**Statement of**

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**House Committee on the Judiciary**
**Subcommittee on Courts, the Internet, and Intellectual Property**

**HEARING ON**

**"FEDERAL JURISDICTION CLARIFICATION ACT"**

**November 15, 2005**

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## Executive Summary

1. **Clarifying the Judicial Code**. The Judicial Conference has proposed amendments to Title 28 dealing with the resident alien proviso, the citizenship of corporations with foreign contacts, separate treatment for removal of criminal proceedings, the "rule of unanimity" for removal, and the timing of removal in multiple-defendant cases. Codifying the "rule of unanimity" is not as straightforward as it appears; however, the other proposals deserve the Subcommittee's support.

2. **"Separate and independent" claims**. The Conference has drafted a sensible rewrite of 28 USC § 1441(c). The new language would provide that: (a) a plaintiff's joinder of unrelated state-law claims will *not* defeat removal that is otherwise proper based on the assertion of federal claims; but that (b) the district court must sever and remand the state-law claims over which it has no jurisdiction.

3. **"Spoiler" defendants in diversity litigation**. Under current law, a civil action cannot be removed on the basis of diversity more than one year after the action is commenced. This allows for "procedural gamesmanship" by plaintiffs. As one court has said, "many plaintiffs' attorneys include in diversity cases a non-diverse defendant only to non-suit that very defendant after one year has passed in order to avoid the federal forum." The Judicial Conference proposes to address this problem by allowing removal after one year if "equitable considerations warrant." This approach is unnecessarily grudging. A better solution is to simply eliminate the one-year provision and restore the law to what it was before 1988.

Looking to the long term, Congress may wish to consider allowing removal based on minimal diversity for specific narrow categories of cases.

4. **Amount in controversy in diversity cases**. The Judicial Conference proposes to index the "amount in controversy" to keep up with inflation. This seems like a sensible idea. The Conference also offers proposals that deal with the problem of determining the amount in controversy in a removed case when it is impossible to use the sum demanded in the complaint. The best approach is to encourage the use of stipulations: if the plaintiff agrees not to seek or accept any recovery in excess of the amount in controversy required by the statute, that should be sufficient to establish that the jurisdictional minimum is not satisfied.

5. **Other aspects of diversity jurisdiction**. Congress may wish to consider: (a) amending 28 USC § 1332(c) to accord "entity" treatment to unincorporated associations, as it did in the Class Action Fairness Act (CAFA); and (b) abrogating a 2005 Supreme Court decision that allows some diversity class actions that do not fall within the carefully crafted compromise of CAFA.

6. **Conclusion**. Congress should consider using the rulemaking process under the Enabling Act as a means of addressing other aspects of removal procedure that have divided the courts. Rulemaking may also provide a good mechanism for creating an orderly system for limited appellate review of remand orders in removed cases.

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Mr. Chairman, Ranking Member Berman, and Members of the Subcommittee:

Thank you for inviting me to express my views at this hearing on possible improvements in the provisions of Title 28 governing the jurisdiction of the federal district courts. The existing framework of federal jurisdiction has served us well for many decades, but no system is perfect, and experience has disclosed several problem areas that deserve attention. I commend the Subcommittee for taking on this important task.

Today's hearing focuses on a package of legislative proposals submitted by the Judicial Conference of the United States. For purposes of discussion, I have found it useful to divide the recommendations into four categories. First, there are proposals that truly involve clarification of various provisions of Title 28. These proposals deal with ambiguities in current law, unintended consequences of late-20th century amendments to the Judicial Code, and provisions that simply are not as well drafted as they could be. Second, there is a proposal to entirely rewrite the notoriously troublesome Code provision on "separate and independent" claims in cases removed to federal court. Third, the Conference seeks to deal with problems involving what might be called "spoiler" defendants in diversity litigation. The final set of proposals also focuses on diversity jurisdiction, but these deal with the amount in controversy requirement.

As I will explain in my statement, the recommendations in the first two categories (with one small exception) are well supported, and I encourage the Subcommittee to move forward with them. The proposals on spoiler defendants and on the amount in controversy raise more difficult issues. I agree that revisions

of the Judicial Code are called for, but not necessarily the ones recommended by the Judicial Conference.

Today's hearing also provides the opportunity to call the Subcommittee's attention to two other aspects of diversity jurisdiction that may warrant legislative action – "entity" treatment for unincorporated associations and the availability of supplemental jurisdiction in diversity class actions in light of a recent Supreme Court decision.

Before turning to the specifics of the various proposals, I will say a few words by way of personal background. I am a professor of law at the University of Pittsburgh School of Law, where I was recently appointed as the inaugural holder of the Sally Ann Semenko Endowed Chair. I have been studying the operation of the federal courts for more than 30 years. During that period, I have written numerous articles, books, and book chapters dealing with various aspects of the federal judicial system. Of particular relevance to this hearing, I am the author (with Dean Lauren Robel of the Indiana University School of Law) of a new casebook, FEDERAL COURTS: CASES AND MATERIALS ON JUDICIAL FEDERALISM AND THE LAWYERING PROCESS, published in spring 2005. That book deals in some detail with several of the issues raised by the Judicial Conference proposals. Of course, in my testimony today I speak only for myself; I do not speak for any other person or institution.

## I. Clarifying the Judicial Code

The Judicial Conference has submitted its recommendations in the form of proposed legislation with the title "Federal Courts Jurisdiction Clarification Act of 2005." Many of the proposals fall easily under the rubric of "clarification." The

section-by-section description adequately explains these proposals; I will deal briefly with them here.[1]

**A. The resident alien proviso**

In 1988, as part of the Judicial Improvements and Access to Justice Act, Congress added what is known as the "resident alien proviso" to section 1332(a) of the Judicial Code. As the Judicial Conference explains, the purpose of the change "was to preclude federal alienage jurisdiction under section 1332(a)(2) in suits between a citizen of a State and an alien permanently residing in the same state." Unfortunately, this proviso has given rise to interpretative problems; it has also had the unintended consequence of expanding alienage jurisdiction in certain settings – a consequence that is contrary to the intent of Congress in 1988.[2]

To deal with these problems, section 2 of the Judicial Conference bill eliminates the resident alien proviso and replaces it with language that directly accomplishes the purpose behind the 1988 amendment. I support this proposal, which is thoroughly discussed in the Conference memorandum.

**B. Citizenship of corporations with foreign contacts**

Section 1332(c) provides that for purposes of determining diversity of citizenship, "a corporation shall be deemed to be a citizen of any *State* by which it has been incorporated and of the *State* where it has its principal place of business…" (Emphasis added.) Does the word "State" in § 1332(c) include foreign "states" – i.e. foreign countries? If it does not, how should the courts treat

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[1] One proposal – to replace the reference to Rule 11 in 28 USC § 1446(a) with a generic reference – warrants no more than a footnote.

[2] For a useful review of the issues and the case law, see Saadeh v. Farouki, 107 F.3d 52 (D.C. Cir. 1997).

a corporation that is incorporated in a foreign country or has it principal place of business there?

As the Judicial Conference explains, these questions have bedeviled the lower courts and have generated conflicting answers. There is every reason for Congress to put an end to litigation and clarify the availability of diversity jurisdiction for corporations with foreign contacts.

The Conference bill (in section 3) would resolve the matter by putting foreign states on the same plane as states of the United States. This is a sensible solution that carries forward the approach already adopted by Congress in the Multiparty, Multiforum Trial Jurisdiction Act of 2002.

The same kinds of issues can arise in direct actions against insurance companies, and the Conference bill adopts the same solution.

**C. Separate treatment for removal of criminal proceedings**

Currently, a single section of Chapter 89 – section 1446 – governs the procedure for removal in both criminal and civil cases. Some provisions of section 1446 apply to all cases; some apply only to criminal prosecutions; and some apply only to civil actions. The Conference very sensibly proposes to limit section 1446 to civil actions and to place the provisions governing removal of criminal actions in a new separate section in Chapter 89.

The Conference bill would codify the new section as "1446a." This would be unfortunate, because it would generate confusion with "1446(a)." A better solution is to add a new section numbered 1455 (reserving section 1454 for the removal provision included in H.R. 2955, the Intellectual Property Jurisdiction Clarification Act of 2005, which was approved by this Subcommittee in June).

Admittedly, the sequence will not appear particularly logical. But the sequence in Chapter 89 already includes anomalies. Moreover, when state criminal proceedings are removed to federal court, the defendant generally will be represented by the United States. United States Attorneys will have no difficulty finding the governing statute, nor will the state prosecutors who have initiated the proceedings.

**D. The "rule of unanimity" for removal**

In section 4(b) of its bill, the Judicial Conference proposes to codify the "rule of unanimity" that requires consent of all defendants to removal. The "rule of unanimity" is a court-made rule that has been part of the law for more than a century, but it has never been incorporated into the Judicial Code.[3]

There may be some utility in codifying the rule, but the question is not as straightforward as it might first appear. To begin with, there is at least one express statutory exception to the requirement of unanimity (the Class Action Fairness Act of 2005)[4] and another statute that contains an implicit exception (the Multiparty, Multiforum Trial Jurisdiction Act of 2002).[5] The amendment would have to take these into account. Additionally, it would be necessary to review the language carefully to make sure that the proposed codification would not inadvertently

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[3] The rule is generally traced to the decision in Chicago, Rock Island & Pac. Ry. v. Martin, 178 U.S. 245, 251 (1900).

[4] Under 28 USC § 1453(b), a class action "may be removed by any defendant without the consent of all defendants."

[5] Section 1441(e)(1) allows removal by "a defendant," in contrast to § 1441(a), which authorizes removal by "the defendant or the defendants."

overturn or call into question any of the well-established exceptions recognized by the courts.[6]

**E. Timing of removal in multiple-defendant cases**

Codification of the rule of unanimity is only a preliminary step toward the "main objective" of section 4(b)(3) of the Judicial Conference bill: "to eliminate confusion surrounding the timing of removal when all of the defendants are not served at the outset of the case." Without a doubt, this is an issue that calls for statutory clarification. There are conflicts not only between circuits, but between districts in the same state.[7]

The Conference has drafted an amendment under which each defendant would have 30 days from service to remove, and earlier-served defendants would be able to consent to removal during the 30-day period following service on later-served defendants even if they did not initiate removal on their own. As the Conference explains, its proposal "provides for equal treatment of all defendants in their ability to obtain federal jurisdiction over the case against them." If the plaintiff is concerned about prolonging the period during which removal might be permissible, he need only "serve all defendants at the outset of the case, thereby requiring all defendants to act within the initial 30-day period."

This is a fair and reasonable solution. And it may well be possible to enact the proposal without codifying the rule of unanimity.[8]

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[6] For example, the courts have held that purely nominal parties need not join in the notice of removal. Defendants who have not been served need not join either. See Charles Alan Wright & Mary Kay Kane, THE LAW OF FEDERAL COURTS 244 (6th ed. 2002).

[7] Compare Adams v. Charter Communications VII, LLC, 356 F.Supp.2d 1268 (M.D. Ala. 2005) ("first-served defendant rule"), with Fitzgerald v. Bestway Services, Inc., 285 F.Supp.2d 1311 (N.D. Ala. 2003) ("last-served defendant rule").

[8] For example, the provision could begin: "In actions involving two or more defendants, each defendant shall have thirty days …" (etc. as in the Conference proposal).

## II. "Separate and Independent" Claims and Removal Jurisdiction

Section 4(a) of the Judicial Conference bill would entirely rewrite section 1441(c) of the Judicial Code, the "separate and independent claim" provision. I support this proposal, but before explaining why, it is necessary to provide some background about the law governing removal jurisdiction in federal question cases.

When a plaintiff chooses state court as the forum for asserting claims "arising under" federal law, the defendant may remove the case to federal district court. This is so because of the interplay of two familiar provisions of the Judicial Code. Under the basic removal statute, 28 USC § 1441(a), a civil action brought in a state court may be removed by the defendant to federal court as long as the case is one "of which the district courts of the United States have original jurisdiction." Under 28 USC § 1331, the district courts have original jurisdiction "of all civil actions arising under the Constitution, laws, or treaties of the United States."

Often a complaint filed in state court will assert claims under state law as well as the federal claims. Two additional provisions of the Judicial Code determine the consequences of the joinder.

The better-known of the two provisions is the supplemental jurisdiction statute, 28 USC § 1367. Under section 1367, when the district court has original jurisdiction over a civil action by reason of federal claims, it may also exercise supplemental jurisdiction over state-law claims that are not otherwise within its jurisdiction as long as those claims "are so related to claims in the action within [the] original jurisdiction that they form part of the same case or controversy under

Article III of the United States Constitution."[9] This "same case or controversy" requirement incorporates the test specified by the Supreme Court's decision in *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966). Under that test, state-law claims fall within supplemental jurisdiction as long as they share a "common nucleus of operative fact" with the federal claims.

The Supreme Court has held that § 1367 "applies with equal force to cases removed to federal court as to cases initially filed there."[10] Thus, once a case is removed based on the presence of one or more federal claims, the district court may also hear "accompanying state law claims" as long as they meet the *Gibbs* test.[11]

This brings us to 28 USC § 1441(c). That section, as revised by Congress in 1990, provides:

> Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.

As the Judicial Conference points out, § 1441(c) is a troublesome provision for two reasons. First, it appears to authorize federal courts to hear claims that are beyond their jurisdiction under the Constitution – non-diverse state-law claims that are unrelated to the federal claims to which they have been joined. The Supreme

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[9] Section 1367 also provides for supplemental jurisdiction when original jurisdiction is predicated on diversity. That aspect of § 1367 is irrelevant in this context, but it has given rise to other problems. One of these is discussed in Part V-B of my statement.

[10] City of Chicago v. International College of Surgeons, 522 U.S. 156, 165 (1997).

[11] Id. Under § 1367(c), the district court has discretion to remand the state claims if "principles of [judicial] economy, convenience, fairness, and comity" suggest that the claims should be heard in the state court. Id. at 172-73.

Court has said that "*Gibbs* delineated the constitutional limits of federal judicial power."[12] By definition, a "separate and independent" federal claim is one that does *not* share a common nucleus of operative fact with the state claims asserted in the complaint. That being so, § 1441(c) goes beyond constitutional limits. As one court has said, in a widely quoted opinion:

> The point made by [numerous authorities] is that because supplemental state law claims arising out of the same nucleus of operative facts, such that they form part of the same constitutional case, are already removable under § 1441(a), pursuant to the district court's supplemental jurisdiction (§ 1367(a)), § 1441(c) serves no other purpose than to allow the removal of wholly separate and distinct state law claims, which but for the pleading of the "separate and independent" federal claim would not be ones over which a federal district court could assume subject matter jurisdiction. Concluding that such a procedure would run afoul of the Gibbs standard of what constitutes a "case" for purposes of Article III, § 2, of the Constitution, these authorities have concluded (or strongly suggested) that the provision is unconstitutional.[13]

The second problem is that many courts have interpreted the opaque language of § 1441(c) to permit a district court "to remand the entire action, *federal claims and all*, if the state law claims predominate."[14] If the district court takes this step, the defendant will be deprived of the right he enjoys under § 1441(a) to litigate the plaintiff's federal claims in a federal court. The effect is to create a perverse set of incentives: by attaching an unrelated state-law claim to his federal claims, a plaintiff may be able to frustrate the right to remove that the defendant would otherwise enjoy.

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[12] Owen Equipment & Erection Co. v. Kroger, 437 U.S. 365, 371 (1978).

[13] Porter v. Roosa, 259 F.Supp.2d 638, 652-53 (S.D. Ohio 2003).

[14] Eastus v. Blue Bell Creameries, L.P., 97 F.3d 100 (5th Cir. 1996) (emphasis added) (citing cases).

Against this background, it is understandable that leading commentators have concluded that "the present statute is useless and ought to have been repealed."[15] The Judicial Conference, however, does not take this approach. Rather, it proposes to replace the existing language with a new provision that specifies in precise detail what the district court should do when the defendant removes a case that includes both federal claims and non-removable state claims. In summary, the new § 1441(c) would provide that: (a) a plaintiff's joinder of unrelated state-law claims will *not* defeat removal that is otherwise proper based on the assertion of federal claims; but that (b) the district court must sever and remand the state-law claims over which it has no jurisdiction. The provision thus protects the defendant's right to remove without authorizing the district court to hear claims that are outside its jurisdiction under Article III.

Although I was initially inclined to favor a simple repeal of § 1441(c), I now prefer the Judicial Conference approach. The main reason is that in a decision earlier this year, the Supreme Court addressed what the majority called a "contamination theory" of jurisdiction.[16] Under that theory, "the inclusion of a claim or party falling outside the district court's original jurisdiction … contaminates every other claim in the complaint, depriving the court of original jurisdiction over any of these claims."[17] Although the Court rejected the theory in that case, I would not want to give district judges any leeway to embrace it in the context of removal. The Judicial Conference proposal would shut the door tight.[18]

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[15] Wright & Kane, supra note 6, at 235.

[16] Exxon Mobil Corp. v. Allapattah Services, Inc., 125 S. Ct. 2611, 2621 (2005).

[17] Id.

[18] The Supreme Court in *Exxon Mobil* also rejected an "indivisibility theory" that would pose a similar risk in the removal context. See id. at 2621-22. The Judicial Conference proposal would eliminate that threat as well.

## III. "Spoiler" Defendants in Diversity Litigation

Section 4(b)(4) of the Judicial Conference bill deals with the timing of removal in diversity cases. The Conference presents the proposal as a measure to resolve a conflict in lower-court decisions interpreting existing law. That is an accurate portrayal, but more is at stake. The Conference recommendation directly addresses a recurring practice that several courts have referred to as "tactical chicanery."[19] It also raises broader issues about the function of diversity jurisdiction in the 21st century.

I believe that the Judicial Conference proposal is a step in the right direction, but that it does not go far enough. In this statement I will sketch the background and offer some alternative proposals.

### A. *Ernst v. Merck*: the federal case that wasn't

This past August, newspaper headlines across the country announced the jury verdict in Carol Ernst's lawsuit against Merck & Co., the pharmaceutical manufacturer. The jury awarded $253 million to Mrs. Ernst for the death of her husband, who had taken the pain drug Vioxx made and marketed by Merck.

If there was ever a case that belonged in federal court on the basis of diversity, *Ernst v. Merck* would seem to fit the bill. The plaintiff was a grieving widow who was a citizen and resident of the state in which the suit was brought. The defendant was not only a citizen of another state; it had its headquarters in a different region of the country.

There were other reasons why this case seemed to belong in federal court. The defendant's business is one that is heavily regulated by federal law; indeed, the drug in question had been approved by the Food and Drug Administration. A

[19] E.g., Linnen v. Michielsens, 372 F.Supp.2d 811, 824 (E.D. Va. 2005), quoting Caudill v. Ford Motor Co., 271 F.Supp.2d 1324, 1326 (N.D. Okla. 2003).

jury verdict finding Merck at fault would effectively regulate the behavior of the defendant not just in Texas but throughout the country.

In spite of all these circumstances, the case was filed in a Texas state court, and Merck was unable to remove it to federal court. Several well-established jurisdictional doctrines combined to compel this result. The plaintiff's claim was grounded solely in state law. Although Merck might have had a defense of federal preemption, the well-pleaded complaint rule allows courts to look only at the complaint. And because a case can be removed to federal court by the defendant only if the complaint satisfies the rules for original jurisdiction (with exceptions not relevant here), removal could not be based on the federal defense.

What about diversity jurisdiction? Mrs. Ernst was a citizen of Texas, and Merck was incorporated in New Jersey. At the time the verdict was handed down, there were no other defendants in the case, so the rule of complete diversity was satisfied. Obviously the amount in controversy was well over $75,000. And because Merck was a citizen of New Jersey, the statutory barrier in § 1441(b) against removal by a citizen defendant in diversity cases had no applicability.

Why then did Merck not remove on the basis of diversity? It did not because it could not.[20] Although Merck was the only defendant in the case at the time of the verdict, that was not so at the time the plaintiff filed suit in state court. In the initial complaint, Mrs. Ernst named several other defendants, all of whom were citizens of Texas. These included the doctor who prescribed Vioxx and a doctor and research lab who took part in some of the Vioxx studies. Thus, not only was the complete diversity rule not satisfied; removal was also barred by the citizen-defendant provision of 28 USC § 1441(b).

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[20] Or at least Merck had reason to believe that it could not. But see infra note 21.

But as I have already mentioned, by the time the case got to trial, there was only one defendant, and that was Merck. Why could Merck not remove once the last Texas defendant had been dropped from the case? After all, section 1446(b) provides that if the case stated by an initial pleading is not removable, the defendant may file a notice of removal within 30 days after receiving an amended pleading "from which it may first be ascertained that the case … *has become* removable." That would seem to describe Merck's situation precisely: once the doctors and other Texas citizens were no longer named as defendants, the case fell within removal jurisdiction under §§ 1332(a) and 1441(a) and was not subject to the barrier of § 1441(b).

The answer lies in the last clause of § 1446(b) – the provision that the Judicial Conference now proposes to modify. Under that provision, added by Congress in 1988, a diversity case "may not be removed … more than 1 year after the commencement of the action." By the time the last Texas defendant had been dropped from the Ernst case, more than one year had elapsed.

This was not happenstance. Mrs. Ernst's lawyer wanted the lawsuit to stay in the state court, so he kept the "spoiler" defendants in the case for more than a year. Merck never even attempted to remove the case to federal court.[21] Commentators

[21] It is something of a puzzle why Merck did not remove notwithstanding the last clause of § 1446(b). Texas is in the Fifth Circuit, and as the Judicial Conference points out, the Fifth Circuit Court of Appeals has held that the one-year limitation on removal is subject to equitable exceptions. See Tedford v. Warner-Lambert Co., 327 F.3d 423 (5th Cir. 2003). Tedford involved extreme facts, so Merck might not have succeeded in invoking the doctrine of that case, but with so much at stake it would have been worth a try.

have suggested that the choice of forum contributed significantly to the pro-plaintiff verdict and the large money judgment voted by the jury.[22]

**B. Modifying the one-year limitation on diversity removal**

The Ernst litigation is far from unique. Numerous courts have called attention to the "abuses and inequities" created by the one-year limitation on diversity removal.[23] Recently one court described the prevalence of "procedural gamesmanship" under § 1446(b) in its current form:

> As numerous courts have acknowledged, and both plaintiffs and defendants recognize, many plaintiffs' attorneys include in diversity cases a non-diverse defendant only to non-suit that very defendant after one year has passed in order to avoid the federal forum. [Citations omitted.] … The result is that diversity jurisdiction – a concept important enough to be included in Article III of the United States Constitution and given to courts by Congress – has become nothing more than a game: defendants are deprived of the opportunity to exercise their right to removal and litigate in federal court not by a genuine lack of diversity in the case but by means of clever pleading. No one can pretend otherwise.[24]

The Judicial Conference proposes to address this "procedural gamesmanship" by codifying the view, already expressed by some courts, that the one-year prohibition on diversity removal is subject to equitable tolling. Specifically, the Conference would amend § 1446(b) to provide that a diversity case "may not be removed … more than 1 year after the commencement of the action *unless equitable considerations warrant removal*." (New language italicized.)

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[22] See, e.g., American Enterprise Institute Panel Discussion (Sept. 9, 2005) (remarks of Ted Frank) (available on NEXIS, News Library). In November 2005, a state-court jury in New Jersey ruled that Merck was *not* liable for a heart attack suffered by a man who had used Vioxx.

[23] The quoted language is from Martine v. National Tea Co., 841 F. Supp. 1421, 1422 (M.D. La. 1993).

[24] Linnen v. Michielsens, 372 F.Supp.2d 811, 824-25 (E.D. Va. 2005).

As is evident from my testimony thus far, I emphatically agree with the Judicial Conference that the one-year limitation on diversity removal is a problematic provision that should not be retained in its present form. However, I believe that the remedy proposed by the Conference is unnecessarily grudging and that it does not adequately address the "abuses" and "gamesmanship" generated by existing law.

The flaw in the Conference bill is that it retains the one-year limit as the baseline rule and puts the burden on the defendant to persuade the district court that "equitable considerations warrant removal." In my view, the burden should not be on the defendant. By hypothesis, we are talking about cases in which the requirements of diversity jurisdiction are satisfied. The defendant should not have to justify its right to remove. It is particularly troubling that (according to the Judicial Conference explanation) one of the relevant factors would be "whether the plaintiff had engaged in manipulative behavior." Defendants would thus be encouraged to paint plaintiffs' litigation tactics in the blackest colors. And district courts would be put in the position of assessing the blameworthiness of counsel's actions. This is neither a good use of judicial resources nor a good way of starting a litigation.

An alternative approach has been proposed by the American Law Institute (ALI) as part of its Federal Judicial Code Revision Project. The ALI would delete the one-year provision of § 1446(b) and replace it with a new provision using the following language:

> If a civil action has been removed … more than one year after the commencement of the action, and if the sole basis for removal is [diversity jurisdiction], the district court may in the interest of justice remand the action to the State court from which it was removed. No such

> remand shall be ordered except upon motion of a party filed within the time permitted for a motion to remand …[25]

This approach is preferable to the Judicial Conference solution, but it is far from ideal. The ALI devotes almost three pages to lengthy illustrations of how its proposal would work. This discussion makes clear that the "interest of justice" exception would leave a fertile ground for maneuvering and gamesmanship.[26]

The better solution, in my view, is to simply eliminate the one-year provision and restore the law to what it was before 1988. As the ALI points out, "the four decades of experience under present § 1446(b) before the 1988 amendment added the one-year period of limitations" provide "no evidence that delayed removal of diversity cases was disrupting state-court proceedings to a degree that demanded such drastic reform."[27]

Beyond that, it is hard to see why Congress should have much sympathy for a plaintiff who keeps an in-state defendant on the hook for two or three years of pretrial motions and discovery, only to drop the defendant from the case at the end of the period. Ordinarily, a plaintiff has every incentive to move his case along expeditiously; he is the litigant who wants the court to act on his behalf. To be sure, there may be some cases where extended discovery is required before the plaintiff realizes that he does not have a viable claim against the in-state

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[25] American Law Institute, Federal Judicial Code Revision Project 463 (2004).

[26] Here, for example, is one brief excerpt:

> [The plaintiff's] best strategy is to dismiss B [the individual defendant who is a co-citizen of the plaintiff] after the one-year period that transforms [the non-citizen corporate defendant's] absolute right of removal into a conditional right of removal subject … to the discretion of the district court, but as soon after one year as is dictated by whatever interest [the plaintiff] might have had in naming B as a party aside from B's status as a jurisdictional spoiler. Id. at 470-71.

[27] Id. at 468.

defendant. Yet even in that situation, if the non-citizen removes after the in-state defendant is dropped from the case, this does not seem unfair.

More generally, I believe that an occasional delay in removal is preferable to a regime that would require satellite litigation in numerous cases over whether "equitable considerations" or "the interest of justice" support the removal. Note, too, that the defendant must still file the notice of removal within 30 days after receiving an amended pleading or other paper disclosing that the "spoiler" is no longer in the case.

When Congress passed the Class Action Fairness Act earlier this year, it explicitly rejected the one-year limitation on removal. See 28 U.S.C. § 1453(b). There is every reason to adopt the same rule for all diversity actions.

If, however, Congress prefers not to go as far for the ordinary diversity case as it did for multistate class actions, it could enact a time-based limitation on diversity removal narrowly designed to avoid unnecessary disruption of state-court proceedings. For example, the legislation could authorize or require the district court to grant a motion to remand a diversity case if: (a) the case was removed more than one year after the commencement of the action *and* after the trial has begun or within 30 days of a scheduled trial; and (b) the motion to remand is made within 10 days. The authorization could also be limited to situations where the case became removable by reason of circumstances outside the plaintiff's control.

**C. Other antidotes to "gamesmanship" and "clever pleading"**

Let us assume that Congress amends § 1446 by eliminating the one-year deadline for removal of cases based on diversity jurisdiction. Does this mean that when a case like *Ernst v. Merck* arises in the future, the out-of-state defendant

corporation will be able to remove – either immediately upon the filing of the suit, or after the plaintiff has dropped the last in-state defendant? Not necessarily.

It is certainly true that a plaintiff generally will have strong tactical reasons for not pursuing claims against an individual co-citizen such as a doctor, retailer, or employee. As one judge has recently explained:

> Normally, the plaintiff has a lot to lose and not much to gain from joining a lowly employee who is not a foreman, boss, or overseer. Juries are loath to saddle a lowly employee with a joint and several judgment. Any experienced trial lawyer … who actually desires a judgment against a target defendant [like an out-of-state corporation] would never seek a joint judgment against [the] target defendant and a lowly employee for fear that the judgment amount would be reduced or negated out of sympathy for the employee.[28]

The same can be said, albeit to a lesser degree, about local retailers and doctors (like the defendant in *Ernst v. Merck*).

But it is also true that plaintiffs often go to great lengths to keep cases – especially personal injury cases – in state rather than federal court. And if the only way to prevent the defendant from removing is to join a co-citizen as defendant, plaintiffs may well be willing to do so. This can be seen vividly in the vast body of case law involving the doctrine of "fraudulent joinder."

Under this doctrine, removal based on diversity jurisdiction will be permitted even though one or more of the named defendants are co-citizens of the plaintiff. However, a defendant who seeks to defeat a remand motion on the ground of fraudulent joinder bears a very heavy burden. For example, in the Fifth Circuit, where *Ernst v. Merck* was litigated,

> the test for fraudulent joinder is whether the defendant has demonstrated that there is *no possibility* of recovery by the plaintiff against an in-state

[28] Linnen, 372 F.Supp.2d at 823-24.

> 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.[29]

A recent practice-oriented commentary offers a grim prognosis for corporate defense lawyers who believe that an in-state defendant has been joined solely to defeat diversity:

> [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.[30]

In this light, I believe that if the one-year limitation on diversity removal had not been in force, Mrs. Ernst (or more realistically her counsel) probably would have kept one of the defendant doctors (or the research lab) in the case. And under Fifth Circuit precedent, Merck probably would not have been able to show that the joinder was fraudulent. The case would thus have been litigated in Texas state court, exactly as happened in the actual case.

In my view, however, joinder of a Texas doctor as defendant would not have changed the essential character of the *Ernst v. Merck* litigation. If Merck as the sole defendant could remove – as plainly it could have done at any time since the Judiciary Act of 1789 – Merck as co-defendant with a local doctor should be able to remove also.

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[29] Smallwood v. Illinois Central R. Co., 385 F.3d 568, 573 (5th Cir. 2004) (en banc) (emphasis added).

[30] 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).

I suggest, therefore, that Congress – and this Subcommittee in the first instance – may wish to consider legislation that would more fully protect the right of the non-citizen defendant to remove a diversity case. One way to do this would be to establish a new basis for removal that draws on the Subcommittee's experience in drafting the Multiparty, Multiforum Trial Jurisdiction Act of 2002.[31] That legislation embodies two elements that are equally relevant in the context of personal injury and wrongful death litigation like *Ernst v. Merck*. First, Congress recognized that under Supreme Court interpretations, Article III can be satisfied by minimal diversity; complete diversity is not a constitutional requirement. Second, Congress distinguished among defendants and recognized the concept of the "primary" defendant.[32]

Building on this model, Congress might add a new section to chapter 89 that would authorize the primary defendant to remove a personal injury claim if (a) the primary defendant is a citizen of a different state from the plaintiffs; and (b) the primary defendant is not a citizen of the state in which the action is brought. "Personal injury claim" could be defined in accordance with H.R. 420, the Lawsuit Abuse Reduction Act, which passed the House just last month. The legislation would provide that consent of other defendants is not required for the removal.

Of course, many other details would have to be addressed. For example, the legislation might be limited to products liability claims rather than personal injury actions generally. Congress might require a minimum amount in controversy

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[31] The Act was passed as part of the Department of Justice Appropriations Act; relevant provisions are codified in 28 USC §§ 1369 and 1441(e).

[32] Both elements were also utilized in the Class Action Fairness Act.

substantially higher than what is required for the general run of diversity suits. The district court might be authorized to remand the case under specified circumstances.[33] Moreover, to address concerns about overloading the federal courts, Congress might want to cut back on some other aspect of diversity jurisdiction – for example, the ability of the home-state plaintiff to sue in federal court.

No doubt there will be other issues as well. I offer the proposal not as a fully worked-out piece of legislation, but as a starting-point for another possible response to the problems identified by the Judicial Conference. The right of the non-citizen to remove a diversity case has been part of our law since the Judiciary Act of 1789. At the very least, Congress should protect that right against "gamesmanship" and "clever pleading." But it may be desirable to go further and allow removal based on minimal diversity in specified circumstances.

## IV. The Amount in Controversy Requirement in Diversity Cases

Two of the proposals offered by the Judicial Conference deal with the amount in controversy requirement in diversity cases. One, applicable to all diversity litigation, would index the jurisdictional minimum to reflect the rate of inflation. The other proposal addresses the very troubling problems that arise in the context of removal when the plaintiff does not specify the amount he seeks or where state law allows the plaintiff to recover more than the amount asserted in the complaint.

[33] For example, the legislation might provide for remand if the district court determines that there is a substantial likelihood that the plaintiff will be able to obtain significant relief from one or more in-state defendants.

**A. Indexing the jurisdictional minimum**

Section 5 of the Judicial Conference bill would amend § 1332 "to enable the minimum amount in controversy for diversity of citizenship jurisdiction … to be adjusted periodically in keeping with the rate of inflation." As the Conference explains, if its proposed formula had been applicable beginning in 2000, the jurisdictional minimum would be $85,000 today rather than $75,000. The minimum would increase to $95,000 effective January 1, 2006.

This certainly seems like a sensible idea. If $75,000 was an appropriate minimum in 1990 – the last time Congress increased the statutory figure – the baseline today should be almost $112,000.[34] But it is not realistic to expect Congress to act regularly to adjust the statutory minimum. The Judicial Conference proposal provides an effective substitute.

**B. Removal and the amount in controversy**

Over the years, the federal courts have developed a voluminous body of case law for determining whether the amount in controversy requirement is satisfied. Today, however, the issue rarely arises when the party seeking entry to federal court is the plaintiff invoking original jurisdiction. After all, even a routine slip-and-fall case may plausibly be portrayed as justifying a damages award of $75,000.[35]

Removal presents a very different picture. As already noted (in the discussion of "spoiler" defendants), plaintiffs in civil litigation today often have a strong preference for keeping their cases in state court. When the amount in

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[34] The calculation was done by the Federal Reserve Bank of Minneapolis web site. See http://minneapolisfed.org/Research/data/us/calc/index.cfm.

[35] See, e.g., Gebbia v. Wal-Mart Stores, Inc., 233 F.3d 880 (5th Cir. 2000). I doubt that increasing the statutory minimum to $95,000 would effect any dramatic change in this respect.

controversy is at issue, "the plaintiff [will be] in the anomalous position of seeking to minimize the value of the claim, while the defendant [will argue] for the higher amount."[36]

State practice rules often create additional complications. These rules may prohibit the plaintiff from asserting a specific demand for money relief in the complaint. Or state law may allow the plaintiff to recover more than the amount pleaded. In these situations, federal decisional law generally allows the defendant to remove based on an assertion that the jurisdictional amount is satisfied. But when the plaintiff contests that assertion, the courts face difficult problems in determining whether removal is proper.

The Judicial Conference has proposed a set of procedures and standards to deal with these situations – and also to thwart what one court has called "abusive manipulation by plaintiffs."[37] I agree that the Conference has identified a problem that warrants Congress's attention, but I am not convinced that the Conference has found the best solution.

First, the proposal would require satellite litigation, with concomitant increases in litigation costs, in cases where the amount at stake will often be modest by today's standards. Second, I am concerned about codifying an elaborate new set of procedures in an area that bristles with court-made rules. Finally, a detailed statute may impede the ability of courts to respond to particular problems generated by laws or practices in particular states.

How, then, might Congress deal with the serious issues that the Conference has raised? I have two suggestions. First, Congress should encourage the use of

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[36] HELLMAN & ROBEL at 816.

[37] De Aguilar v. Boeing Co., 47 F.3d 1404, 1410 (5th Cir. 1995).

stipulations to avoid litigation over the amount in controversy. If the plaintiff is willing to sign a binding stipulation that he or she is not seeking and will not accept any recovery in excess of $75,000 exclusive of interest and costs, that should be sufficient to establish that the amount in controversy requirement is not satisfied. Some courts have so held under existing law.[38]

To be sure, it would be necessary to establish procedures to assure that plaintiffs adhere to their stipulations.[39] But that will impose less of a burden on courts and litigants than actual disputation over the amount in controversy.

Second, rather than enact a detailed set of procedures as part of the Judicial Code, I think it would be preferable for Congress to establish a standard and to ask the Judicial Conference to utilize the rulemaking process to devise the procedures for implementation. For instance, Congress might specify that a case may be removed on the basis of diversity jurisdiction only if –

> (1) the sum demanded in good faith in the initial pleading exceeds the amount specified in section 1332(a) of this title; or
>
> (2) the district court finds by a preponderance of the evidence that the amount in controversy exceeds that amount.

A separate provision would authorize the Judicial Conference to establish procedures for making the necessary determinations, including the use of stipulations.[40]

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[38] See, e.g., Brooks v. Pre-Paid Legal Services, Inc., 153 F.Supp.2d 1299 (M.D. Ala. 2001). However, most courts will not give effect to stipulations made after removal. E.g., Rogers v. Wal-Mart Stores, Inc., 230 F.3d 868 (6th Cir. 2000).

[39] In *Brooks*, the court said: "The court emphasizes that, while it does not call into question the integrity of Plaintiffs' damages stipulation, should Plaintiffs disregard their demand and pursue or accept damages in excess of $75,000, then upon motion by opposing counsel, sanctions will be swift in coming and painful upon arrival." Brooks, 153 F.Supp.2d at 1302.

[40] The rulemaking process may also be worth considering as a means of addressing other technical aspects of removal. See Part VI infra.

**Addendum**. The Judicial Conference has now proposed amendments to § 1441(a) and § 1447 that would facilitate the use of "declarations" to specify the amount in controversy for the purpose of determining whether a case may be removed on the basis of diversity. As is evident from the preceding discussion, I enthusiastically support this concept. I offer these additional thoughts.

First, careful drafting will be required to codify a regime that makes use of "declarations." The procedures should mesh with the vagaries of practices in the 50 states. They should also be integrated with other aspects of removal procedure. For example, the proposed amendment to § 1441(a) would prohibit removal as long as the declaration "remains binding under state practice." This might pose difficulties in determining when the 30-day period for removing begins to run.

In this light, it may be desirable to utilize federal-state judicial councils in the various circuits to design the details of the system. Judges and lawyers within each state are in the best position to know how to fit "declarations" into existing state practices. They could draft local rules and forms that would minimize confusion and delay.

Second, reliance on "declarations" may substantially reduce the need to craft elaborate procedures for determining the amount in controversy in removed cases. In particular, I suggest that if the plaintiff *declines* to file a declaration, this can be taken as creating a presumption that the amount in controversy does satisfy the statutory minimum. The presumption would be rebuttable, but negative as well as positive reliance on declarations would help to avoid the satellite litigation that burdens litigants and delays the final selection of the forum.

## V. Other Aspects of Diversity Jurisdiction

There are many other aspects of federal jurisdiction that may warrant Congressional attention – for example, the prohibition on appellate review of remand orders in 28 USC § 1447(d).[41] I will confine myself to two problems of diversity jurisdiction that have been spotlighted by recent developments: (a) "entity" treatment for unincorporated associations; and (b) the scope of supplemental jurisdiction in class actions.

### A. "Entity" treatment for unincorporated associations

Corporations have been treated as "citizens" for purposes of diversity jurisdiction since the middle of the 19th century. Initially this was accomplished through Supreme Court decisions, but Congress ratified the Court's approach in § 1332(c) of Title 28 (discussed in Part I-B of my statement). However, the Court has repeatedly refused to accord entity treatment to other forms of business association. Most recently, in *Carden v. Arkoma Associates*, 494 U.S. 185 (1990), the Court acknowledged that other types of organizations, such as limited partnerships, might be functionally similar to corporations. But the Court emphatically reaffirmed the corporations-only rule, saying that the task of "accommodating our diversity jurisdiction to the changing realities of commercial organization" properly belongs to Congress.

In the Class Action Fairness Act of 2005, Congress accepted the Court's invitation. Section 1332(d)(10) of Title 28 now provides that for purposes of the new provisions governing original and removal jurisdiction of multistate class

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[41] Under current law, even if the district judge committed an egregious error in remanding a case to the state court, the defendant generally has no remedy. At the same time, the Supreme Court and the courts of appeals have recognized a patchwork of exceptions to the statutory prohibition that is itself a source of litigation and uncertainty. See, e.g., In the Matter of Florida Wire & Cable Co., 102 F.3d 866 (7th Cir. 1996).

actions, "an unincorporated association shall be deemed to be a citizen of the State where it has its principal place of business and the State under whose laws it is organized."

The House Report on the Class Action Fairness Act of 2003 explained the reasons for this provision. The Report noted that the current rule, as laid down in cases like *Carden*, "has been frequently criticized because often [an] unincorporated association is, as a practical matter, indistinguishable from a corporation in the same business."[42] The Report quoted with approval from the Moore treatise: "Congress should remove the one remaining anomaly and provide that where unincorporated associations have entity status under State law, they should be treated as analogous to corporations for purposes of diversity jurisdiction."[43]

The reasons given in the House Report apply equally to the general run of diversity suits. The difference, of course, is that extending the rule of § 1332(d)(10) to all diversity actions would affect a much larger number of cases, perhaps adding substantially to federal court caseloads. Congress must weigh the added burdens against the benefit of eliminating the anomaly described in the House Report.

**B. Supplemental jurisdiction in class actions**

Three decades ago, in *Zahn v. International Paper Co.*, 414 U.S. 291 (1973), the Supreme Court ruled that in a class action based on diversity jurisdiction, each class member must satisfy the jurisdictional amount requirement, and any class member who does not "must be dismissed from the case." The precedent of *Zahn*

[42] H.R. Rep. No. 108-144 at 41.

[43] Id.

formed an important part of the legal background that Congress considered when it enacted the Class Action Fairness Act of 2005 (CAFA).[44]

This past June, in *Exxon Corp. v. Allapattah Services, Inc.*, 125 S. Ct. 2611 (2005), the Supreme Court held that Congress actually overruled *Zahn* in 1990, a decade and a half before CAFA became law. Congress did so, according to the Court, by enacting the supplemental jurisdiction statute, 28 USC § 1367. Under the Court's interpretation, as long as at least one named plaintiff satisfies the amount-in-controversy requirement, the district court may exercise supplemental jurisdiction "over the claims of other plaintiffs in the same Article III case or controversy, even if those claims are for less than the [statutory minimum]."

Almost certainly, *Exxon Mobil* represents a misreading of Congressional intent. It is hard to believe that Congress would have abrogated a well-known, controversial, important Supreme Court decision without a single word to that effect from any member of the Judiciary Committee in either the House or the Senate. In fact, the available legislative history points in exactly the opposite direction. The report of the House Judiciary Committee on the bill that included § 1367 states explicitly: "The section is not intended to affect the jurisdictional requirements of 28 U.S.C. § 1332 in diversity-only class actions, as those requirements were interpreted prior to [a 1989 Supreme Court decision]."[45] A footnote at that point cites *Zahn*.[46]

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[44] See H.R. Rep No. 108-144 at 10.

[45] H.R. Rep. No. 101-734 at 28, quoted in *Exxon Mobil*, 125 S. Ct. at 2629 (Stevens, J., dissenting).

[46] The majority opinion in *Exxon Mobil*, written by Justice Kennedy, acknowledged the passage I have quoted, but emphasized that a contrary understanding of the language of § 1367 could be found in a working paper prepared by a subcommittee of the Federal Courts Study Committee. The majority said: "The House Report is no more authoritative than the Subcommittee Working Paper." 125 S. Ct. at 2626 (Court opinion).

In any event, the more important question is not whether *Exxon Mobil* is a flawed interpretation of the statute that Congress enacted in 1990, but whether it is sound policy today. There is good reason to think that it is not, at least with respect to class actions. The Class Action Fairness Act was a carefully crafted compromise that broadened the availability of diversity jurisdiction for class actions – but with significant limitations. Those limitations were an essential part of the compromise that enabled the legislation to pass with broad bipartisan support in both Houses. *Exxon Mobil*'s interpretation of § 1367 will allow some class actions to be litigated in federal court (originally or on removal) even though they would not be within the jurisdiction under either *Zahn* or CAFA.

A simple fix would be to amend § 1367(b) to insert a reference to Rule 23, so that the section would read as follows (new language italicized):

> In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 *or Rule 23* of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

This would avoid the prospect that "there will now be two sets of rules on diversity class actions, with no coordination between them."[47]

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This is a stunning statement. House Reports, of course, are prepared by House Committees as part of Congress's own processes; they are relied on by Members to determine the import of the bills they vote on. In contrast, there is no reason to think that any Member outside the Judiciary Committees would even have been aware of a working paper prepared by a subcommittee of a study group. Yet the Supreme Court believes that the two documents are equally authoritative in determining the meaning of a Congressional enactment.

[47] Alan B. Morrison, Straightening Out the Supplemental Jurisdiction Mess: Short and Long Term Fixes, 74 U.S.L.W. 2179, 2181 (2005).

Although the Court in *Exxon Mobil* also interpreted § 1367 to allow jurisdiction over claims by plaintiffs joined under Rule 20, I do not suggest overruling that aspect of the Court's decision. For one thing, there is no legislation comparable to CAFA to be concerned about. For another, it is not clear that this aspect of the Court's holding is undesirable as a matter of policy. Thus, in *Ortega*, the companion case to *Exxon Mobil*, the Court allowed family members to join in an injured girl's suit for personal injuries. While one might certainly question whether a suit seeking damages for a cut pinky finger belongs in federal court at all,[48] once it is there, it is efficient to allow family members to pursue their claims in the same action.[49]

## VI. Conclusion

The Judicial Conference has identified several problems of federal jurisdiction that deserve the attention of Congress and, in the first instance, this Subcommittee. I agree with the Conference's diagnoses and, for the most part, with its proposed cures. I have also suggested some other amendments to Title 28 that may warrant consideration.

In discussing the problem of determining the amount in controversy in removed cases, I noted that a preferable solution might be to use the rulemaking process under the Enabling Act. This approach is also worth considering as a means of addressing other aspects of removal procedure that have divided the

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[48] The district court, after considering the damages awards that the Supreme Court of Puerto Rico found reasonable in tort cases, concluded that even the girl's own claim was not worth $75,000. The First Circuit reversed that ruling. See Ortega v. Star-Kist Foods, Inc., 370 F.3d 124, 128-29 (1st Cir. 2004).

[49] Professor Alan Morrison has suggested a similar but broader *Exxon Mobil* fix. See Morrison, supra note 47, at 2181 n.8. For the reasons given in the text, I would limit the amendment to class actions.

courts. For example, what constitutes an "initial pleading" for purposes of determining when the 30-day period for removal begins to run?[50] Is removability determined "by the face of the initial pleading or by defendant's knowledge, constructive or otherwise, of the requisite jurisdictional facts?"[51] Because questions like these are technical and often interdependent, they are better handled through rule-making than legislation. Congress might also use the rulemaking process to create an orderly system for limited appellate review of remand orders in removed cases.[52]

I do not suggest rulemaking as a way of dealing with issues of jurisdiction – either removal jurisdiction or original jurisdiction. We have been reminded that "questions of jurisdiction [are] questions of power as between the United States and the several states."[53] Congress should itself decide on the scope and extent of the federal judicial power. But within the framework established by Congress, there is room for adjustment of procedure through the rulemaking process.[54]

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[50] See, e.g., Sikirica v. Nationwide Ins. Co., 416 F.3d 214 (3d Cir. 2005).

[51] See Harris v. Bankers Life & Cas. Co., 425 F.3d 689 (9th Cir. 2005). There has been a split among judges *within the same judicial district* over whether the 30-day period begins to run when the defendant receives a complaint that does not explicitly request more than $75,000 in damages but does contain "allegations that, if proven, will result in an award over that sum." See Gallo v. Homelite Consumer Products, 371 F.Supp.2d 943, 948 (N.D. Ill. 2005).

[52] See supra note 41.

[53] Felix Frankfurter & James M, Landis, The Business of the Supreme Court: A Study in the Federal Judicial System 2 (1928) (quoting former Justice Benjamin Curtis).

[54] Professor Morrison has offered a similar suggestion, though he would allow the rulemaking to "fill in the details" of jurisdictional statutes. Morrison, supra note 47, at 2182. I would not go that far.

## Statement of Arthur D. Hellman

## Federal Jurisdiction Clarification Act

## Executive Summary

1. **Clarifying the Judicial Code**. The Judicial Conference has proposed amendments to Title 28 dealing with the resident alien proviso, the citizenship of corporations with foreign contacts, separate treatment for removal of criminal proceedings, the "rule of unanimity" for removal, and the timing of removal in multiple-defendant cases. Codifying the "rule of unanimity" is not as straightforward as it appears; however, the other proposals deserve the Subcommittee's support.

2. **"Separate and independent" claims**. The Conference has drafted a sensible rewrite of 28 USC § 1441(c). The new language would provide that: (a) a plaintiff's joinder of unrelated state-law claims will *not* defeat removal that is otherwise proper based on the assertion of federal claims; but that (b) the district court must sever and remand the state-law claims over which it has no jurisdiction.

3. **"Spoiler" defendants in diversity litigation**. Under current law, a civil action cannot be removed on the basis of diversity more than one year after the action is commenced. This allows for "procedural gamesmanship" by plaintiffs. As one court has said, "many plaintiffs' attorneys include in diversity cases a non-diverse defendant only to non-suit that very defendant after one year has passed in order to avoid the federal forum." The Judicial Conference proposes to address this problem by allowing removal after one year if "equitable considerations warrant." This approach is unnecessarily grudging. A better solution is to simply eliminate the one-year provision and restore the law to what it was before 1988.

Looking to the long term, Congress may wish to consider allowing removal based on minimal diversity for specific narrow categories of cases.

4. **Amount in controversy in diversity cases**. The Judicial Conference proposes to index the "amount in controversy" to keep up with inflation. This seems like a sensible idea. The Conference also offers proposals that deal with the problem of determining the amount in controversy in a removed case when it is impossible to use the sum demanded in the complaint. The best approach is to encourage the use of stipulations: if the plaintiff agrees not to seek or accept any recovery in excess of the amount in controversy required by the statute, that should be sufficient to establish that the jurisdictional minimum is not satisfied.

5. **Other aspects of diversity jurisdiction**. Congress may wish to consider: (a) amending 28 USC § 1332(c) to accord "entity" treatment to unincorporated associations, as it did in the Class Action Fairness Act (CAFA); and (b) abrogating a 2005 Supreme Court decision that allows some diversity class actions that do not fall within the carefully crafted compromise of CAFA.

6. **Conclusion**. Congress should consider using the rulemaking process under the Enabling Act as a means of addressing other aspects of removal procedure that have divided the courts. Rulemaking may also provide a good mechanism for creating an orderly system for limited appellate review of remand orders in removed cases.