to establish that the joinder of a non-diverse defendant is totally ridiculous and that there is no possibility of ever recovering, that it is a sham, that it is corrupt. That is very hard to do. The problem is the bar is so terribly high."

Don't we have the presumption in favor of the fraudulent defendants that would join this, and isn't the burden too high? You said it is complex, and there are anecdotes on either side of this. But in the end, if we are after justice and equity and it gets to be a burden to litigate through that, the argument to simplify our system doesn't argue necessarily in favor of justice. Would you agree with that?

Mr. HOFFMAN. Thank you for your question. Let me see if I can try to answer it this way.

First of all, in terms of Judge Wilkinson's remarks, I don't know when they were made, whether he was speaking to a Federalist Society group or whether he was—I suspect it is not from a judicial opinion. Obviously, we know there are many, many judicial opinions. I just don't know, so I can't speak to it.

In terms of the substantive part of your question, Representative King, my answer to you I think, and I will try to be very brief on this, is really to track what I said before. To the extent that there is an issue, and I submit there isn't, but to the extent the Committee or proponents think there is an issue, the issue doesn't lie with fraudulent joinder law or with how judges are applying it in their particular places, but rather it is with the substantive law. And again, what I meant by that, to expound that point, regardless of how the standard is, whether it is no possibility or reasonable possibility, whatever it is for figuring out whether a defendant has

been improperly joined, the cases turn almost exclusively on this question of whether or not the law allows recovery.

This is not to legislate by anecdote, but I will just give you one example to try to put some meat on the bones of what I am trying to say. So, there was a case out of Mississippi just a couple of years ago where there was a woman who was in a nursing home and terrible things happened to her. She was deprived of water, she had multiple falls and bruises.

So anyway, she ends up suing the nursing home, and she also sues the administrators, the folks who are running the home. They are, of course, the non-diverse defendants. So the administrators bring a motion saying—you know, they remove it, and in response to the motion to remand, they say we were fraudulently joined. Their argument is they say we can't be held liable unless we actually were the ones who physically touched, physically injured the plaintiff.

What the court ends up ruling is that under Mississippi law, physical injury is not the only requirement for holding a supervisor liable. So the point is, to the extent there is an issue, they may have a beef with Mississippi law—maybe it goes too far, maybe it doesn't—but it is not a fraudulent joinder issue.

Mr. KING. Well, I am not disagreeing with the point that is in the heart of that. I am recognizing that the clock has wound down. I have other curiosities about this I will seek to examine, but I want to thank all the witnesses and the Chairman and yield back the balance of my time.

Mr. FRANKS. I thank the gentleman.

I suppose when it comes to plausibility, we can explain it to the judges, but perhaps we can't understand it for them as well.

This concludes today's hearing. Thanks to all of our witnesses for attending.

Without objection, all Members will have 5 legislative days to submit additional written questions for the witnesses or additional materials for the record.

And again, I thank the witnesses, I thank the Members, and I thank the audience.

This hearing is adjourned.

[Whereupon, at 12:35 p.m., the Subcommittee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

SHOOK
HARDY & BACON

October 22, 2015

Cary Silverman

1155 F Street, N. W., Suite 200
Washington, D.C.
20004-1305
t 202.783.8400
dd 202.662.4859
f 202.783.4211
csilverman@shb.com

Tricia White
Committee on the Judiciary
U.S. House of Representatives
363 Ford House Office Building
Washington, D.C. 20002

Re: Fraudulent Joinder Prevention Act, H.R. 3624
Responses to Questions for the Record

Dear Ms. White:

As requested by Chairman Bob Goodlatte on September 8, 2015, enclosed please find my responses to questions for the record from Representative Trent Franks. Thank you for your assistance.

Sincerely,

Cary Silverman

Enclosure

SHOOK
HARDY & BACON

Responses to questions for the record from Representative Trent Franks

1. What is wrong with the "any possibility of recovery approach" that seems to be used in some form by many state courts?

Cary Silverman

1155 F Street, N. W., Suite 200
Washington, D.C.
20004-1305
t 202.783.8400
dd 202.662.4859
f 202.783.4211
csilverman@shb.com

The "any possibility of recovery approach" is easily manipulated by plaintiffs' lawyers to preclude the federal courts of jurisdiction over cases involving citizens of different states. It often prevents out-of-state defendants from having a lawsuit filed against them decided in a neutral federal forum. Under this standard, a plaintiff can destroy "complete diversity" by including a meritless claim against a nondiverse (local) defendant in the complaint.

Judge David Hamilton, then a federal district court judge who has since been appointed to the U.S. Court of Appeals for the Seventh Circuit, characterized the burden of showing fraudulent joinder as "one of the heaviest burdens known to civil law."[1] More recently, Judge J. Harvie Wilkinson III of the U.S. Court of Appeals for the Fourth Circuit remarked that the "problem with fraudulent jurisdiction law as it exists today . . . is that the bar is so terribly high."[2]

Under the "any possibility of recovery" standard, some courts find there must be "*absolutely* no possibility the plaintiff will be able to establish a cause of action against the non-diverse defendant or that outright fraud exists in the plaintiff's pleading of jurisdictional facts."[3] Some federal courts find they can retain jurisdiction only where the plaintiff has no "glimmer of hope" of recovering against the local defendant.[4]

What plaintiffs' lawyers do, often with success, is seize upon a slight ambiguity in the applicable law, a narrow basis for liability, or a limited exception to what otherwise is a complete defense to liability for the nondiverse (local) defendant. They then argue that there is a chance, however remote, that a state court could find there is a viable claim against the non-diverse defendant. Such assertions are made without providing any factual support and where a plausibility standard would show there is no basis for a claim. Courts applying the "any possibility of recovery approach" may also ignore whether the plaintiff intends to seek a judgment against the nondiverse defendant, or whether, as often occurs, the plaintiff will take no action against the local defendant after the case is remanded. My prepared testimony highlights several recent examples.

Denying a defendant access to a neutral federal forum just because a plaintiff has a 0.01% chance of having a valid claim against a local defendant is not sound jurisdictional policy.

2. In your testimony, you mentioned that courts have several ways of evaluating fraudulent joinder. Do you think the "plausibility standard" included in the bill would work as well as, or better than, the other existing standards? Is the "plausibility standard" currently used by the courts?

The "plausibility standard" would work better than existing standards. Federal courts routinely apply a plausibility standard to determine whether a complaint states a viable claim when there is a motion to dismiss. It requires a complaint to contain sufficient factual matter, accepted as true, to state a claim that is "plausible on its face" and that does not rely on "mere conclusory statements."[5] A plausibility standard will continue to allow plaintiffs who have legitimate claims against local defendants to have their cases decided in state court. All it requires is that if a plaintiff asserts that a local store manager, employee, pharmacist, or retailer is liable, for example, then the plaintiff must describe what that person or business did that subjects it to liability under applicable state law. A conclusory allegation or bare assertion that there is a claim would not be enough for a plaintiff to obtain remand of a case to state court.

Plausibility is an improvement over current standards for three reasons. First, it is a standard set by the U.S. Supreme Court that is well understood by judges that will not create any new litigation or confusion to implement. Second, it will provide a uniform standard that, while deferential to plaintiffs, will allow defendants a fair opportunity to have case brought against them decided in neutral federal courts. Third, it will reduce the potential for gamesmanship and make litigation more efficient because courts will assess the actual viability of the claim against the nondiverse defendant, rather than render remand decisions based on speculation.

3. Some argue that the law regarding fraudulent joinder is well-settled given that the case establishing the doctrine is more than one-hundred years old. Do you believe the law regarding fraudulent joinder is well-settled?

The U.S. Supreme Court established the doctrine of fraudulent joinder in the early 1900s, but has not revisited it since 1931.[6] This was before adoption of the Federal Rules of Civil Procedure in 1938. It was before Congress enacted the federal statutes that govern removal in 1948.[7] The Court has not considered fraudulent joinder since the explosion of mass tort litigation, which often involves citizens of different states.[8]

Confusion in the law of fraudulent joinder also occurs because of the dearth of case law at the circuit court level. There are thousands of cases each year in which federal district courts decide fraudulent joinder. When a federal district court grants a motion to remand a case to state court, its

ruling is not an appealable decision.[9] For that reason, relatively few rulings on fraudulent joinder reach the appellate level.

There is a consensus among legal scholars and practitioners that courts take significantly different approaches to evaluating fraudulent joinder. Scholarship has repeatedly recognized these variations and identified it as a problem that would benefit from reform that would bring consistency, predictability, and fairness.[10] Even within a federal circuit, there is no uniformity in the standard applied or the evidence a court will consider. As shown in my prepared testimony, while many courts seem to follow the "no possibility" of a claim approach, those same courts will go on to define that "possibility" differently. In some cases, the court will say "reasonable possibility"; in other cases the court will say "absolutely no possibility" or "no glimmer of hope." Still other courts will simply treat fraudulent joinder as it would a motion to dismiss for failure to state a claim. These differences in language are not just semantics. There is evidence that federal judges treat similar cases differently.[11]

4. Some critics contend that the Fraudulent Joinder Prevention Act creates federalism concerns. However, isn't this legislation actually respectful of federalism because, rather than modifying the standard for fraudulent joinder, Congress instead could simply abolish the complete diversity rule pulling thousands of cases into federal court that would otherwise be heard by state courts?

The U.S. Constitution empowers the federal judiciary to decide controversies "between citizens of different states."[12] Article III does not require "complete diversity." Congress has authority to set the jurisdiction of the federal courts. It could abolish the complete diversity requirement and authorize district courts to decide any case that includes citizens of different states, the language used in the Constitution. The Fraudulent Joinder Prevention Act does not take that approach. The bill would codify an approach to fraudulent joinder that is firmly rooted in existing law and that would not significantly increase the caseload of the federal judiciary.

5. As I understand it, fraudulent joinder is a question of federal court jurisdiction. Isn't it Congress's job to set the jurisdiction of the federal courts and, therefore, isn't it appropriate for Congress to legislate with regard to fraudulent joinder?

The Fraudulent Joinder Prevention Act is firmly within Congress's authority to establish the jurisdiction of the federal courts.

Article III of the Constitution established the U.S. Supreme Court, but empowered Congress to establish lower federal courts as needed.[13] Congress then enacted the Judiciary Act of 1789, which established the federal court system, empowered federal courts to hear cases between citizens of different states where more than $500 was in dispute, and codified the power of a defendant to "remove" such a case from state to federal court.

Over time, Congress has repeatedly modified diversity jurisdiction as well as the laws governing removal. For example, Congress has increased the amount in controversy requirement five times.[14] In 1958, Congress further limited diversity jurisdiction by making corporations citizens of their primary places of business as well as their chartering states.[15] Congress altered the complete diversity requirement and expanded federal court jurisdiction in 1990,[16] 2002,[17] and 2005.[18] Most recently, Congress made several changes to the federal laws governing diversity jurisdiction, venue, and removal in 2011.[19] As this history shows, it is appropriate for Congress to clarify the law of fraudulent joinder and set a uniform standard for the federal courts.

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[1] *Strange v. Crum Constr. LLC*, No. IP01-0789-C-H/G, 2001 WL 1160952, at *1 (S.D. Ind. Aug. 28, 2001).

[2] *See* Federalist Society, 2014 National Lawyers Convention, Diversity Jurisdiction from Strawbridge to CAFA – Event Video, Nov. 17, 2014, *at* http://www.fed-soc.org/multimedia/detail/diversity-jurisdiction-from-strawbridge-to-cafa-event-video (video at minute 1:08:30 to 1:10:10).

[3] *Green v. Amerada Hess Corp.*, 707 F.2d 201, 205 (5th Cir. 1983) (emphasis added).

[4] *Hartley v. CSX Transp., Inc.*, 187 F.3d 422, 426 (4th Cir. 1999).

[5] *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

[6] *See Mecom v. Fitzsimmons Drilling Co.*, 284 U.S. 183, 189 (1931); *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 99 (1921); *Chesapeake & Ohio Ry. Co. v. Cockrell*, 232 U.S. 146, 153 (1914); *Ala. Great S. Ry. Co. v. Thompson*, 200 U.S. 206, 217 (1906).

[7] 28 U.S.C. §§ 1441 to 1447.

[8] Congress created the United States Judicial Panel on Multidistrict Litigation, known informally as the MDL Panel, in 1968. *See* 28 U.S.C. § 1407.

[9] 28 U.S.C. §1447(d).

[10] *See, e.g.*, Kevin L. Pratt, Note, *Twombly, Iqbal, and the Rise of Fraudulent Joinder Litigation*, 6 Charleston L. Rev. 729, 748-55 (2012) (finding "lower courts remain confused about the correct fraudulent joinder standard to apply" and identifying four approaches, all of which are "ambiguous" and "inefficient"); Paul Rosenthal, *Improper Joinder: Confronting Plaintiffs' Attempts to Destroy Federal Subject Matter Jurisdiction*, 59 Am. Univ. L. Rev. 49, 64-72 (2009) (detailing four "divergent approaches" and finding that "[p]redicting what test will apply to determine

fraudulent joinder is difficult, as the standards can shift, even within the same opinion"); Matthew J. Richardson, *Clarifying and Limiting Fraudulent Joinder*, 58 Fla. L. Rev. 119, 124 (2006) (finding "federal circuit are split as to significant, and even fundamental, ways of stating and applying the doctrine" and advocating for reform to clarify "doctrinal confusion"); E. Farish Percy, *Making a Federal Case Out of It: Removing Civil Cases to Federal Court Based on Fraudulent Joinder*, 91 Iowa L. Rev. 189, 215 (2005) ("Even though the fraudulent joinder doctrine has existed for more than a century, the appellate courts have established neither a uniform definition of fraudulent joinder not a uniform procedure for evaluating allegations of fraudulent joinder.").

[11] *See, e.g.*, Jennifer Gibbs, *The Wild West of Improper Joinder in North Texas*, Law360, Aug. 17, 2015 (showing federal court judges in Texas have taken different approaches, leading to different results, in deciding fraudulent joinder in insurance coverage disputes); Jessica Davidson Miller & Milli Kanani Hansen, *Fighting Back Fraudulent Joinder in Pharmaceutical Drug and Device Cases, RX for the Defense* (Defense Research Inst. Apr. 13, 2012) (observing that "[s]ome courts – particularly those with a lot of experience in seeing how pharmaceutical and medical device product defect claims normally play out – are highly dubious of efforts to join non-manufacturer parties. Other courts manifest a much narrower view of federal jurisdiction, leading them to more reflexively remand cases regardless of the futility of a plaintiff's state-law claims again non-manufacturer parties").

[12] U.S. Const. art. III, § 2 ("The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.").

[13] *See* U.S. Const. art. III, § 1.

[14] Congress raised the amount in controversy requirement from the initial $500 to $2,000 in 1887, $3,000 in 1911, $10,000 in 1958, $50,000 in 1988, and to the current $75,000 in 1996.

[15] Pub. L. No. 85-554, § 2, 72 Stat. 415 (1958) (codified at 28 U.S.C. § 1332(c)).

[16] The Judicial Improvements Act of 1990, Pub. L. No. 101-650 (1990), included a provision providing federal courts with supplemental jurisdiction over claims that formed "part of the same case or controversy" even when the joinder of additional parties eliminated complete diversity. *See* 28 U.S.C. § 1367(a).

[17] The Multiparty, Multiforum Trial Jurisdiction Act, Pub. L. No. 107-273 (2002), eliminated the complete diversity requirement in cases in which a single-location accident caused 75 or more deaths. *See* 28 U.S.C. § 1369.

[18] The Class Action Fairness Act of 2005, Pub. L. No. 109-2 (2005), granted federal jurisdiction over class actions when only a minimal diversity standard is satisfied, there are over 100 plaintiffs, and more than $5 million is in controversy. *See* 28 U.S.C. §§ 1332(d), 1453, 1711 to 1715.

[19] *See* Federal Courts Jurisdiction and Venue Clarification Act of 2011, Pub. L. No. 112-63 (2011).

Written Testimony of

Arthur D. Hellman*
Sally Ann Semenko Endowed Chair
University of Pittsburgh School of Law

House Committee on the Judiciary
Subcommittee on the Constitution and Civil Justice

Hearing on

H.R. 3624
"Fraudulent Joinder Prevention Act of 2015"

September 29, 2015

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* Arthur D. Hellman is a professor at the University of Pittsburgh School of Law. He is coauthor of a Federal Courts casebook and has testified at several hearings of the House Judiciary Committee on proposals for revising the Judicial Code. He worked with the House Judiciary Committee in the drafting of the Federal Courts Jurisdiction and Venue Clarification Act of 2011 and the "Holmes fix" provisions of the America Invents Act.

Written Testimony of
Arthur D. Hellman

H.R. 3624, the "Fraudulent Joinder Prevention Act of 2015" (FJPA), addresses a longstanding problem in the federal judicial system: a plaintiff seeking money damages from an out-of-state defendant joins a fellow citizen as defendant solely to thwart the out-of-state defendant's right to remove the case from state court to a neutral federal forum. Almost half a century ago, the American Law Institute observed, "The most marked abuse has been joinder of a party of the same citizenship as plaintiff in order to defeat removal on the basis of diversity jurisdiction. Such tactics have led to much litigation, largely futile, on the question of fraudulent joinder."[1]

Over the last half century, the volume of litigation on this question has only increased. A decade ago, one commentator reported that fraudulent joinder litigation "is escalating throughout the country and is fast becoming a prominent and time-consuming aspect of complex tort litigation."[2] Another commentator found that determining whether joinder is fraudulent "has proved difficult and time-consuming for many federal courts" and that the federal circuits "have split over a number of the important issues in defining and applying the doctrine."[3]

Against this background, it makes sense to seek a legislative remedy. The purposes of the legislation would be to reduce the extent of futile litigation, to clarify the fraudulent joinder doctrine, and to provide a federal forum when the plaintiff's "real target" (to borrow a phrase from Chairman Goodlatte) is a diverse defendant, but a co-citizen is joined to forestall removal.[4]

The FJPA seeks to accomplish these purposes, and I therefore support the basic thrust of the bill. However, I have several concerns about the bill's drafting. In this statement I will outline those concerns and suggest how the bill might be

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[1] American Law Institute, Study of the Division of Jurisdiction Between State and Federal Courts 337-38 (1969).

[2] E. Farish Percy, Making a Federal Case of It: Removing Civil Cases to Federal Court Based on Fraudulent Joinder, 91 Iowa L. Rev. 189, 192 (2005).

[3] Matthew J. Richardson, Clarifying and Limiting Fraudulent Joinder, 58 Fla. L. Rev. 119, 121-22 (2006).

[4] Chairman Goodlatte used the phrase in explaining the "primary defendant" provisions of the Class Action Fairness Act. See 151 Cong. Rec. 2642 (2005) (remarks of Rep. Goodlatte). For brief discussion, see Part IV of this statement.

redrafted to accomplish its purposes more effectively. I will also offer an alternative approach – an approach utilizing minimal diversity – that may warrant consideration.

I. Background: Diversity Jurisdiction and Fraudulent Joinder

Diversity of citizenship jurisdiction was included in the Constitution "in order to prevent apprehended discrimination in state courts against those not citizens of the State."[5] Starting with the Judiciary Act of 1789, Congress has implemented that grant through statutory authorization. Thus, from the beginning of the Nation's history, a non-citizen sued in state court by a citizen of the forum state has had the right to remove the case to federal court, provided that the case satisfied an amount-in-controversy requirement.[6]

Three sections of the Judicial Code provide the framework for removal based on diversity of citizenship. Section 1332(a) confers original jurisdiction over suits between "citizens of different states" when the amount in controversy exceeds $75,000.[7] Section 1441(a) allows removal of "any civil action brought in a State court of which the district courts … have original jurisdiction." But section 1441(b)(2) prohibits removal based solely on section 1332(a) "if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought." This latter provision is referred to as the "forum defendant rule."

Today, removal is a major battleground in civil litigation. The reason is that across the spectrum of civil suits, many plaintiffs prefer to litigate in state court; defendants often prefer the federal court.[8] The law governing removal is complex and often arcane; each year it generates a vast number of disputes involving timing, amount in controversy, amendments to pleadings, and many other issues.

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[5] Erie R. Co. v. Tompkins, 304 U.S. 64, 74 (1938).

[6] In the Judiciary Act of 1789, the right of removal was limited to cases in which the plaintiff was a citizen of the forum state. Today the right extends to all cases in which all plaintiffs are diverse from all defendants, provided that the amount-in-controversy requirement is satisfied and no defendant properly joined and served is a citizen of the forum state.

[7] Section 1332(a) also provides for other kinds of party-based jurisdiction. As noted in Part II, the Subcommittee should consider whether to include these in the FJPA.

[8] See Arthur D. Hellman, Another Voice for the Dialogue: Federal Courts as a Litigation Course, 53 St. Louis U. L. J. 761, 765-68 (2009).

A frequent source of dispute is the doctrine known as "fraudulent joinder." The doctrine is a qualification on the rule of "complete diversity." Under that rule, which traces back to a decision by Chief Justice John Marshall, a suit is "between ... citizens of different states," and thus within federal jurisdiction under section 1332(a), only when no plaintiff is a citizen of the same state as *any* defendant. The fraudulent joinder doctrine comes into play when the plaintiff sues a defendant who is a citizen of a different state and also sues a co-citizen.[9] For example, in an insurance dispute, the in-state policyholder sues an out-of-state insurance company and joins the local agent as a co-defendant. In a products liability action, the plaintiff sues an out-of-state pharmaceutical manufacturer and also the local doctor who prescribed the drug. The diverse defendant removes based on section 1332(a); the plaintiff moves to remand on the ground that complete diversity is lacking; the defendant opposes the motion on the ground that the joinder of the co-citizen is "fraudulent."

As many courts and commentators have noted, "fraudulent" is a term of art; the plaintiff's motives are irrelevant. Rather, "fraudulent" is defined in accordance with the purpose of the doctrine, and the purpose is to protect the right of the non-citizen defendant to the neutral forum of the federal court. The Seventh Circuit has summarized the rationale in an often-quoted opinion:

> No matter what the plaintiff's intentions are, an out-of-state defendant may need access to federal court when the plaintiff's suit presents a local court with a clear opportunity to express its presumed bias — when the insubstantiality of the claim against the in-state defendant makes it easy to give judgment for the in-state plaintiff against the out-of-state defendant while sparing the in-state defendant.[10]

So the *insubtantiality* of the claim against the "spoiler" defendant is the key to the doctrine. But there is a disconnect between the rationale as stated by the Seventh Circuit and the statement in the same paragraph (echoed by other courts) that a claim is fraudulent only when it "has *no chance* of success." if the courts were really seeking to identify cases in which it would be "easy to give

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[9] As will be discussed in Part II, the doctrine is also invoked when there is complete diversity but one or more defendants are citizens of the forum state.

[10] Poulos v. Naas Foods, Inc., 959 F.2d 69, 73 (7th Cir. 1992). As this quotation indicates, it is often assumed that the plaintiff is a citizen of the forum state, and in most cases the assumption is borne out.

judgment for the in-state plaintiff against the out-of-state defendant while sparing the in-state defendant," I do not think they would set the bar as high as they do.

Plaintiffs and defendants alike recognize the importance of the doctrine to litigation strategy. A plaintiff-oriented practice guide explains: "Myriad attempts have been made by creative counsel to state a tenable claim against non-diverse defendants in order to defeat diversity jurisdiction without running afoul of the fraudulent joinder rule. As would be expected, some have been successful and some not."[11] A defense-oriented guide warns:

> [Fighting] fraudulent joinder requires reasonable preparation and, as a consequence, can substantially raise litigation costs. [The efforts] will probably fail under the "no possibility" standard. Apparently erroneous decisions by the district court, moreover, are final because remand orders are generally not reviewable by appeal or writ of mandamus. Even worse, there is a possibility that the corporate client will have to pay opposing counsel's attorneys' fees under 28 U.S.C. § 1447(c) in the event that the district court determines that the removal was improvident.[12]

The preceding quotation suggests another reason why legislative clarification is desirable: if the district court erroneously remands a case on the ground that the plaintiff's claim against the co-citizen has *some* chance of success, the error cannot be corrected by the court of appeals because section 1447(d) prohibits review of remand orders.[13] To make matters worse, many district judges follow a mantra to the effect that there is a "presumption against removal jurisdiction" and "any doubt about the right of removal requires resolution in favor of remand."[14]

I have no illusions that legislation can eliminate all litigation over fraudulent joinder or answer all of the questions that will arise. But it is worth some effort

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[11] David S. Casey, Jr. and Jeremy Robinson, Litigating Tort Cases §7.7 (updated August 2014).

[12] Jay S. Blumenkopf et al., Fighting Fraudulent Joinder: Proving the Impossible and Preserving Your Corporate Client's Right to a Federal Forum, 24 Am. J. Trial Advocacy 297, 310 (2000).

[13] There are some court-made exceptions to the prohibition on appellate review, but the orders described in the text fall squarely within the prohibition's heartland.

[14] See, e.g., Dulcich Inc. v. Mayer Brown LLP, 954 F.Supp.2d 1129, 1135-36 (D. Or. 2013); see generally Scott R. Haiber, Removing the Bias Against Removal, 53 Cath. U. L. Rev. 609 (2004).

to try to bring greater clarity and uniformity to the doctrine and also to strike a better balance between the diverse defendant's right to a federal forum and the plaintiff's prerogative to shape his lawsuit in the way he thinks best.

II. Drafting the FJPA: Structure and Coverage

The FJPA addresses the problem of fraudulent joinder by adding two sentences to section 1447(c) of the Judicial Code. The first sentence specifies the kinds of *materials* that may be presented by the parties in a motion for remand and "any opposition thereto." The second sentence specifies the *criteria* for *denying* a motion to remand.[15]

I have several concerns about the way the bill is drafted. Here I will discuss the structure and coverage of the bill and will offer some technical suggestions for redrafting that I believe are consistent with the intent of the bill in its current form. I will also suggest one possible expansion in the bill's coverage. In Part III, I will discuss the criteria set forth in the second sentence.

First, the proposed language would be added to section 1447(c), which applies to all cases removed from state court, whatever the basis for original jurisdiction. That includes federal-question cases covered by section 1331 and class actions covered by section 1332(d). But fraudulent joinder is not a problem for federal-question cases, because the citizenship of the defendant is irrelevant to jurisdiction. It is not a problem for class actions, because the statute itself allows for removal based on minimal diversity. See section 1332(d)(2). So the new provision should be limited to cases removed under the general diversity statute, section 1332(a). Moreover, the Subcommittee should consider whether to include all or just some of the separate provisions of section 1332(a).

Second, the bill provides that if the district court finds that the specified criteria are satisfied – i.e., if the joinder of the co-citizen is fraudulent – the court "*shall deny a motion to remand*." This seems to assume that if there is a motion to remand, it would assert that removal is barred by the rule of complete diversity. But there can be many other grounds for a motion to remand. Some are jurisdictional like the complete-diversity rule; others are procedural. If even one of those other grounds is well-taken, the case should be remanded whether or not the joinder is fraudulent. The bill should specify that the new provision

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[15] All references in this statement are to the draft bill printed on Sept. 21, 2015, at 10:50 a.m. I understand that that draft is identical to the bill as introduced.

applies only when there is a motion to remand on the ground that diversity is incomplete.

Third, the bill would bar remand if the complaint fails against "a" nondiverse defendant. What happens if the plaintiff names more than one nondiverse defendant, and the complaint fails against only one? There is still one legitimate nondiverse defendant, and that destroys complete diversity. I assume that it is not the intent of the drafters to abrogate the complete-diversity rule. Thus, as long as there is at least one legitimate nondiverse defendant, the motion to remand should be *granted*.

Fourth, the bill refers to "defendants" without qualification, thus including defendants who have not been served. This is inconsistent with the approach taken in analogous Code provisions, e.g. section 1441(b)(2). I suggest that the FJPA should follow that example.

Fifth, the purpose of the bill is to allow removal under specified circumstances notwithstanding incomplete diversity. Such a defect would ordinarily require remand. This consideration suggests that the bill should provide for remand *unless* the defendant shows that the specified criteria are satisfied.

All of the suggestions thus far are technical; they are aimed at implementing what I believe to be the intent of the bill in its current form. The Subcommittee may also wish to consider one substantive change that would modestly expand the coverage of the legislation. As currently drafted, the FJPA addresses fraudulent joinder only in the context of the complete-diversity rule. But fraudulent joinder is also used to exploit the forum defendant rule of section 1441(b)(2). And the doctrine has been applied in the same way. Just last week, a district court in Missouri observed, "The standards for determining whether a *resident* defendant is fraudulently joined are the same as the standards for determining whether a diversity-destroying defendant is fraudulently joined."[16] And earlier this month, a district court in California remanded a case based on the forum defendant rule even though there was complete diversity; the court rejected the defendant's fraudulent joinder argument.[17] So I suggest that the

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[16] Byrd v. TVI, Inc., 2015 WL 5568454 (E.D. Mo. Sept. 21, 2015) (emphasis added).

[17] Whyte v. M/Y Senses LLC, 2015 WL 5210328 (N.D. Cal. Sept. 4, 2015).

Subcommittee consider revising the bill to address both types of fraudulent joinder.[18]

To correct the technical flaws I have identified – and to clarify the operation of the new provision – I suggest that instead of adding language to section 1447(c), the new provision should be codified as a new subsection (f) in section 1447. A draft of the new subsection is set forth below. The draft contains three paragraphs. Paragraph (1) identifies the class of cases that would be covered by the new provision. Paragraph (2) specifies the criteria for granting a motion to remand in those cases. Paragraph (3) incorporates the substance of the first sentence of the HLC draft bill; it makes clear that the district court, in a considering a motion to remand, may consider affidavits and other evidence as well as the pleadings.

[DRAFT]

(f) (1) This subsection shall apply to any case in which –

(a) a civil action is removed solely on the basis of the jurisdiction conferred by section 1332(a) and

(b) a motion to remand is made on the ground that

[i] one or more defendants properly joined and served are citizens of the same state as one or more plaintiffs or

[ii] one or more defendants properly joined and served are citizens of the state in which the action was brought.

(2) The motion described in paragraph (1)(b) shall be granted unless the court finds that –

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[18] In 2013, the Seventh Circuit said that no court of appeals had decided "whether the fraudulent joinder doctrine creates an exception to the forum defendant rule." The court found no need to resolve the question, but it laid out the policy factors on both sides. Morris v. Nuzzo, 718 F.3d 660, 666-671 (7th Cir. 2013). The Subcommittee may wish to study this analysis. It seems to me that if a plaintiff goes to the trouble of bringing suit outside his home state, then includes a marginal claim against a forum defendant as well as a claim against a non-forum defendant, there is a good chance that he is trying to gain some tactical advantage from litigating in that particular state. If so, that may be a good reason to apply the fraudulent joinder doctrine.

(a) the complaint fails to state a plausible claim for relief under applicable state law against each defendant described in paragraph (1)(b), or

(b) there is no good faith intention to prosecute the action against all defendants described in paragraph (1)(b) or to seek a joint judgment including all such defendants.

(3) In determining whether to grant a motion under paragraph (1)(b), the court shall consider the pleadings, affidavits, and other evidence submitted by the parties.

III. Drafting the FJPA: Criteria for Remand

The FJPA seeks to prevent fraudulent joinder by requiring the district court to deny a motion to remand under two circumstances: first, "if the complaint does not state a plausible claim for relief against a nondiverse defendant under applicable state law," and second, if "there is no good faith intention to prosecute the action against a nondiverse defendant or to seek a joint judgment." I think that the "plausible claim" test holds promise, though there may be some room for fine-tuning. However, the "good faith intention" test is problematic, and I suggest that it be omitted from the legislation.

A. The "plausible claim" prong

Under current law, it is extremely difficult for a defendant to avoid remand by invoking the "fraudulent joinder" doctrine. Typically, the courts say that a case should not be remanded unless "there is *no possibility* of recovery by the plaintiff against [the spoiler] defendant."[19] Some courts go so far as to say that a "glimmer of hope for the plaintiff" is sufficient.[20] The FJPA would ease the burden on defendants by providing that the court should keep the case "if the complaint does not state a *plausible* claim for relief against a [spoiler] defendant under applicable state law."

The plausibility standard is borrowed from *Twombly* and *Iqbal*, the Supreme Court's cases interpreting Rule 12(b)(6) of the Federal Rules of Civil Procedure. I would thus expect that in construing the FJPA, courts would draw on the Court's

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[19] Smallwood v. Illinois Central R. Co., 385 F.3d 568, 573 (5th Cir. 2004) (en banc) (emphasis added). To be sure, there is enormous variation in the language used by the courts. One commentator has identified "four basic tests." Percy, supra note 2, at 216.

[20] Hartley v. CSX Transp., Inc., 187 F.3d 422, 426 (4th Cir. 1999).

exposition of the plausibility standard in the 12(b)(6) context. In *Iqbal*, the later of the two cases, the Court explained that the plausibility standard is not akin to a "probability requirement," but "it asks for *more than a sheer possibility* that a defendant has acted unlawfully."[21] At least verbally, this certainly appears to be a more demanding test than the standard generally applied to assertions of fraudulent joinder.

Two courts of appeals have addressed the relationship between the *Twombly-Iqbal* standard for Rule 12(b)(6) motions and the standard for finding fraudulent joinder. Both courts concluded that the 12(b)(6) standard is more demanding, and both reversed district courts that had applied that standard in denying motions to remand. In *Stillwell v. Allstate Ins. Co.*, the Eleventh Circuit quoted the "more than a sheer possibility" language from *Iqbal* and said: "In contrast, all that is required to defeat a fraudulent joinder claim is 'a possibility of stating a valid cause of action.'"[22] In *Junk v. Terminix Intern. Co.*, the Eighth Circuit contrasted *Iqbal*'s plausibility standard with circuit precedent stating that joinder is not fraudulent when "there is arguably a *reasonable basis* for predicting that the state law might impose liability based upon the facts involved."[23]

In this light, I think that the "plausible claim" prong will serve the purpose of reducing the very high burden that currently rests on defendants who invoke the fraudulent joinder doctrine. *Stillwell* confirms that the "plausible claim" standard is more demanding than the "possibility" test applied by the Eleventh Circuit to assertions of fraudulent joinder. *Junk* indicates that the standard is also more demanding than the "reasonable basis" test applied by other circuits.

I do have one concern, however. The *Twombly-Iqbal* standard was developed in cases involving claims created by federal law. It will not necessarily be easy to apply the test to state common-law claims, especially when "creative counsel" come up with claims that are novel but not foreclosed by state law.[24] Suppose, for example, that there is a state-law rule that appears to bar the claim against the "spoiler" defendant, but the plaintiff argues that the claim falls within an

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[21] Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (emphasis added).

[22] Stillwell v. Allstate Ins. Co., 663 F.3d 1329, 1333 (11th Cir. 2011).

[23] Junk v. Terminix Intern. Co., 628 F.3d 439, 446 (8th Cir. 2010), quoting Filla v. Norfolk Southern Railway Co., 336 F.3d 806, 809-11 (8th Cir. 2003) (emphasis added).

[24] Of course the standard is applied to state-law claims today at the Rule 12(b)(6) stage. See, e.g., Menard v. CSX Transp., Inc., 698 F.3d 40 (1st Cir. 2012).

exception to the rule, and there is no direct authority one way or the other in the controlling jurisdiction.[25] Is that a "plausible" claim?

If the Subcommittee thinks that such claims should not be allowed to defeat removal, the "plausible claim" prong could be modified by specifying that remand should be denied "if the complaint does not state a plausible claim for relief against a [spoiler] defendant under applicable state law *as established by legislative enactment or prior judicial decision*." (This language is taken from a line of cases in Utah in a different context.)

B. The "good faith intention" prong

Under the second prong of the FJPA's standard, remand should be denied if "there is no good faith intention to prosecute the action against a nondiverse defendant or to seek a joint judgment." This language comes from *Goldberg v. CPC International, Inc.*, a 1980 federal district court decision that has been quoted in some later cases. The district court in *Goldberg* wrote: "Courts have found joinder to be fraudulent where there is no reasonable basis in fact or colorable ground supporting the claim against the joined defendant, *or no real intention in good faith to prosecute the action against that defendant or seek a joint judgment.*"[26] For that proposition, the court cited two Supreme Court decisions.

A few years ago, a district court in Oregon gave careful and thorough consideration to an argument for remand based on the "good faith intention" criterion derived from the *Goldberg* opinion.[27] In rejecting the argument, the court made three points. First, the Supreme Court cases cited by the *Goldberg* court did not endorse any kind of subjective "intent test" for fraudulent joinder. Indeed, in one of the cases the Supreme Court itself said, "[T]he motive of the

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[25] For example, in Simpkins v. Southern Wine & Spirits of America, 2010 WL 3155844 (N.D. Cal. Aug. 9, 2010), the out-of-state defendant argued that the in-state defendant was fraudulently joined because state law precluded tort claims against him under the well-established "economic loss rule." But no state-court decision had decided the specific question whether the rule would bar tort claims against a contracting party's individual employees. So "settled" law did not "obviously" bar the claims against the co-citizen defendant, and the joinder was not fraudulent. The court acknowledged that the question was "very close" and that "the result it [was] compelled to reach in light of the very high standard for establishing fraudulent joinder may not further the interests of judicial economy and deterrence of forum shopping."

[26] Goldberg v. CPC International, Inc., 495 F. Supp. 233, 239 (N.D. Cal. 1980) (emphasis added).

[27] Selman v. Pfizer, Inc., 2011 WL 6655354 (D. Or. Dec. 16, 2011).

plaintiff, taken by itself, does not affect the right to remove."[28] Second, case law in the Ninth Circuit and elsewhere has emphasized that a plaintiff's motive has no bearing on a fraudulent joinder analysis. Third, pragmatic concerns militate against employing an "intent test." On the latter point, the court said in part:

> Under an "intent test" for fraudulent joinder, a defendant could possibly obtain discovery against a plaintiff and a plaintiff's counsel regarding their subjective intentions and motivations for naming a particular resident (nondiverse) defendant against whom that plaintiff has adequately stated a plausible claim. This would invite potentially expensive and intrusive collateral discovery and discovery disputes, especially where the inquiry would seek to invade the thought-processes of the plaintiff's counsel. In addition, such an "intent test" could potentially flood the federal courts with removal petitions and requests for discovery into the intentions and motivations of a plaintiff's counsel.

It might be thought that "good faith intention" would be a workable criterion here because it is analogous to a provision added by the Federal Court Jurisdiction and Venue Clarification Act of 2011 (JVCA). That provision, codified in 28 U.S.C. § 1446(c)(1), allows the removal of a diversity case more than a year after commencement of the action if the district court finds that "the plaintiff has acted in *bad faith* in order to prevent a defendant from removing the action." However, that provision operates quite differently from the one proposed in the FJPA. The bad faith exception in § 1446(b)(1) comes into play only when a case has been pending in the state court for at least a year. The district court will thus have ample evidence on which to determine whether the plaintiff has acted in bad faith. For example, in one recent case, the district court found bad faith because the plaintiffs delayed accepting settlement offers "to continue the litigation" until the one-year period passed.[29] In other cases, a "bad faith" argument can be based on the plaintiff's failure to engage in discovery against the non-diverse defendant. In the present context, the defendants will have removed within 30 days of being served. That is just not long enough to provide evidence of bad faith – or its absence.

For these reasons, I believe that the "good faith intention" prong of the FJPA would be disruptive and difficult to administer. I also believe that it is

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[28] Chi., R.I. & Pac. Ry. Co. v. Schwyhart, 227 U.S. 184, 193 (1913).

[29] Hiser v. Seay, 2014 WL 6885433 (W.D. Ky. Dec. 5, 2014).

probably unnecessary.[30] An objective test, properly defined and applied, should be adequate to limit fraudulent joinder.[31]

IV. An Alternative Approach

The FJPA, if limited to the "plausible claim" prong and redrafted along the lines suggested in Part II, will go a long way toward accomplishing the purposes set forth in Part I. Nevertheless, I can understand the unease that some people will feel about the basic approach of the bill. Courts will be probing whether claims against a co-citizen defendant "possess enough heft" to edge over the line from the merely possible to the plausible.[32] This inquiry is difficult enough when the claims are federal; it will be even more challenging when the district court is assessing a complaint asserting state-law claims and filed in state court under state pleading rules. To be sure, under the FJPA the court can consider affidavits and other materials that supplement the pleadings, but the downside is that the inquiry may be more time-consuming and complex. Is there a better way?

Consider *Greenberg v. Macy's*, a case decided a few years ago in the Eastern District of Pennsylvania.[33] Plaintiff, a citizen of Pennsylvania, filed a complaint in state court asserting a single count of negligence against five corporate entities related to Macy's, Inc. She alleged that while shopping at a Macy's store she was injured when she tripped on a platform placed in front of a store elevator. She alleged that the defendants wrongfully created the dangerous condition that injured her.

The defendants – all citizens of states other than Pennsylvania – removed to federal court based on diversity. The plaintiff quickly filed a notice of dismissal without prejudice. The next day, she filed a new complaint in state court. The substance of the new complaint was the same as the first, but the parties were not. In addition to the five corporate defendants named in the original complaint,

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[30] A district judge in Texas has identified "badges of improper joinder" that may point to a determination that an in-state defendant has been joined "solely for the purpose of defeating federal court jurisdiction." But in the leading case considering the "badges," the judge also found that the plaintiff's pleading against the in-state defendant did not survive a "Rule 12(b)(6)-type analysis." Plascencia v State Farm Lloyds, 2014 U.S. Dist. LEXIS 135081 (N.D. Tex. Sept. 25, 2014).

[31] Omitting the "good faith intention" prong will have the added benefit of deleting the reference to a "joint judgment." This is a rarely used phrase that would likely cause confusion.

[32] See Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 557 (2007).

[33] Greenberg v. Macy's, 2011 WL 4336674 (E.D. Pa. Sept. 15, 2011).

plaintiff added four new defendants. Two of the new defendants were Pennsylvania citizens; each was an employee of a non-Pennsylvania corporate defendant. The defendants again removed, now arguing that the plaintiff fraudulently joined the two Pennsylvania employees to defeat diversity.

The district court began by applying the fraudulent joinder doctrine as defined by the Third Circuit. Under Third Circuit case law, joinder is not fraudulent as long as there is "even a possibility that a state court would find that the complaint states a cause of action against" the non-diverse defendants. The complaint satisfied that test because plaintiff had pled a "colorable case" of "negligent malfeasance" against the two employees. The defendants offered affidavits by the two employees stating that they had nothing to do with the condition that allegedly caused plaintiff's injuries, but the court believed that under circuit law it could not consider those affidavits.

But the court did not stop there. It noted that some district courts, in deciding whether to remand under a fraudulent joinder inquiry, had applied the "plausibility test" of *Twombly* and *Iqbal*. Out of caution, the court went on to apply that test to the case before it. It found that "[e]ven with the benefit of [the rulings in *Twombly* and *Iqbal*], Defendants have not made out fraudulent joinder."

Toward the end of its opinion, the court acknowledged that the case presented "a close question," because plaintiff had not alleged in any detail how the two employees acted wrongfully. Moreover, it was "apparent that Plaintiff joined [the two employees] simply to defeat diversity." Nevertheless, "I cannot conclude that the joinder is fraudulent."

Three points about this case stand out. First, the court applied the "plausibility" test and still found that the joinder of the co-citizens was not fraudulent. Second, the result might have been different if the court had been able to consider affidavits, as it would be able to do under the FJPA. Third, the "real targets" of the suit were the corporate defendants, all non-Pennsylvania citizens, who were named in the initial complaint. Plaintiff added the individual defendants only to keep the case in state court.

In this light, I cannot help wondering if the FJPA unnecessarily perpetuates the "inherent complexity"[34] of the fraudulent joinder doctrine because it treats the complete-diversity rule as inviolable. Of course the complete-diversity rule is not a constitutional requirement; under the Supreme Court's interpretation,

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[34] Percy, supra note 2, at 122.

Article III can be satisfied by minimal diversity. In this century, Congress has taken advantage of this interpretation in the Multi-party, Multiforum Trial Jurisdiction Act of 2002 and the Class Action Fairness Act of 2005 (CAFA).

In both statutes, Congress distinguished among defendants and recognized the concept of the "primary" defendant. It may well be that many "fraudulent joinder" cases could be easily decided if the court, instead of having to determine whether the claims against the "spoiler" rise to some level of "plausibility" (or other standard), had to decide only whether the "real target" of the suit – the primary defendant – was diverse from the plaintiff. If that were the law, *Greenberg* probably would not have come to the court as a fraudulent joinder case at all; the plaintiff would not have bothered to dismiss and re-file. In *Selman*, the Oregon case discussed in Part III-B, the fraudulent joinder issue might have been litigated, but the court would readily have denied the motion to remand. The "real target" was the manufacturer of the drugs that allegedly caused the plaintiffs' illness; inclusion of the non-diverse medical providers as defendants did not change the essential character of the litigation.

I have not attempted to flesh out this idea, because it is not part of the FJPA and it would be a substantial departure from current law. If the Subcommittee thinks the idea is worth pursuing, I would be happy to suggest some details of how it might be implemented.

V. Conclusion

The FJPA addresses a real problem in the federal judicial system: a plaintiff's naming of an in-state defendant solely to keep a civil lawsuit in state court and thwart the right of an out-of-state defendant to remove the case to a neutral federal forum. The fraudulent joinder doctrine was developed by the federal courts to combat this stratagem, but it does not do that very effectively. One reason the doctrine has so little bite is that courts are in thrall to the notion that there is "a general presumption against removal jurisdiction" and that "all doubts are [to be] resolved in favor of remand."[35] By enacting legislation to clarify and strengthen the fraudulent joinder doctrine, Congress can neutralize the presumption (at least for this class of cases) and make it more likely that removal will be permitted when the "real target" of the plaintiff's claims is the out-of-state defendant.

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[35] Danford v. Champlin, 2011 WL 2802830 (D. Colo. July 14, 2011). The court noted: "The general presumption against removal jurisdiction cabins my review of Defendants' arguments [for finding fraudulent joinder]."

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