FEDERAL COURTS JURISDICTION CLARIFICATION ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON COURTS, THE INTERNET, AND INTELLECTUAL PROPERTY

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED NINTH CONGRESS

FIRST SESSION

NOVEMBER 15, 2005

Serial No. 109–67

Printed for the use of the Committee on the Judiciary

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

U.S. GOVERNMENT PRINTING OFFICE

24–607 PDF WASHINGTON : 2006

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2250 Mail: Stop SSOP, Washington, DC 20402–0001

COMMITTEE ON THE JUDICIARY

F. JAMES SENSENBRENNER, JR., Wisconsin, *Chairman*

HENRY J. HYDE, Illinois
HOWARD COBLE, North Carolina
LAMAR SMITH, Texas
ELTON GALLEGLY, California
BOB GOODLATTE, Virginia
STEVE CHABOT, Ohio
DANIEL E. LUNGREN, California
WILLIAM L. JENKINS, Tennessee
CHRIS CANNON, Utah
SPENCER BACHUS, Alabama
BOB INGLIS, South Carolina
JOHN N. HOSTETTLER, Indiana
MARK GREEN, Wisconsin
RIC KELLER, Florida
DARRELL ISSA, California
JEFF FLAKE, Arizona
MIKE PENCE, Indiana
J. RANDY FORBES, Virginia
STEVE KING, Iowa
TOM FEENEY, Florida
TRENT FRANKS, Arizona
LOUIE GOHMERT, Texas

JOHN CONYERS, JR., Michigan
HOWARD L. BERMAN, California
RICK BOUCHER, Virginia
JERROLD NADLER, New York
ROBERT C. SCOTT, Virginia
MELVIN L. WATT, North Carolina
ZOE LOFGREN, California
SHEILA JACKSON LEE, Texas
MAXINE WATERS, California
MARTIN T. MEEHAN, Massachusetts
WILLIAM D. DELAHUNT, Massachusetts
ROBERT WEXLER, Florida
ANTHONY D. WEINER, New York
ADAM B. SCHIFF, California
LINDA T. SÁNCHEZ, California
CHRIS VAN HOLLEN, Maryland
DEBBIE WASSERMAN SCHULTZ, Florida

PHILIP G. KIKO, *General Counsel-Chief of Staff*
PERRY H. APELBAUM, *Minority Chief Counsel*

SUBCOMMITTEE ON COURTS, THE INTERNET, AND INTELLECTUAL PROPERTY

LAMAR SMITH, Texas, *Chairman*

HENRY J. HYDE, Illinois
ELTON GALLEGLY, California
BOB GOODLATTE, Virginia
WILLIAM L. JENKINS, Tennessee
SPENCER BACHUS, Alabama
BOB INGLIS, South Carolina
RIC KELLER, Florida
DARRELL ISSA, California
CHRIS CANNON, Utah
MIKE PENCE, Indiana
J. RANDY FORBES, Virginia

HOWARD L. BERMAN, California
JOHN CONYERS, JR., Michigan
RICK BOUCHER, Virginia
ZOE LOFGREN, California
MAXINE WATERS, California
MARTIN T. MEEHAN, Massachusetts
ROBERT WEXLER, Florida
ANTHONY D. WEINER, New York
ADAM B. SCHIFF, California
LINDA T. SÁNCHEZ, California

BLAINE MERRITT, *Chief Counsel*
DAVID WHITNEY, *Counsel*
JOE KEELEY, *Counsel*
RYAN VISCO, *Counsel*
SHANNA WINTERS, *Minority Counsel*

CONTENTS

NOVEMBER 15, 2005

OPENING STATEMENT

WITNESSES

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

FEDERAL COURTS JURISDICTION CLARIFICATION ACT

TUESDAY, NOVEMBER 15, 2005

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS, THE INTERNET,
AND INTELLECTUAL PROPERTY,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 4:12 p.m., in Room 2141, Rayburn House Office Building, the Honorable Lamar Smith (Chairman of the Subcommittee) presiding.

Mr. SMITH. The Subcommittee on Courts, the Internet, and Intellectual Property will come to order.

Looking out at the audience today, I have to comment, I've never seen such a sparsely attended hearing. And before I get to my prepared remarks, I want to acknowledge that that's not to say we're not talking about substantive subjects; it's only to say that we're talking about very arcane subjects that may or may not be of interest to, or understandable by, the typical person who might be in town visiting and wanting to sit in on typical Judiciary or other Committee hearings. But that doesn't mean we don't appreciate the attendance of our three witnesses today and what advice they will give us in just a few minutes.

I'm going to recognize myself—oh, and I'm glad to see another Member, the gentleman from California, here as well. And that means there's as many Members as there are witnesses; which is always a good sign. And I'm going to recognize myself for an opening statement, and then the others.

In recent years, Congress has focused its attention on Federal jurisdiction over major cases. For example, in 2002, at the initiative of this Subcommittee, Congress passed the Multiparty, Multiforum Trial Jurisdiction Act. Earlier this year, Congress passed the Class Action Fairness Act.

In this hearing, we turn to some of the jurisdictional problems raised by ordinary civil litigation. These cases may not have the high profile of class action or airline disaster litigation, which are more numerous. But the legislative proposals we're considering today would have a wide impact on ordinary private litigation in the Federal courts.

And it's not only Federal courts that would be affected. Many of these proposals deal with the removal of cases to Federal court from State courts. As lawyers know, removal is one of the most contentious aspects of civil litigation.

Plaintiffs' lawyers try to keep cases in State court; defendants counter with their own efforts to remove to Federal court. Our job is not to favor plaintiffs or defendants, but to make sure that the jurisdictional arrangements are both fair and efficient for all litigants.

Some may view removal as an intrusion on State prerogatives. But removal has been part of the Federal Judicial Code since the first Judiciary Act. And under the Constitution, Congress has broad authority to define the circumstances under which a defendant should be able to claim the protection of a neutral Federal forum.

The proposals we're considering here today run the gamut from the very technical to those that aim at litigation tactics that have been described as "gamesmanship," such as using the rigid 1-year rule for removal to run the clock on defendants and deprive them of their opportunity to remove their case to Federal court.

Now, we look forward to discussing these and other issues with our panelists here today. And I'll now recognize the gentleman from California, Mr. Berman, for his opening statement.

Mr. BERMAN. Well, thank you very much, Mr. Chairman. The topic here today is diversity jurisdiction and civil procedure. As you pointed out, it's opaque, and any illumination will be helpful; bring us back to the courses many, many years ago that we used to have.

The only modification I make of your general principle is plaintiffs who sue in State courts try to keep their cases in State courts. The ones who sue in Federal court stay.

But the hearing today concerns the complexities of diversity jurisdiction, the concept of federalism, which holds an assurance of an impartial forum for parties in lawsuits filed in courts in States other than their own, and facilitates a continued open dialogue between the Federal and State systems.

Some of the amendments in the Committee print appear to be technical in nature; others address some of the core policy considerations behind Federal diversity jurisdiction. Because application of diversity jurisdiction is complicated and greatly affects an already over-burdened Federal court, it is important that we consider the impact of these provisions.

Reducing redundant or unnecessary litigation is a laudable goal. We should clarify when Federal diversity jurisdiction exists, and help those who appear before courts understand where the bright lines of diversity jurisdiction exist.

Furthermore, it's my understanding that specific provisions of the proposed legislation will achieve the original intention of Congress when passing, I guess, the most recent diversity jurisdiction legislation.

These witnesses who are here today will help outline how this legislation will do that, and explain the advantages of passing the proposed text in the Federal Courts Jurisdiction Clarification Act. Thank you, Mr. Chairman. I yield back.

Mr. SMITH. Thank you, Mr. Berman. The gentleman from California, Mr. Issa, is recognized for an opening statement.

Mr. ISSA. Thank you, Mr. Chairman. I would ask that my entire opening statement be placed in the record.[1]

Mr. SMITH. Without objection, it will be.

Mr. ISSA. And very briefly, Mr. Chairman, I want to thank you for holding this hearing. And I know you said it's arcane, but as somebody who has seen the gamesmanship lawyers play, either to get something in or keep something from going into Federal jurisdiction, depending upon their goals, I'm keenly interested in hearing how current legislation, and potentially even future legislation, can be catered to create what the Chairman—rightfully so—has said should be a neutral situation; one in which it is not we in Congress trying to determine that something must go for an advantage to a plaintiff or a defendant.

And your view, particularly, Your Honor, on what we've done so far and what gamesmanship you see being played to get in—to manipulate, to get into the Federal court for an advantage of one side over the other, would be very insightful. Because ultimately, we do not—well, I believe that this Committee in its entirety does not want to be encouraging the Federal Government to take on burdens that are inappropriate or unnecessary; that the courts belong to the States, with rare exceptions, and we should try to keep those as rare as absolutely necessary.

So I look forward to the testimony. As Chairman, I think you hit it right on, by saying that this is all about us not favoring one side or the other, but providing an appropriate path. And with that, I yield back.

Mr. SMITH. Thank you, Mr. Issa. Before I introduce the witnesses, I'd like to invite you to stand and be sworn in.

[Witnesses sworn.]

Mr. SMITH. Our first witness is Judge Janet C. Hall, of the United States District Court for the District of Connecticut. She is here today on behalf of the Judicial Conference. Judge Hall was appointed to the bench in 1997. She graduated from Mount Holyoke College, magna cum laude, and also received her JD from the New York University School of Law, where she was a Ruth Tilden scholar.

Our next witness is Professor Arthur Hellman. Professor Hellman is a professor of law at the University of Pittsburgh Law School. His areas of specialization are civil procedure, Federal courts, constitutional law. Professor Hellman received a BA from Harvard, and a JD from Yale Law School.

Finally, our last witness is Mr. Richard Samp, Chief Counsel from the Washington Legal Foundation, where the majority of his practice focuses on Federal court litigation. Mr. Samp is a graduate of Harvard College and the University of Michigan Law School.

Welcome to you all. Without objection, your entire statements will be made a part of the record. And we ask, of course, that you all limit your comments to 5 minutes.

I suspect that Mr. Berman and I will have sort of extended questions, and we'll be able to elicit further responses when we get to that point.

---

[1] The prepared statement of Mr. Issa was not available for insertion in this hearing at the time it was submitted for publishing.

Thank you all again for being here. And Judge Hall, we'll begin with you.

TESTIMONY OF THE HONORABLE JANET C. HALL, JUDGE, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT, ON BEHALF OF THE JUDICIAL CONFERENCE COMMITTEE ON FEDERAL-STATE JURISDICTION

Judge HALL. Good afternoon, and thank you, Mr. Chairman, Congressman Berman, and Congressman Issa. My name is Janet Hall, and I'm a United States District Court Judge and a member of the Judicial Conference Committee on Federal-State Jurisdiction.

I'm pleased to testify here today on behalf of the Judicial Conference—which is, of course, the policy-making body for the Federal Judiciary—regarding the Federal Courts Jurisdiction Clarification Act of 2005.

This bill was initiated by the Judicial Conference, and we greatly appreciate your holding this hearing on it. We believe that the proposals contained there in the act will clarify jurisdictional issues that have arisen in Federal court litigation, and thus help the parties avoid expense and delay.

The Federal Courts Jurisdiction Clarification Act is intended to do exactly what its title says. It primarily clarifies Federal statutes as to when claims may be asserted in Federal court. It is not intended to change policies about who can proceed in Federal court; but rather, to resolve some interpretational issues with which courts have struggled.

Uncertainty is costly. If plaintiffs and defendants do not know where they can pursue a claim or have it considered, then judicial proceedings are wasted. Parties end up in needless litigation over procedural issues, which only delays the ultimate resolution of the case. We would like to bring more certainty to the litigation process, and we believe that we have submitted proposals to you which can do just that.

Provisions in the bill are primarily focused on diversity of citizenship jurisdiction, which limits jurisdiction to cases in which no plaintiff is from the same State as any defendant, and the amount in controversy exceeds $75,000. I could just briefly highlight a few of the provisions.

Section 2 resolves the problem created by the addition in 1988 of a sentence to the diversity jurisdiction statute that was intended to prevent aliens residing in a State from suing a U.S. citizen residing in the same State. This proviso, which was written in a "deems" fashion, does deem an alien admitted for permanent resident [sic] to be a citizen of the State in which the alien is domiciled.

However, some litigants have sought to give it a more expansive effect. And courts have disagreed on how to interpret it. Section 2 will resolve this ambiguity by restoring what we believe Congress intended when it initially enacted this language, so as to preclude diversity jurisdiction when a lawsuit is between a U.S. citizen and a permanent resident alien who are both domiciled in the same State.

Section 3 updates and clarifies the definition of citizenship for corporations as well as insurance companies that are involved in direct action litigation, where those entities have foreign business connections. In 1958, Congress enacted a statute that provided for purposes of diversity of citizenship jurisdiction that a corporation is deemed to have two citizenships, in effect: of the State by which it's incorporated, and of the State where its principle place of business is.

Because of the use in the statute of a capital "S" in "States," conflicting interpretations have arisen in the courts over whether foreign states are included in the definition. Section 3 seeks to resolve this ambiguity by adding specific reference to foreign states, so that a company who is incorporated abroad or who has its principal place of business abroad would be deemed to be a citizen of those two places.

Section 4 solves several problems that have arisen with removal and remand procedures. It first addresses the problem created when State law claims that otherwise are not removable are joined with a Federal case or claim and the removal is sought. Courts have reached different conclusions as to whether the statute permits them to hear these cases at all.

This proposal solves that problem by allowing removal, requiring the district court to keep the Federal claim and to hear it, but to remand the otherwise unrelated non-removable State claim back to State court.

Section 4 also addresses timing of removal in multiple-defendant situations. The proposed changes essentially solve the problem created when defendants are served over an extended period of time, and the latest-served defendant seeks to remove. In these situations, because the statute currently is written only in the singular, "the defendant may remove," courts have disagreed on the right of the later-served defendant to remove.

Section 5 of the Act would index the monetary threshold for diversity jurisdiction. In '97, Congress increased the amount—the threshold—from in excess of 50,000 to the current amount of 75,000. But since the real value of any amount specified would decrease over time and inflationary periods, this proposal would seek to index the amount using a consumer price index; allowing it to change, in effect, with the value of the dollar, and thereby keeping the jurisdictional limit as a meaningful threshold; without requiring review constantly by Congress.

Lastly, I want to describe a new provision that the Congress recently endorsed and transmitted to the House Monday, to facilitate the use of declarations to specify the amount of damages being sought. This proposal makes it easier for litigants to indicate that they don't seek, and will not accept, more than the $75,000 in damage; and in turn, will enable a defendant to determine if removal would be a fruitless step in the courts if it is removed to determine that diversity jurisdiction doesn't exist.

Mr. Chairman, in closing, I want to thank you again for holding this hearing, inviting the Judicial Conference to testify on these proposals that we believe will help litigants and the courts.

Again, uncertainty is costly and leads to delay. And the judiciary believes it's identified several statutory changes that will add cer-

tainty to the process and improve the administration of justice. Thank you, sir.

[The prepared statement of Judge Hall follows:]

PREPARED STATEMENT OF THE HONORABLE JANET C. HALL

Mr. Chairman and Members of the Subcommittee, my name is Janet Hall. I am a United States District Judge in the District of Connecticut and a member of the Judicial Conference Committee on Federal-State Jurisdiction. I have been asked to testify today on behalf of the Judicial Conference of the United States regarding the "Federal Courts Jurisdiction Clarification Act of 2005." We greatly appreciate your holding a hearing on legislation that the Judicial Conference has proposed. Thank you for the opportunity afforded the federal judiciary to testify today, and I would ask that my statement be included in the record.

For several years, the Judicial Conference of the United States has been seeking to identify problems that litigants and judges have repeatedly encountered in interpreting certain jurisdictional statutes in title 28, United States Code. This effort, which has been carried out by the Conference's Committee on Federal-State Jurisdiction, has been referred to as the "jurisdictional improvements project." The project provides a means by which the federal courts can identify recurring problems and suggest clarifications to particular statutes. The goal is simply to help both litigants and judges by eliminating needless litigation and wasteful judicial proceedings.

Through the jurisdictional improvements project, the Judicial Conference has approved several proposals to correct identified problems. Each one has been the result of much study and consultation with legal experts. This collection of proposals has now been folded into one proposed legislative package called the "Federal Courts Jurisdiction Clarification Act of 2005."

Much of this proposal focuses on diversity of citizenship jurisdiction. The Constitution provides the basis for federal court jurisdiction over disputes between citizens of different states (diversity jurisdiction) and over disputes involving citizens of the United States and citizens or subjects of foreign states (alienage jurisdiction). As currently codified, diversity jurisdiction exists whenever the matter in controversy exceeds $75,000 and is between citizens of different states. *See* 28 U.S.C. § 1332(a)(1). Under the long-standing complete diversity requirement, no plaintiff can be from the same state as any defendant for diversity jurisdiction to be available. *See Strawbridge v. Curtiss,* 7 U.S. (3 Cranch) 267 (1806). The traditional reason given for providing for diversity jurisdiction is "a fear that state courts would be prejudiced against those litigants from out of state." C. Wright & M. Kane, *The Law of Federal Courts* 144 (6th ed. 2002).

RESIDENT ALIEN PROVISO (SEC. 2)

Although the Constitution permits the assertion of federal jurisdiction over disputes involving aliens, established law bars the assertion of jurisdiction over a dispute that involves only aliens. Alienage jurisdiction exceeds the limits of Article III unless a citizen of the United States also appears as a party. *See Hodgson v. Bowerbank,* 9 U.S. (5 Cranch) 303 (1809). Cognizant of this long-standing constitutional limitation, section 1332 allows for jurisdiction over aliens in two situations, both of which involve U.S. citizens. First, section 1332(a)(2) applies to disputes between citizens of a state and citizens or subjects of a foreign state. Second, section 1332(a)(3) applies to disputes between citizens of different states and in which citizens or subjects of a foreign state are additional parties. Jurisdiction based on section 1332(a)(2) or (3) is still subject to the minimum amount-in-controversy requirement.

In general, the federal courts have taken a fairly narrow view of the scope of section 1332(a)(2) jurisdiction, declining on statutory grounds to assert jurisdiction over disputes in which aliens appear on both sides of the litigation. *See, e.g., Ed & Fred, Inc. v. Puritan Marine Ins. Underwriters Corp.,* 506 F.2d 757 (5th Cir. 1975). Even though U.S. citizens may appear on one side of the litigation, the presence of aliens as opposing parties (even aliens from different foreign countries) has proven fatal to the assertion of jurisdiction. *See generally Allendale Mutual Ins. Co. v. Bull Data Systems, Inc.,* 10 F.3d 425, 428 (7th Cir. 1993); 15 Moore's Federal Practice § 102.77 (3d ed. 2001). In actions proceeding under section 1332(a)(3), this rule has not been applied with the same rigor. More specifically, when a claim between diverse U.S. citizens grounds the jurisdiction and aliens appear as additional parties on both sides of the litigation, jurisdiction has been upheld. *See Transure, Inc. v. Marsh & McLennan, Inc.,* 766 F.2d 1297, 1298–99 (9th Cir. 1985) (upholding jurisdiction

under section 1332(a)(3)); *Dresser Industries, Inc. v. Underwriters at Lloyds of London,* 106 F.3d 494, 500 (3d Cir. 1997) (same).

In 1988, Congress added the "resident alien proviso" to section 1332(a) through enactment of the Judicial Improvements and Access to Justice Act (Pub. L. No. 100–702). The proviso states that "an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled." 28 U.S.C. § 1332(a). The purpose of that 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. *See, e.g., China Nuclear Energy Industry Corp. v. Anderson, LLP,* 11 F. Supp. 2d 1256, 1258 (D. Co. 1998). In such situations, the permanent resident alien has appreciable connections to the state, and there was perceived to be no need to provide for a federal forum to protect the alien against possible bias in state court.

While the 1988 amendment curtailed alienage jurisdiction as intended, the "deeming" feature created an arguable basis for expansion of alienage jurisdiction in other settings—an interpretational problem with which the courts have struggled. *See, e.g., Arai v. Tachibana,* 778 F. Supp. 1535, 1538–40 (D. Haw. 1991), and *Saadeh v. Farouki,* 107 F.3d 52, 57–61 (D.C. Cir. 1997). Under section 1332(a)(1), for example, two resident aliens from different states might each be deemed to be a citizen only of his or her respective state of domicile and claim access to federal diversity jurisdiction in circumstances that would appear to violate the long-standing rule of *Hodgson v. Bowerbank* (described *supra*). Under sections 1332(a)(2)–(3), additional possibilities emerge for litigants involved in litigation with resident aliens to seek to expand their access to federal court beyond what was available before the deeming proviso took effect in 1988.

For example, in *Singh v. Daimler-Benz AG,* 9 F.3d 303 (3rd Cir. 1993), the court allowed a permanent resident alien in one state to proceed against a U.S. citizen in another state and a non-resident alien, even though the configuration of parties would have apparently failed to support a finding of jurisdiction under either section 1332(a)(2) or (a)(3) in the absence of the deeming provision.

To correct the problem, section 2 of the proposed bill eliminates the resident alien proviso and its deeming feature altogether, along with its potential for jurisdictional expansion. By eliminating the proviso, resident aliens would no longer be treated as U.S. citizens for purposes of jurisdiction, thereby avoiding the possibly anomalous results under section 1332(a)(1)–(3). In place of the proviso, section 2 would provide specifically that the district courts shall not have diversity of citizenship jurisdiction under section 1332(a)(2) of a claim between a citizen of a state and a citizen or subject of a foreign state admitted to the United States for permanent residence and domiciled in the same state. This provision expressly restricts the exercise of jurisdiction over disputes between citizens of a state and citizens or subjects of a foreign state admitted to the United States for permanent residence and domiciled in the same state.

Section 2 would thus achieve the goal of modestly restricting jurisdiction, which we believe Congress sought to accomplish when it first enacted the resident alien proviso, and it would avoid the threat of jurisdictional expansion now posed by the proviso. By attaching this modest restriction only to section 1332(a)(2), the provision would permit resident aliens to appear as additional parties to disputes under section 1332(a)(3), without their status as deemed U.S. citizens of their state of residence being treated as a basis for either establishing or defeating the diversity of U.S. citizenship that grounds jurisdiction under this provision.

CITIZENSHIP OF CORPORATIONS AND INSURANCE COMPANIES WITH FOREIGN CONTACTS (SEC. 3)

Section 3 amends section 1332(c)(1) of title 28, United States Code, to specify the treatment of citizenship in diversity actions involving corporations, as well as insurance companies involved in direct action litigation. The purpose is to clarify how foreign business contacts should affect the determination of whether diversity of citizenship is present for these entities when a case is filed in or removed to federal court.

The changes made in this section also update the definition of corporate citizenship to resemble that used by Congress in the Multiparty, Multiforum Trial Jurisdiction Act of 2002 (Pub. L. No. 107–273; *see* 28 U.S.C. § 1369(c)(2).)

Actions involving corporations

When one of the parties to a civil action is a corporation, section 1332(c) deems that corporation to be a citizen of any "State" in which it has been incorporated "and of the State where it has its principal place of business." The quoted phrase was added to section 1332(c)(1) in 1958 to give essentially multiple citizenship to cor-

porations. The intent was to preclude diversity jurisdiction over a dispute between an in-state citizen and a corporation incorporated or doing business primarily in the same state. In such situations, the parties face no threat of bias if the action were to be resolved in state court.

For example, today under section 1332(c), if a corporation incorporated in Delaware has its principal place of business in Florida, it is deemed to be a citizen of both Delaware and Florida. If a Florida citizen or a Delaware citizen sues that corporation, diversity jurisdiction would be defeated because both the plaintiff and defendant would be treated as citizens from the same State (Florida or Delaware).

When an action involves a U.S. corporation with foreign contacts or foreign corporations that operate in the United States, federal courts have struggled in applying this statute. *See* C. Wright & M. Kane, *supra,* at 170. This difficulty occurs primarily because section 1332(c)(1) refers to a "State" and makes no reference to a corporation with either of these two types of foreign contacts (country of incorporation or principal place of doing business). Subsection (e) of section 1332 defines "States" as including the Territories, the District of Columbia, and the Commonwealth of Puerto Rico. Some courts have noted that because the word "States" in the subsection begins with a capital "S," it applies only to the fifty states and the other places specified in the definition and therefore does not apply to citizens of foreign states (or countries). *See, e.g., Torres v. Southern Peru Copper Corp.,* 113 F. 3d 540, 543 (5th Cir. 1997); *Barrantes Calbaceta v. Standard Fruit Co.,* 883 F.2d 1553, 1559 (5th Cir. 1989). Other courts applying section 1332(c)(1) have concluded that the word "States" should mean foreign states, as well as States of the Union. *See, e.g., Nike, Inc. v. Comercial Iberica de Exclusivas Deportivas, S.A.,* 20 F.3d 987, (9th Cir. 1994).

Following are examples of how the courts have reached different conclusions in trying to apply the provision in the absence of specific references to "foreign states." The Fifth Circuit has treated a U.S. corporation with its principal place of business abroad as a citizen only of the state where it is incorporated. *See, e.g., Barrantes, supra* (plaintiffs from Costa Rico (aliens) brought suit against Standard Fruit Company, a Delaware corporation with its principal place of business in Latin America); *Torres, supra* (alien plaintiffs brought suit against Delaware corporation with principal place of business in Peru). Such treatment of the corporations as citizens of Delaware while ignoring their foreign contacts resulted in decisions upholding the availability of federal alienage jurisdiction and allowing the actions to proceed in federal court.

The Ninth Circuit, in contrast, has rejected any distinction between foreign and domestic corporations; each would be deemed a citizen of both its place of incorporation and its principal place of business. See Nike, Inc., supra, at 990. Although technically dicta as applied to U.S. corporations with business centers abroad, the Ninth Circuit's approach has been applied to U.S. corporations in a number of district court decisions. See note, David A. Greher, The Application of 28 U.S.C. § 1332(c)(1) to Alien Corporations: A Dual Citizenship Analysis, 36 Va. J. Int'l L. 233, 251 n.92 (1995) (collecting some cases). Such an approach would result in a denial of alienage jurisdiction over suits brought by aliens against U.S. corporations that have business centers abroad.

The provision in section 3(a) would resolve this division of authority by implementing the dual-citizenship intent of this provision with regard to corporations with foreign activities. It would insert the words "foreign state" in two places in section 1332(c)(1) to make it clear that all corporations, foreign and domestic, would be regarded as citizens of both their place of incorporation and their principal place of business. The provision would result in a denial of diversity jurisdiction in two situations: (1) where a foreign corporation with its principal place of business in a state sues or is sued by a citizen of that same state, and (2) where a citizen of a foreign country (alien) sues a U.S. corporation with its principal place of business abroad. Such a change would bring a degree of clarity to an area of jurisdictional law now characterized by the conflicting approaches of the lower federal courts. By more clearly defining citizenship of corporations with foreign ties, the legislation would deny access to a federal court in a small range of cases for which a federal forum might be available today.

For example, a company might have its principal place of business in a Brazil and nonetheless choose to incorporate in Texas. It becomes embroiled in a contract dispute with a citizen of Mexico residing in California. The incorporation in Texas would make the corporation a citizen of Texas. According to some lower courts, present law would enable the corporation to claim access to a federal court through diversity jurisdiction in a dispute with the Mexican living in California. Section 3(a) of this proposed bill would alter the jurisdictional analysis by deeming the corporation to be a citizen of both Texas (where incorporated) and Brazil (where it has its

principal place of business). In this hypothetical, the case becomes one of an alien (the Brazilian company) suing an alien (the Mexican citizen). Federal jurisdiction presently precludes such disputes because suits between two aliens do not satisfy the jurisdictional requirements of section 1332(a). (It is noted that when such disputes arise from allegedly tortious conduct in another country, the federal courts will often assert jurisdiction only to dismiss the case under the doctrine of forum non conveniens.)

The new provision would have no impact on the freedom of corporations to incorporate where they see fit, to do business in accordance with their own business plan, or to seek to utilize the state courts as they might today. It would simply treat them as citizens of their place of incorporation and principal place of business on a basis consistent with the treatment of U.S. corporations.

Section 3(a) also revises the wording of section 1332(c)(1) so that a corporation shall be deemed a citizen of "every State and foreign state by which it has been incorporated," instead of "*any* State. . . .." (Emphasis added.) Although corporations can incorporate in more than one state, the practice is rare. In applying the present wording of the subsection, most courts have treated such multi-state corporations as citizens of every state by which they have been incorporated. Section 3 would codify the leading view as to congressional intent and treat corporations as citizens of every state of incorporation for diversity purposes. *See* C. Wright & M. Kane, *supra,* at 167–68.

Direct actions against insurance companies

Subsection (b) of section 3 also amends section 1332(c)(1) to extend parallel language to insurance companies in direct action litigation. That subsection presently includes "deeming" language for determining the citizenship of an insurance company involved in direct action litigation, which was added by Congress in 1964 (Pub. L. 88–439, 78 Stat. 445). More specifically, the provision now reads as follows:

> in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business.

28 U.S.C. § 1331(c)(1).

In a direct action case, the plaintiff sues the liability insurance company directly without naming as a defendant the insured party whose negligence or other wrongdoing gave rise to the claim. Section 1332(c) presently seeks to prevent such direct actions from qualifying for diversity jurisdiction by deeming the insurance company to be a citizen of the state of which the insured is a citizen, as well as of every state by which the insurer has been incorporated and of the state where it has its principal place of business.

Congress enacted the provision primarily in response to a surge in diversity case filings against insurance companies in Louisiana federal court. Sen. Rep. No. 1308, 88th Cong., 2d Sess. (1964), reprinted in 1964 U.S. Code Cong. & Admin. News, p. 2778. That increase followed adoption of a state statute there in 1959 allowing direct actions against insurance companies. "Because of the broad review of jury verdicts that the Louisiana practice permits, lawyers for plaintiffs in that state greatly preferred to be in federal court rather than in state court. They were able to convert what otherwise would have been a routine automobile-accident case between two Louisiana citizens into a diversity action by taking advantage of the state statute permitting suit directly against the insurer without joinder of the insured." C. Wright & M. Kane, supra, at 171. Wisconsin also had enacted a state statute permitting direct actions. *Id.; see also Inman v. MFA Mutual Ins. Co.,* 264 F. Supp. 727, 728 (E.D. Ark. 1967); *Carvin v. Standard Accident Ins. Co.,* 253 F. Supp. 232, 234 (E.D. Tenn. 1966). The statutory provision added by Congress in 1964 was successful at preventing such direct actions from proceeding in federal court under diversity jurisdiction. *Northbrook National Ins. Co., v. Brewer,* 493 U.S. 6 (1989) (in applying the provision, the Supreme Court set forth the legislative history).

Today, direct actions continue to exist in some states through specific statutes (*e.g.,* Louisiana, Wisconsin, and Puerto Rico) or through examination of the nature of certain causes of action authorized in that state (*e.g.,* Texas, Florida, and North Carolina). *See, e.g., Hernandez v. Travelers Ins.* 489 F.2d 721 (5th Cir. 1974) (case from Texas), *Shingleton v. Bussey,* 223 So.2d 713 (Sup. Ct. Fla. 1969), and *Corn v. Precision Contracting, Inc.* 226 F. Supp. 2d 780 (W.D.N.C. 2002). Yet, for diversity purposes, the citizenship of the insurer in such actions should be no different than that provided for corporations in the rare instances when the insurance company

has foreign contacts. As stated in the 1964 Senate Judiciary Committee Report accompanying passage of the earlier provision, the purpose was to eliminate diversity jurisdiction in such direct actions brought against a non-resident insurance carrier. Sen. Rep., *supra.* And at least one court has held that the 1964 provision should be applied to insurance companies incorporated abroad so as to carry out the intent of the statute and deny diversity jurisdiction. *See Newsom v. Zurich Ins. Co.,* 397 F.2d 280, 282 (5th Cir. 1968).

Subsection (b) of section 3, therefore, amends section 1332(c)(1) to provide the same definition of citizenship for an insurance company engaged in direct action litigation as that proposed in subsection (a) for corporations with foreign contacts. It inserts references to "foreign states" so as to address situations where insurance companies are incorporated abroad or have their principal place of business abroad. As a practical matter, this provision would only affect the limited number of states where direct actions are permitted under state law or such actions are determined to exist.

The American Law Institute also endorsed in 1969 the same legislative solution to this problem as that now before this Congress so as to allow courts and litigants to recognize foreign contacts in determining diversity of citizenship for corporations, as well as insurance companies involved in direct action litigation.

REMOVAL AND REMAND PROCEDURES (SEC. 4)

Section 4 amends title 28, United States Code, to accomplish the following: (1) require district courts to retain a federal claim and remand joined state claims or causes of action that would otherwise be non-removable; (2) separate the removal provisions in section 1446 into two statutes, with one governing civil proceedings and the other criminal; (3) replace the specific reference to Rule 11 of the Federal Rules of Civil Procedure with a generic reference to the rules governing pleadings and motions in civil actions in federal court; (4) address multiple-defendant situations in three ways—by codifying the requirement that all defendants join in or consent to a notice of removal, by giving each defendant 30 days in which to have the opportunity to remove or consent to removal, and by permitting earlier-served defendants, who did not remove within their own 30-day period, to consent to a timely notice of removal by a later-served defendant;

(5) authorize district courts to permit removal of diversity proceedings after the present one-year deadline when equitable considerations justify it; and (6) commence the 30-day period for removal when it becomes known, through responses to discovery or information that enters the record of the state proceeding, that the amount in controversy exceeds the statutory minimum figure, as well as create an exception to the one-year removal deadline upon a showing of plaintiff's deliberate non-disclosure of the amount in controversy. This statement describes each provision more fully below.

Joinder of federal law claims and state law claims

Subsection (a) of section 4 amends section 1441(c) to clarify the right of access to federal court upon removal for the adjudication of separate federal law claims that are joined with (unrelated) state law claims. Section 1441(c) presently authorizes a defendant to remove the entire case whenever a "separate and independent" federal question claim is joined with one or more non-removable claims. That subsection also now states that, following removal, the district court may either retain the whole case, or remand all matters in which state law predominates.

Some federal district courts have declared the provision unconstitutional or raised constitutional concerns because, on its face, section 1441(c) purports to give courts authority to decide state law claims for which the federal courts do not have original jurisdiction. *See, e.g., Salei v. Boardwalk Regency Corp.,* 913 F. Supp. 993, 1007 (E.D. Mich. 1996). Other courts have chosen simply to remand the entire case to state court, thereby defeating access to federal court. *See, e.g., Moralez v. Meat Cutters Local 539,* 778 F. Supp. 368, 371 (E.D. Mich. 1991). Many commentators have recognized the problem, and a leading treatise on the subject declares that "the present statute is useless and ought to have been repealed." C. Wright & M. Kane, *supra,* at 235.

Section 4(a) of this bill is intended to better serve the purpose for which the statute was originally designed, namely to provide a federal forum for the resolution of federal claims that fall within the original jurisdiction of the federal courts. The change to section 1441(c) would permit the removal of the case but require that a district court remand unrelated state law matters. This sever-and-remand approach is intended to cure any constitutional problems while preserving the defendant's right to removal in claims arising under federal law.

Separating the removal statute into civil and criminal statutes

Sections 4(b)(1), (b)(2)(A), and (d) amend section 1446 to change the section title and strike certain references to "criminal prosecutions" so as to separate the removal provisions relating to civil and criminal proceedings into two statutes. Section 1446 presently contains several subsections, some of which are applicable to removal of both civil and criminal cases, some applicable only to civil cases, and some pertaining only to criminal cases. Separating them into two statutes would assist litigants in knowing which provisions were applicable to their type of case.

To complete the implementation of this change, section 4(e) codifies the new statute for criminal proceedings as section 1446a. The statute for civil proceedings would continue to be section 1446. To make conforming changes for this provision, current subsections (c)(1)–(5) and (e) of section 1446 would be deleted and re-codified in the new section 1446a. Also, current sections 1446(d) and (f) would be redesignated as subsections (c) and (d), respectively.

Rule 11 reference

Section 4(b)(2)(B) amends section 1446(a) to replace the specific reference to Rule 11 of the Federal Rules of Civil Procedure with a generic reference to the rules governing pleadings and motions in civil actions in federal court. The statute now requires that the notice of removal be signed pursuant to Rule 11 of the Federal Rules of Civil Procedure. Rule 11 applies to "[e]very pleading, written motion, and other paper" filed in a civil action, but does not specifically refer to a notice of removal. The intent is to make clear that the requirements of Rule 11 (or other rules governing pleadings) apply to a "notice of removal" while avoiding any specific reference to that rule. This will prevent any confusion should the Federal Rules of Civil Procedure ever be revised or renumbered or additional rules applying to pleadings be added.

Removal in multiple-defendant cases

Section 4(b)(3) begins by amending section 1446(b) by re-formatting the subsection. It creates a new subsection (2) within section 1446(b) that codifies the present rule of unanimity regarding consent by all defendants to removal. *See* C. Wright & M. Kane, *supra,* at 244. It then addresses the main objective of this new subsection, namely to eliminate confusion surrounding the timing of removal when all of the defendants are not served at the outset of the case.

Section 1446(b) currently specifies a 30-day period for "the defendant" to remove the action, but it does not address situations with multiple defendants, particularly where they are served over an extended period of time during and after the expiration of the first-served defendant's 30-day period for removal. In those situations, federal courts have differed in determining the date on which the 30-day period begins to run. *Compare Marano Enterprises v. Z-Teca Restaurants, LP,* 254 F.3d 753, 756–57 (8th Cir. 2001) (holding that each defendant has 30 days to effect removal, regardless of when or if other defendants had sought to remove) and *Brierly v. Alusuisse Flexible Packaging, Inc.,* 184 F.3d 527, 532–33 (6th Cir. 1999) (holding that time for removal in case involving multiple defendants runs from the date of service on the last-served defendant, and permitting defendant who failed to remove within own 30-day period to join the timely removal petition of a later-served defendant) with *Getty Oil Corp., v. Ins. Co. of North America,* 841 F.2d 1254, 1262–63 (5th Cir. 1988) (holding that the first-served defendant and all then-served defendants must join in the notice of removal within 30 days after service upon the first-served defendant); *cf. McKinney v. Board of Trustees of Mayland Community College,* 955 F.2d 924, 925–28 (4th Cir. 1992) (holding that each defendant may have 30 days to file notice of removal, and rejecting the *Getty Oil* argument that served defendants must join a petition for removal within the time specified for the first-served defendant).

Section 4(b)(3) of this proposed bill addresses the present interpretational problem by affording a later-served defendant 30 days from his or her own date of service (or receipt of initial pleading) to seek removal. The change, which essentially embraces the Fourth Circuit's view, would also allow earlier-served defendants to consent to removal during the 30-day removal period of a later-served defendant. Fairness to later-served defendants, whether they are brought in by the initial complaint or an amended complaint, necessitates that they be given their own opportunity to remove, even if the earlier-served defendants chose not to remove initially. Such an approach does not allow an indefinite period for removal; plaintiffs could still choose to serve all defendants at the outset of the case, thereby requiring all defendants to act within the initial 30-day period.

In addition, the provision allows unserved defendants to join in a removal initiated by a served defendant. This new subsection clarifies the rule of timeliness and

provides for equal treatment of all defendants in their ability to obtain federal jurisdiction over the case against them without undermining the federal interest in ensuring that defendants act with reasonable promptness in invoking federal jurisdiction.

Authorizing removal after one year

Section 4(b)(4) amends section 1446(b) to authorize district courts to permit removal after the one-year period specified in current law upon a finding that equitable considerations warrant removal. In 1988, Congress amended this statute to prohibit the removal of diversity cases more than one year after their commencement. This change encouraged prompt determination of issues of removal in diversity proceedings, and it sought to avoid the disruption of state court proceedings that might occur when changes in the case made it subject to removal. The change, however, led some plaintiffs to adopt removal-defeating strategies designed to keep the case in state court until after the one-year deadline passed. In those situations, some courts have viewed the one-year time limit as "jurisdictional" and therefore an absolute limit on the district court's jurisdiction. Other courts have viewed the period as "procedural" and therefore subject to equitable tolling. *See, e.g., Tedford v. Warner-Lambert Co.,* 327 F.3d 423, 426 (5th Cir. 2003).

To resolve the conflict, section 4(b)(4) grants district court judges discretion to allow removal upon a finding that equitable considerations warrant it. In determining the equities, the district court will presumably consider such factors as whether the plaintiff had engaged in manipulative behavior, whether the defendant had acted diligently in seeking to remove the action, and whether the case had progressed in state court to a point where removal would be disruptive.

Amount in controversy and removal timing

Section 4(b)(5) amends section 1446(b) by inserting a new subsection (4) to address issues relating to uncertainty of the amount in controversy when removal is sought and state practice either does not require or permit the plaintiff to assert a sum claimed or allows the plaintiff to recover more than an amount asserted. While current practice allows defendants to claim that the jurisdictional amount is satisfied and remove, several issues complicate this practice.

First, the circuits have adopted differing standards governing the burden of showing that the amount in controversy is satisfied. The "sum claimed" and "legal certainty" standards that govern the amount-in-controversy requirement when a plaintiff originally files in federal court have not translated well to removal, where the plaintiff often may not be permitted to assert a sum claimed or, if asserted, may not be bound by it. Second, many defendants faced with uncertainty regarding the amount in controversy feel compelled to remove immediately—rather than waiting until future developments provide needed clarification—for fear that waiting and removing later will be deemed untimely. In these cases, federal judges often have difficulty ascertaining the true amount in controversy, particularly when removal is sought before discovery occurs. As a result, judicial resources may be wasted and the proceedings delayed when little or no objective information accompanies the notice to remove.

Section 4(b)(5) responds by amending section 1446(b) to allow a defendant to assert an amount in controversy different from that in the initial pleading if the complaint seeks non-monetary relief or a money judgment but the state practice either does not permit demand for a specific sum or permits recovery of damages in excess of the amount demanded. The removal will succeed if the district court finds by a preponderance of the evidence that the amount in controversy exceeds the amount specified in 28 U.S.C. § 1332(a), presently $75,000. If the defendant lacks information with which to remove within the 30 days after the commencement of the action, the defendant may take discovery in the state court with a view toward ascertaining the amount in controversy. If a statement appears in response to discovery or information appears in the record of the state proceeding indicating that the amount in controversy exceeds the threshold amount, then the new subsection deems it to be an "other paper" within the meaning of section 1446(b)(3), thereby triggering a 30-day period in which to remove the action. The district court must still find by the preponderance of the evidence that the jurisdictional threshold has been met. However, if such an "other paper" appears in response to discovery or as part of the record and trial is underway or is to begin within 30 days, then the defendant must show, and the district court must find, that the plaintiff deliberately sought to conceal the true amount in controversy.

In addition, if the removal notice has been filed more than one year after commencement of the action, such a finding is deemed to satisfy the equitable considerations in section 1446(b)(3) so as to permit removal.

INDEXING THE AMOUNT IN CONTROVERSY (SEC. 5)

Section 5 amends section 1332 to enable the minimum amount in controversy for diversity of citizenship jurisdiction, which is presently $75,000, to be adjusted periodically in keeping with the rate of inflation. Such an automatic adjustment would avoid the need to periodically revisit the underlying amount specified in the statute and then to enact large increases. This change would also preserve the monetary amount as a meaningful threshold for diversity jurisdiction.

Section 5(a) amends section 1332 to indicate that the present minimum amount in controversy, $75,000, is subject to adjustment as provided under a new subsection (f) of section 1332. Section 5(b) adds subsection (f), which would set forth the formula for adjusting the amount in controversy.

The formula specifies that effective on January 1 of each year immediately following a year evenly divisible by 5, the jurisdictional amount shall be adjusted according to a formula tied to the Consumer Price Index for All Urban Consumers (CPI-U). The CPI-U, which measures the average change in the prices paid by urban consumers for a representative basket of goods and services, is the most widely used gauge of price changes as a means of adjusting dollar values. Under this section's formula, the Director of the Administrative Office of the U.S. Courts would be required, before the end of each year that is evenly divisible by five, to compute the percentage increase in the CPI-U for September of such year in relation to the price index for September of the fifth year preceding such year. The percentage increase would be rounded up or down to the nearest $5,000 and then added to the amount in controversy then in effect. The new figure, as well as the percentage change and the resulting dollar amount, would be submitted for publication in the *Federal Register* by November 15 of the year in which it is computed. (It is anticipated that any new minimum amounts in controversy would be published within the notes following section 1332, after their publication in the *Federal Register*.)

If this formula had been applicable beginning in 2000, the formula would have operated as follows. The change in the CPI-U for September 2000 as compared to 1995 provided a cumulative CPI-U increase of 13%. Applying that increase to the amount in controversy (13% x $75,000) would yield $9,750, which figure, rounded to the nearest $5,000, would become $10,000. The resulting figure would be added to the amount in controversy ($75,000 + $10,000), resulting in a new amount in controversy of $85,000, effective January 1 of 2001.

The next review if the formula had been in effect would have been in 2005 (the next year evenly divisible by 5). The change in the CPI-U for September 2005 as compared to 2000 would provide a cumulative CPI-U increase of 12.33% (assuming a 3% CPI increase for 2005). Applying that percentage to the amount in controversy ($85,000) would yield $10,480, which, rounded to the nearest $5,000, would become $10,000. This figure would be added to the amount in controversy ($85,000 + $10,000) to make it $95,000, effective January 1 of 2006. (Note that the CPI-U as applied to the amount in controversy must yield at least $2,500, which would then be rounded to $5,000, so as to have any effect and generate a new amount in controversy.)

Congress has previously enacted similar indexing provisions. For example, in the Bankruptcy Reform Act of 1994, Congress authorized adjustments every three years of certain dollar amounts applicable to bankruptcy actions so as to keep pace with inflation as reflected by changes in the CPI-U. *See* 11 U.S.C. § 104(b); 66 Fed. Reg. 10910–02 (2001). In addition, in the Federal Civil Penalties Inflation Adjustment Act of 1990, Congress authorized executive agencies to adjust civil monetary penalties at least once every four years so as to "allow for regular adjustment for inflation," which adjustment is also based on the Consumer Price Index. Pub. L. No. 101–134 (codified as a note under 28 U.S.C. § 2461); *see, e.g.,* FTC application at 16 C.F.R. Pt. 1.

The minimum amount in controversy for diversity jurisdiction was last increased in 1997 when Congress raised the amount from $50,000 to $75,000. (*See* Federal Courts Improvement Act of 1996, Pub. L. No. 104–317.) Prior to that, the minimum amount in controversy had been $10,000 until Congress raised it to $50,000 in 1988 through enactment of the Judicial Improvements and Access to Justice Act (Pub. L. No. 100–702). However, the present $75,000 threshold amount has not been adjusted by Congress in eight years, while the true value of that amount has decreased significantly. This indexing provision will allow the dollar figure for the amount in controversy to keep pace in the future with inflation and to avoid the need for large increases after lengthy intervals.

FACILITATING THE USE OF DECLARATIONS TO ASSERT DAMAGES IN CIVIL CASES

In September 2005, the Judicial Conference adopted another position that would clarify federal jurisdiction, and therefore, is being submitted for inclusion within the Federal Courts Jurisdiction Clarification Act. This proposal facilitates the use of declarations as to the dollar amount of damages being sought in a civil case. It amends 28 U.S.C. § 1441(a) to prevent removal to federal court of state cases in which plaintiffs declare that they will forgo recovery in excess of the current monetary threshold ($75,000) for diversity of citizenship jurisdiction. It also amends 28 U.S.C. § 1447 to allow plaintiffs in cases that have been removed to federal court to submit a declaration indicating their willingness to forgo damages in excess of $75,000 and seek remand. This two-part declaration-remand proposal is intended to prevent cases in which the plaintiff agrees to forgo claims in excess of the threshold amount in controversy from being removed and, if removed, to allow federal judges to remand the action. In so doing, it is intended to facilitate the resolution of cases where the plaintiff is seeking an amount less than $75,000, and avoid needless litigation over the proper forum for the case.

These provisions permit litigants to indicate, where possible, that a state court forum is appropriate when the plaintiff is willing to forgo damages in excess of $75,000. Some states do not require or allow the plaintiff to include a specific amount of damages in the complaint. Other states permit plaintiffs to allege a certain amount for the purpose of ensuring that the case is directed to the appropriate state trial court, without indicating the specific amount of damages being sought. The reason for such restrictions appears to be to prevent complaints from asserting figures that overstate the value of the case and pose a potential threat to the defendant's reputation. Nevertheless, even if a state prohibits a plaintiff from alleging a specific damage amount, many states permit the use of a declaration or statement of damages to allow the plaintiff to indicate that he or she will not seek damages in excess of the threshold monetary amount that permits the defendant to remove the case to federal court.

This proposal also responds to the limitation placed upon federal courts in determining whether a diversity case may be remanded. In *St. Paul Mercury & Indemnity Co. v. Red Cab Co.,* 303 U.S. 283, 288–89 (1938), the Supreme Court held that events occurring after diversity jurisdiction attaches that reduce the amount in controversy below the statutory limit do not divest the federal court of subject-matter jurisdiction. Thus, while a plaintiff may file a declaration in federal court (that he or she is neither seeking nor will accept more than $75,000 in relief) so as to obtain remand of the action, some courts hold that they are precluded by the holding in *Red Cab* from allowing a post-removal declaration to divest the federal court of jurisdiction. As a result, some federal courts proceed to hear the diversity suits to completion even though the plaintiffs would have waived recovery above $75,000 in order to return to state court.

This proposal addresses these difficulties, with which judges and litigants have struggled, through two, related provisions. The first provision precludes removal of a case where the plaintiff has filed a declaration in state court, if permitted by state practice, that he or she will not seek or accept a recovery in excess of the $75,000 federal jurisdictional threshold. More specifically, it provides that if the plaintiff has filed a declaration in State court, as part of or in addition to the initial pleading, to the effect that the plaintiff will neither seek nor accept an award of damages or entry of other relief exceeding the amount specified in section 1332(a) of this title, the case shall not be removed based on diversity jurisdiction so long as the plaintiff abides by the declaration and it remains binding under state practice. Such a declaration would establish, so long as the declaration would be treated as binding in accordance with state law, that the claim does not satisfy the requirements for federal jurisdiction. This provision is not intended to dictate or alter the extent to which state procedure allows the use of declarations. Instead, it is intended to clarify the legal implications of declarations when they are submitted in an effort to remain in state court.

The second provision vests federal district courts with discretion to remand an action to state court on the basis of a declaration filed within 30 days of removal. These post-removal declarations would not deprive the district court of subject matter jurisdiction and thus inflexibly require dismissal of the action or remand to state court. Instead, the filing of a declaration would trigger a discretionary authority under which the district judge could remand the action or retain it "in the interest of justice." Although most district courts would likely order a remand upon the filing of an effective declaration, the interest-of-justice standard would enable judges to consider equitable factors that bear on the fairness of returning the case to state

court and allow the district court to retain it where special factors would make the remand unfair or oppressive.

Following is an example of how this proposal might be applied. A plaintiff in Idaho files a tort claim against a defendant in Kansas. Idaho law provides that a plaintiff cannot assert in the complaint the actual amount in damages being sought. The defendant later learns during discovery that the case may be worth over $100,000 in damages. Two scenarios could then unfold. The plaintiff could file a declaration with the state trial court, if permitted, saying that she does not seek and will forgo any damages in excess of $75,000. This declaration would be intended to make the case non-removable, so long as the declaration is not circumvented and remains binding. If the defendant nevertheless were to file a notice of removal in federal court, the federal judge could easily cite to the new sentence in section 1441(a) in ordering a remand.

If the defendant instead removes the case to federal court before the plaintiff can file the declaration in state court, the plaintiff would have 30 days in which to file a declaration in the federal district court indicating that she will not seek or accept an award of damages above $75,000. If the plaintiff files such a declaration, the federal district judge could then remand the action. If the plaintiff returns to state court and learns of additional injuries and medical bills resulting from the tort and indicates a desire to seek damages for them, then the defendant might again remove the case. The federal district court could then decide that, in the interest of justice, it should keep the case (even though the declaration was filed earlier) because the amount in controversy then appears to exceed $75,000.

CONCLUSION

In closing, I would like to say that, although much of this bill appears to address nuances of jurisdictional law, they are nuances that make a difference in the administration of justice. This package of proposals put forth by the Judicial Conference will solve interpretational problems surrounding certain statutes and will add certainty to the legal process. As a result, we hope that the 109th Congress will embrace these provisions and help us to avoid the wasteful litigation that has occurred.

Thank you again, Mr. Chairman, for the opportunity to testify on behalf of the Judicial Conference in support of this necessary legislation. I would be pleased to answer any questions you or the other members of the Subcommittee may have.

Mr. SMITH. Thank you, Judge Hall.

Professor Hellman.

TESTIMONY OF ARTHUR D. HELLMAN, PROFESSOR, UNIVERSITY OF PITTSBURGH SCHOOL OF LAW

Mr. HELLMAN. Thank you, Mr. Chairman. If there was ever a case that belonged in Federal court on the basis of diversity, it would seem to be the lawsuit that Carol Ernst brought against Merck and Co., alleging that her husband's death was caused by the drug Vioxx, which Merck manufactured.

The plaintiff was a grieving widow who was a citizen and resident of the State in which the suit was brought, which happened to be Texas. The defendant was not only a citizen of another State, it had its headquarters in a different region of the country.

It's not surprising that the plaintiff filed suit in State court in her home State. But you would expect that the defendant would remove the case to Federal court, because the suit seemed to meet the requirements for diversity jurisdiction removal: Mrs. Ernst was a citizen of Texas; Merck was incorporated in New Jersey.

At the time the verdict was handed down, there were no other defendants in the case, so the familiar 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 forum defendant rule had no applicability.

Why, then, did Merck did not remove this suit on the basis of diversity? It did not because it could not. 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 her 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 that took part in Vioxx experiments.

But I've already said that by the time the case got to trial, there was only one defendant, and that was Merck. Why couldn't Merck 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 the case does become removable. That would seem to describe Merck's situation precisely.

Well, the answer to that puzzle lies in the last clause of section 1446(b), a provision that the Judicial Conference now proposes to modify. Under that provision, which was added by Congress only 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 1 year had elapsed.

Well, that was no accident. Mrs. Ernst's lawyer wanted that lawsuit to stay in the State court, so he kept the Texas defendants—sometimes called the "spoilers"—in the case for more than a year, and Merck never even attempted to remove.

Well, the Ernst litigation is far from unique. Earlier this year, a district judge summed up what he called the procedural gamesmanship that the current law allows. And what he said was this, and I'll quote it:

"As numerous courts have acknowledged, many plaintiffs' attorneys include in diversity cases a non-diverse defendant only to nonsuit that very defendant after 1 year has passed in order to avoid the Federal forum. The result is that diversity jurisdiction—a concept important enough to be included in article III of the 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."

That's the end of the quote.

Well, the Judicial Conference proposes to address this procedural gamesmanship by amending the statute to provide that the 1-year prohibition on diversity removal is subject to equitable tolling. That would be a modest improvement on current law, but I believe that it is unnecessarily grudging, and that it does not adequately address the abuses generated by existing law.

The better solution, I suggest, is to simply eliminate the 1-year rule and restore the law to what it was before 1988, where it doesn't seem to have caused any real problems. That's exactly what Congress has already done in the Class Action Fairness Act, and there is every reason to extend that judgment to all diversity cases.

Gamesmanship to prevent removal is not limited to naming cocitizens as defendants. We also see it in the context of disputes over the amount in controversy requirement of 1332. As Judge Hall has mentioned, the Judicial Conference, in a recent update, has

proposed that the courts rely on stipulations—or declarations, as they call them. That's an excellent idea; although implementation will require careful drafting.

Well, my time is about up. In my statement, I've suggested several other possible amendments to the Judicial Code. These deal with appellate review of remand orders; the possibility of removal based on minimal diversity in specified kinds of cases; and the use of rulemaking to address technical aspects of removal procedure that have divided the courts.

I hope we'll have a chance to discuss these later in the hearing. And I appreciate the opportunity to share these views with the Subcommittee. Thank you.

[The prepared statement of Mr. Hellman follows:]

PREPARED STATEMENT OF ARTHUR D. HELLMAN

Statement of

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

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

HEARING ON

"FEDERAL JURISDICTION CLARIFICATION ACT"

November 15, 2005

Arthur D. Hellman
University of Pittsburgh School
of Law
Pittsburgh, PA 15260
Telephone: 412-648-1340
Fax: 412-648-2649
E-mail: hellman@law.pitt.edu

Statement of
Arthur D. Hellman

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

---

[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

---

[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]

---

[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

---

[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.

---

[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]

---

[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).

---

[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.)

---

[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

---

[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.

---

[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

---

[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

---

[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

---

[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]

---

[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

---

[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]

---

[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]

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

---

[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]

---

[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.

Mr. SMITH. Okay. Professor Hellman, thank you. And thank you for citing that Texas case.

Mr. HELLMAN. Not your district, though, I believe.

Mr. SMITH. Very instructive.

Mr. Samp.

TESTIMONY OF RICHARD A. SAMP, CHIEF COUNSEL, WASHINGTON LEGAL FOUNDATION

Mr. SAMP. Mr. Chairman and Ranking Member Berman, thank you for the opportunity to express my views at this hearing. I strongly support the thrust of this excellent set of proposed changes put together by the Judicial Conference. My testimony raises for the Subcommittee's consideration several minor revisions to the Judicial Conference's approach.

I approach this bill, and any effort to revise Federal court jurisdiction, with three principal goals in mind. First, statutes ought to be clear. When clearly-defined jurisdictional limits are established, courts and litigants devote far less of their resources to disputes over whether a case belongs in Federal court.

Second, the statutes ought to honor the Founders' commitment to diversity jurisdiction as an essential feature of the Federal court system. Cases in which jurisdiction was based on diversity of citizenship, including cases originally filed in Federal court and those removed from State court to Federal court by defendants, have been a major staple of Federal court dockets since 1789. Indeed, for the first century of our history, virtually all Federal cases were diversity jurisdiction cases.

Third, the statutes ought not to be written so as to allow one party to the litigation to manipulate the system to prevent the other party from exercising his or her right to invoke the Federal court's diversity jurisdiction. Plaintiffs that wish to litigate their claims in the State court, as many do, often take steps designed to thwart defendants' exercise of their removal rights. Accordingly, if those rights are to be protected, Congress needs to adopt statutes designed to prevent plaintiffs from inappropriately interfering with removal rights.

The proposed legislation does an excellent job of addressing all three of those concerns. I wholeheartedly support sections 2, 3, 4(a), 4(b)(1) and (2), 4(b)(3), and 4(e) of the bill, having to do with such subjects as what to do when a defendant seeks to remove a Federal law claim that is joined with a separate and independent claim, and how to handle removal petitions when there is more than one defendant. I won't discuss those provisions further, except to say that in my written testimony, I have proposed several minor changes in wording.

I want to focus my testimony today on two provisions: section 4(b)(4), which addresses removal more than 1 year after commencement of the action; and section 4(b)(5), which addresses how courts should determine whether the amount in controversy exceeds the $75,000 minimum necessary to establish jurisdiction in diversity cases.

Since 1988, Federal law has barred defendants from filing removal petitions more than 1 year after commencement of the action, even if the defendant had no way of ascertaining that the case

was removable until after that 1-year period has expired. As the bill recognizes, this provision has led to abuses by plaintiffs, who employ a variety of tactics to make it impossible for defendants to remove cases during the 1-year period.

The bill proposes to address that problem by allowing cases to be removed even after the 1-year period, when "equitable considerations warrant removal." I respectfully suggest that that provision will lead to innumerable fights over what constitutes equitable considerations.

A better solution would be to abolish the 1-year time limit altogether. In 1988, when it adopted the provision, Congress was apparently concerned that late removals would disrupt ongoing proceedings in which a State court judge had already invested substantial resources. But even without the 1-year limitation period, there are still substantial restrictions on a defendant who seeks to remove a case that has been pending for a considerable period of time. In particular, the defendant may only remove within 30 days of the date on which the case's removability was first ascertainable.

It will generally be the plaintiff's fault if information permitting removal is not provided until more than a year following commencement of the action, so he or she has little cause to complain about a late removal.

If Congress does decide to adopt the Judicial Conference's "equitable considerations" language, I suggest that the bill be amended to spell out as precisely as possible just what the relevant considerations are.

With respect to section 4(b)(5), the provision addressing the amount in controversy requirement, I support the Judicial Conference's recognition of the need to allow removal petitions to be filed where the complaint does not specify an amount in controversy, or where the plaintiff has purposely low-balled the damage figure in an effort to defeat removal, knowing that State courts will not deem them bound at trial by that low figure.

If removal is to be allowed in those instances based on the defendant's independent estimate of the amount in controversy, it is critical that the statutes include detailed provisions regarding when the 30-day removal period begins to run. Otherwise, the Federal courts can expect numerous battles over whether defendants met the 30-day limitation period.

Plaintiffs will argue that the defendant should have known immediately—based, for example, on the availability of punitive damages—that the case was removable, and should not have waited to obtain the plaintiffs' corroborating statement before filing the removal petition.

I ask the Committee to consider one change in this area: doing away with the jurisdictional amount requirements in those diversity cases in which the amount of damages is inherently unquantifiable.

Most tort cases fit that category, particularly if the plaintiff claims to have suffered personal injury. In such cases, the plaintiff can claim, in addition to any medical expenses, lost income, and loss of bodily function, both pain and suffering damages and punitive damages. Such damages are taken into account in determining whether the minimum jurisdictional amount has been reached.

I find it hard to believe that any district court judge, after conducting a mini-trial in connection with a motion to remand a personal injury case, could honestly determine by a preponderance of the evidence that no reasonable jury could award the plaintiff at least $75,000 in pain and suffering and punitive damages. Because virtually all plaintiffs bringing personal injury claims seek damages in excess of $75,000, the elimination of the minimal jurisdictional amount for such claims is unlikely to have any measurable effect on Federal court case loads. Doing so would actually conserve judicial resources by reducing the number of fights over whether the jurisdictional amount has been met.

Thank you for the opportunity to testify today.

[The prepared statement of Mr. Samp follows:]

PREPARED STATEMENT OF RICHARD A. SAMP

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

Thank you for the opportunity to express my views at this hearing on the Federal Courts Jurisdiction Clarification Act of 2005, proposed legislation to clarify and improve statutes governing the subject matter jurisdiction of the federal courts. The Judicial Conference of the United States is to be commended for having put together an excellent set of proposed revisions that address many of the jurisdictional issues that have caused difficulties for the federal courts in recent years. I strongly support virtually all of the proposed changes. My testimony raises for the Subcommittee's consideration several minor revisions to the Judicial Conference's proposed approach, but I can say unhesitatingly that the proposed legislation as written represents a significant improvement over current law.

MY BACKGROUND

Since 1989, I have served as Chief Counsel of the Washington Legal Foundation, a non-profit public interest law firm located in Washington, D.C. I am a graduate of Harvard College and the University of Michigan Law School. My interest in issues concerning federal court jurisdiction was piqued by the two years I spent as a clerk for a federal judge and has continued during my 25 years as a litigating attorney. Most of my practice focuses on federal court litigation, so I am very familiar with current statutes governing federal court jurisdiction and many of the issues that typically arise regarding the proper scope of that jurisdiction.

The Washington Legal Foundation regularly participates in appellate cases that address the circumstances under which parties sued in State court should be permitted to remove the case to federal court. *See, e.g., Lincoln Property Co. v. Roche,* No. 04–712 (U.S., dec. pending); *Collins v. American Home Products Corp.,* 343 F.3d 765 (5th Cir. 2003), *cert. denied,* 125 S. Ct. 1823 (2005). WLF strongly believes that when residents of a State are engaged in litigation with nonresidents of the State, the right of the nonresidents to have their claims heard in a federal court needs to be protected, in order to protect them from the home-team biases sometimes displayed by State courts.

MAJOR OBJECTIVES THAT SHOULD DRIVE ANY REVISIONS

When one evaluates current statutes governing federal court jurisdiction, three principal goals ought to be borne in mind. First, the statutes ought to be clear. When clearly defined jurisdictional limits are established, courts and litigants devote far less of their resources to disputes over whether a case belongs in federal court. When the federal circuit courts are divided over the meaning of a jurisdictional statute, that is *prima facie* evidence that the statute is not sufficiently clear, and that Congress should step in to clear up the confusion—given that the Supreme Court lacks the docket space to address more than a small fraction of circuit splits. When Congress does step in, it is important that the new rule be both easy to understand and easy to enforce; otherwise, parties inevitably will devote considerable resources to contests over the meaning of any new potential ambiguities.

Second, the statutes ought to honor the Founders' commitment to diversity jurisdiction as an essential feature of the federal court system. Both James Madison and Alexander Hamilton viewed diversity jurisdiction as an important safeguard against local prejudices directed at nonresident litigants. The Judiciary Act of 1789 granted diversity jurisdiction to the federal courts; indeed, until the creation of federal ques-

tion jurisdiction a century later, diversity jurisdiction cases were the prime staple of federal court dockets. The rationale underlying diversity jurisdiction—protection against local prejudice—also caused the drafters of the Judiciary Act of 1789 to grant nonresident defendants the right to remove diversity cases from State court to federal court. While limitations on resources necessitate placing reasonable limits on federal court jurisdiction, those limitations should not be invoked as justification for ignoring the important role that diversity jurisdiction and removal jurisdiction have played for the past 216 years in protecting nonresident litigants from local prejudice.

Third, the statutes ought not to be written so as to allow one party to litigation to manipulate the system to prevent the other party from exercising his or her right to invoke the federal court's diversity jurisdiction. When complete diversity of citizenship exists among plaintiffs and defendants and the amount in controversy is sufficiently large, plaintiffs are entitled to file their lawsuit in federal court. If they choose instead to file their suit in a State's court and the defendants are not citizens of that State, the Defendants are entitled to remove the case to federal court, even if the suit does not raise any issues of federal law. As Justice Story explained nearly 200 years ago, a plaintiff does not enjoy any preference when it comes to choosing whether his suit is to be heard in a federal court or a State court; rather, federal law traditionally has afforded a defendant the same rights as a plaintiff to decide to litigate their case in the federal courts. *Martin v. Hunter's Lessee,* 1 Wheat (14 U.S.) 304, 348 (1816). Nonetheless, plaintiffs that wish to litigate their clams in State court (as many do) often take steps designed to thwart defendants' exercise of their removal rights. Accordingly, if those rights are to be protected, Congress needs to adopt statutes designed to prevent plaintiffs from inappropriately interfering with removal rights.

I address the provisions of the proposed legislation with each of those three goals in mind.

SECTION 2. RESIDENT ALIEN PROVISION

Section 2 of the proposed legislation addresses ambiguities regarding alienage jurisdiction created in 1988 when Congress amended 28 U.S.C. § 1332(a) to provide that permanent resident aliens should be deemed, for purposes of determining federal court jurisdiction, to be citizens of the State in which they permanently reside. Section 2 eliminates those ambiguities while retaining the purpose of the 1988 amendment: to preclude jurisdiction under § 1332(a)(2) over suits between a citizen of a State and a permanent resident alien residing in the same State. I fully support the proposed change.

SECTION 3. CITIZENSHIP OF CORPORATIONS AND INSURANCE COMPANIES WITH FOREIGN CONTACTS

Section 3 addresses the issue of which States' citizenship(s) ought to be attributed to a corporation that either: (1) is incorporated in the United States but has a principal place of business overseas; or (2) is incorporated abroad but has a principal place of business in the United States. Federal courts have been badly split on this issue, in light of ambiguities in the current version of 8 U.S.C. § 1332(c)(1). I support the proposed change because it provides a clear rule of decision and because it does not deny federal court access to corporations in situations in which they have reason to fear local prejudice.

SECTION 4(A). JOINDER OF FEDERAL LAW CLAIMS WITH CLAIMS THAT WOULD NOT BE REMOVABLE IF FILED SEPARATELY

The current version of 28 U.S.C. § 1441(c) authorizes a State-court defendant to remove the entire suit to federal court if at least one of the claims raises a federal question, even if the suit also contains other claims that are "separate and independent" from the federal claim and could not otherwise be removed. This provision has led to enormous difficulties, with some courts going so far as to declare the provision unconstitutional—because it purports to grant federal courts jurisdiction over matters outside their constitutionally delegated original jurisdiction (e.g., State-law claims involving citizens of a single State). Section 4(a) provides an admirable solution: it would continue to permit removal of the entire case but then require remand of the claims that are "separate and independent" of the federal claim(s). This solution eliminates all the difficulties in the current law identified by federal courts but still retains a federal forum for federal claims.

I have one minor editorial suggestion. Section 4(a) refers (in a proposed 28 U.S.C. § 1441(c)(i)(B)) to "a non-removable claim that is not part of the same case or controversy (within the meaning of Article III of the Constitution) as the [federal]

claim." I would change the first part of that clause to read, "a claim that could not be removed if filed as a separate action and that is not part . . ." I fear that the word "non-removable" might be subject to misinterpretation because it has a acquired a generally accepted meaning in other contexts; it refers to causes of action that could never be removed under any circumstances. *See, e.g.,* 28 U.S.C. § 1445 (listing "nonremovable actions" that may never be removed to federal court). I assume that the intent of Section 4(a) is to operate more broadly than that. For example, if the "separate and independent claim" is a State-law cause of action between citizens of different States but seeks damages of less than $75,000, I assume that Section 4(a) was intended to be applicable. But some courts might not view such a claim as a "non-removable claim," and thus might deem proposed § 1441(c)(i)(B) to be inapplicable. The alternative language I have suggested might eliminate the potential confusion.

SECTIONS 4(B)(1), (B)(2)(A), & (E). SEPARATING THE REMOVAL STATUTE INTO CIVIL AND CRIMINAL STATUTES

Sections 4(b) and 4(e) of the proposed legislation would divide the rules governing removal of civil and criminal cases into separate sections. Currently, both sets of rules are included in 28 U.S.C. § 1446. The proposed legislation would move the rules governing removal of criminal cases into a new section, to be designated § 1446a. The Judicial Conference explains that its proposal is designed to make the provisions more readily understandable. I have not noticed that the current inclusion of both sets of rules in § 1446 has led to any confusion, but I am certainly not opposed to the proposal (which includes no changes in the substance of the rules).

SECTION 4(B)(3). REMOVAL IN MULTIPLE-DEFENDANT CASES

Most of the procedures for removing a civil case from State court to federal court are set forth in 28 U.S.C. § 1446(b). A major deficiency in § 1446(b) is that it speaks of removal by "the defendant" and does not explicitly address what procedures should be followed when (as often is true) there is more than one defendant in the case. That deficiency has led to enormous confusion in the federal courts when removal is sought in a multiple-defendant case. Section 4(b)(3) does an excellent job of clearing up that confusion. In particular, it addresses when the 30-day removal period begins to run when defendants are not served on the same day. The proposed rule prevents plaintiffs from using scattered service dates to obstruct removal, by providing: (1) each defendant is provided 30 days after it has been served, to file or join in a removal petition; and (2) an earlier-served defendant may consent to a subsequent removal during the 30-day period following service on a later-served defendant, even though the earlier served defendant failed to file a timely removal petition of its own. These provisions, which have already been adopted by case law in a number of circuits, greatly facilitate coordination among defendants and prevent a later-served defendant from being denied access to a federal forum simply because an earlier-served defendant may not have been sophisticated enough to have been aware of removal rights.

I have one suggested edit. The first sentence in proposed § 1446(b)(2) reads, "In actions involving two or more defendants, all defendants must join in or consent to the removal of the action." I would add, following the words "all defendants," the following clause: "who have been properly joined and served." The proposed language is borrowed from 28 U.S.C. § 1441(b) (which addresses which defendants should be taken into account in determining whether any of the defendants is a citizen of the forum state). Not infrequently, a plaintiff will never serve one or more of the plaintiffs. Without the proposed language, a plaintiff could argue that the failure of unserved defendants (whose location may be unknown to the other defendants) to join in or consent to the removal petition defeats removal. Defendants should not be placed in the position of having to track down unserved defendants to obtain their consent to removal and to complete the search within a 30-day period, or else forfeit their right to a federal forum. By adding the "properly joined" language, Congress would make clear that, as federal courts have made clear for more than a century, a fraudulently joined defendant need not be considered for purposes of determining diversity of citizenship, nor consent to removal.

SECTION 4(B)(4). AUTHORIZING REMOVAL AFTER ONE YEAR.

It has long been true that a defendant seeking to remove a case to federal court must do so within 30 days of service; or, if the case stated by the initial pleading was not removable, within 30 days of the date on which "it may first be ascertained that the case is one which is or has become removable." 28 U.S.C. § 1446(b). In 1988, Congress imposed a significant new limitation on the timing of removal petitions:

they may never be removed more than one year "after commencement of the action." That limitation applies even if the defendant seeking removal was not served until well after the action was commenced, and even if the case did not become removable until after the one-year limitation period has expired.

The Judicial Conference correctly recognizes that the one-year limitation period causes considerable hardship for defendants, and that plaintiffs often seek to manipulate the rule to their advantage—by waiting until after the period has expired either to: (1) dismiss a defendant whose citizenship destroyed diversity and thereby prevented removal, even though the plaintiff never had any intention of proceeding to trial with that defendant; or (2) reveal for the first time that he seeks damages in excess of the minimum jurisdictional amount. The Judicial Conference proposes to address that concern by amending § 1446(b) to provide that the one-year limitation period is inapplicable when "equitable considerations warrant removal."

I agree with the Judicial Conference that the one-year limitation period has become a major problem, but I respectfully disagree with its solution. I agree with Professor Heller that a better solution would be to do away with the one-year limitation period altogether. In 1988 when it adopted the provision, Congress was apparently concerned that late removals would disrupt on-going proceedings in which a State court judge had already invested substantial resources. But even without the one-year limitation period, there are still substantial restraints on a defendant who seeks to remove a case that has been pending for a considerable period of time. In particular, the defendant may only remove within 30 days of the date on which the case's removability was first ascertainable. Proposed § 1446(b)(5) does a good job of spelling out when removability should be deemed first ascertainable ("Information in the record of the state proceeding, or in response to discovery, shall be treated as an "'other paper'"); that provision makes clear that a removal petition would be untimely if a defendant failed to ascertain that a suit was removable because he was delinquent in undertaking discovery. I note that before the one-year limitation period was adopted in 1988, the federal courts were not flooded with late-filed removal petitions, so deletion of the limitation period is unlikely to have any significant impact on federal court case loads.

Moreover, the only way that it can ever take more than a year for removability to become ascertainable is for a plaintiff to delay in providing the pertinent information. It may be that the plaintiff delayed in providing the information to gain a tactical advantage, or it may simply be that the plaintiff only discovered the information (or made a decision to switch litigation tactics) well after the suit was filed. Either way, the plaintiff can rightly be held accountable for any adverse consequences (caused by removal) brought about by his inaction or change in tactics. Doing away with the one-year rule will eliminate any incentive plaintiffs may have to employ strategies to stall the case in hopes of delaying the ascertainment of facts that would render the case removable.

A principal flaw in the proposed legislation is that it would encourage endless litigation over what is meant by the phrase, "unless equitable considerations warrant removal." The proposed legislation is virtually silent on that point. It should be a principal aim of Congress when "clarifying" jurisdictional statutes to adopt provisions that provide clarity, not ones that invite new litigation.

If the Committee decides to follow the basic approach of the proposed legislation, I would amend proposed § 1446(b)(3) to provide as much detail as possible regarding what sort of "equitable considerations" warrant removal after expiration of the one-year limitation period. I would begin by moving the following language from proposed § 1446(b)(4) to proposed § 1446(b)(3):

> If the notice has been filed more than 1 year after commencement of the action, such a finding [that the plaintiff deliberately failed to disclose the actual amount in controversy to prevent removal] shall be deemed to satisfy the equitable considerations . . .[1]

I would also include the language that the Judicial Conference included in its Section-by-Section analysis of the proposed legislation:

> In determining the equities, the district court will . . . consider such factors as whether the plaintiff had engaged in manipulative behavior, whether the defendant had acted diligently in seeking to remove the action, and whether the case had progressed in state court to a point where removal would be disruptive.

---

[1] This language seems out of place in proposed § 1446(b)(4) (which deals with jurisdictional amount issues) and much more naturally fits within proposed § 1446(b)(3) (which deals with timing issues).

Another possible equitable consideration: whether the defendants first contemplated seeking removal only after the State judge gave an indication that he was likely to rule for the plaintiff. The more such equitable considerations that are spelled out explicitly in § 1446(b)(3), the less likely it is that courts will reach conflicting results regarding the relevant equitable factors and regarding what quantum of equitable factors would "warrant" removal.

SECTION 4(B)(4). AMOUNT IN CONTROVERSY.

Current law bars the removal of diversity cases unless the amount in controversy is at least $75,000. As the Judicial Conference notes, the amount-in-controversy requirement can complicate removal issues because frequently the complaint will not list damages sought, or the plaintiff will purposely "low ball" the damage figure, knowing that State courts will not deem him bound by that removal-defeating figure.

The proposed legislation would allow removal of virtually any diversity case, regardless of the amount listed in the complaint.[2] At that point, the propriety of removal will depend on whether "the district court finds by the preponderance of the evidence that the amount in controversy exceeds" the jurisdictional amount. The proposed change would unquestionably help to counteract the efforts of some plaintiffs to obstruct removal by specifying a low-ball damage figure or no damage figure at all. I have two concerns, however. First, if Congress adopts this proposal, it will need to provide additional guidance regarding when removability should first be deemed ascertainable by defendants. This proposed provision suggests that a defendant should be permitted to remove a case based on his independent knowledge of the plaintiff's injuries, without regard to what the plaintiff may have claimed. If that is so, one can expect that numerous plaintiffs will challenge removal on the basis that the defendant fail to meet the 30-day removal deadline; they will argue that the defendant should have known immediately, based (for example) on the availability of pain-and-suffering and punitive damages, that the case was removable, and should not have waited to obtain the plaintiff's corroborating statement before filing the removal petition. Second, federal judges may be asked to conduct time-consuming mini-trials soon after the removal petitions have been filed, in order to determine whether the jurisdictional amount has been met; and, of course, the parties' roles will be reversed at any such mini-trial, with the plaintiff bad-mouthing his or her own claim.

I ask the Committee to consider an alternative: doing away with jurisdictional amount requirements in those diversity cases in which the amount of damages is inherently unquantifiable. Most tort cases fit into that category, particularly if the plaintiff claims to have suffered personal injury. In such cases, the plaintiff can claim—in addition to any medical expenses, lost income, and loss of bodily function—both pain-and-suffering damages and punitive damages. Such damages are taken into account in determining whether the minimum jurisdictional amount has been reached. *See, e.g., Bell v. Preferred Life Assurance Society,* 320 U.S. 238 (1943). I find it hard to believe that any district court judge, after conducting a mini-trial in connection with a motion to remand a personal injury case, could honestly determine by a preponderance of the evidence that no reasonable jury could award the plaintiff at least $75,000 in pain-and-suffering and punitive damages. Accordingly, I recommend that the Committee consider amending 28 U.S.C. § 1332 by eliminating the minimum jurisdictional amount in all tort cases, or at least in some significant subset of tort cases—such as personal injury claims. I note that H.R. 420, recently adopted by the House of Representatives, provides a definition of "personal injury claims" (for purposes of defining the types of claims subject to an anti-"forum shopping" provision). The Committee may want to adopt that same definition of "personal injury claim" here.

Because virtually all plaintiffs bringing personal injury claims seek damages in excess of $75,000, the elimination of the minimum jurisdictional amount for such claims is unlikely to have any measurable effect on federal court case loads. Probably the only cases that will be added to federal court dockets that are not there

---

[2] Proposed § 1446(b)(5) allows the defendant to remove and assert his own amount in controversy if:

> [T]he initial pleading seeks (i) non-monetary relief; or (ii) a money judgment but the State practice either does not permit demand for a specific sum or permits recovery of damages in excess of the amount demanded.

My understanding of State court practices is that virtually all States permit recovery of damages in excess of the amount demanded. Thus, the proposed rule would permit removal of *any* diversity case, so long as the defendant believes in good faith that the jurisdictional amount exceeds $75,000.

now will be cases in which the defendant filed in state court with every intention of recovering in excess of $75,000 and then successively defeated removal by hiding for more than a year the full extent of damages sought.

Indeed, there is little evidence that the minimum jurisdictional amount requirement has any appreciable effect on federal court case loads. It serves primarily as an additional weapon for parties seeking to defeat federal court jurisdiction, with the result that federal judges need to devote resources to refereeing such disputes. When I was clerking for a federal judge in 1980–1982, the jurisdictional amount for both diversity and federal question cases was $10,000. The subsequent elimination of the jurisdictional amount in federal question cases did not result in significant increases in the number of cases filed in federal court, nor did the more-than-seven-fold increase in the jurisdictional amount in diversity cases lead to a significant decrease.

SECTION 5. INDEXING THE AMOUNT IN CONTROVERSY.

The proposed legislation would amend 28 U.S.C. § 1332(a) to require the indexing of the minimum jurisdictional amount requirement in diversity cases, so that the amount would keep pace with inflation. In general, Congress over the past century has been increasing the jurisdictional amount in diversity cases far faster than the rate of inflation. The Judicial Conference's rationale is that an indexing provision would save Congress the trouble of having to tinker periodically with the jurisdictional amount.

I do not feel strongly one way or the other about this proposal, but in general I oppose it. Changing the jurisdictional amount every eight to ten years has not proven particularly burdensome to Congress. To the contrary, I think it is a good thing to provide Congress on a periodic basis with a good rationale to revisit jurisdictional amount issues. Indeed, over the years Congress has regularly engaged in major revisions of its philosophy on minimum jurisdictional amount requirements. They did not exist at all for most of the 19th century, a time when federal question jurisdiction did not exist and most of the federal court docket consisted of cases based on diversity jurisdiction. Over the next 100 years, jurisdictional amounts were gradually increased in lock-step for both diversity and federal question cases. Later, the jurisdictional amount was eliminated entirely in federal question cases, while Congress continued the gradual increase in the jurisdictional amount for diversity cases. The attitude of future Congresses may change as the size of federal court dockets change and as preserving diversity jurisdiction in federal court is deemed either more or less important by Congress. I see little reason to lock in today the size of future increases in the jurisdictional amount.

SEPT. 2005 PROPOSAL—FACILITATING USE OF DECLARATIONS TO SPECIFY DAMAGES

In September 2005, the Judicial Conference proposed an additional amendment to 28 U.S.C. § 1441(a) and 1447, to "facilitate use of declarations to specify damages." The idea behind the legislation is to allow plaintiffs to keep their cases out of federal court if they agree to be bound by a declaration that they will forgo any damages in excess of the jurisdictional amount in diversity cases (currently $75,000). In general, I support the use of such declarations, as a way to minimize fights over the amount in controversy. A defendant has little basis for complaint if there is no possibility that they could be held liable in State court for more than $75,000. Federal court is not intended to serve as a small claims court; and while out-of-state defendants may face prejudice in State courts even in small cases, at least their potential exposure is much smaller.

My only reservation is that any legislation needs to have numerous protections to ensure that a plaintiff will remain bound by any declaration of intent to forgo damages in excess of $75,000. Those protections should include a provision that will allow the defendant to return to federal court (or go there for the first time) if the defendant reneges on his promise. Federal courts would likely be much more willing to enforce this federal provision than would State courts. The provision should also be made explicitly inapplicable to class actions.

Mr. SMITH. Thank you, Mr. Samp. You are really warming to the subject matter, and it's nice to see.

What I did was to come up with a chart that breaks down the legislation to the nine components, just to see where there is general agreement and to see where there might be some disagreement.

I think three sections, there is agreement across the board. These would be section 2, resident alien provision; section 3, citizenship for corporations and insurance companies; and section 2005, Judicial Conference proposal use of declaration to specify damages.

You all support those provisions. There's four other provisions that there are just minor disagreement; and there's two provisions where I think there's more significant disagreement. And let me get to those as quickly as we can. But I would like to, as much as possible, come to some kind of an understanding or agreement today, so that we can produce a good work product and move it along.

On section 4(a), the joinder of Federal law claims with claims that would not be removable if filed separately, the only suggestion there was by Mr. Samp, who said—and I was going to ask Judge Hall and Professor Hellman if you all see any problems with this—would strike the word "non-removable" in the draft, and change it to "a claim that could not be removed." He believes the word "non-removable" may be subject to misinterpretation. Might be no problem there, particularly.

Judge HALL. I would certainly like to work with the Committee.

Mr. SMITH. Okay. So that is resolvable in any case, I think. Okay.

Section 4(b)(1), separating the removal statute into civil and criminal penalties, Professor Hellman there—and I'd like to ask Judge Hall and Mr. Samp if they agree—supports; but believes that the current draft will cause confusion. He believes a better solution is to add a new section, numbered 1444 and 1445, instead of the draft's suggestion of using 1446 and 1446(a). That's no problem, I don't think. Okay, these are maybe—these are even technical within the technical.

Judge HALL. I think so.

Mr. SMITH. So I'm going to check those off. I think we're okay on those.

Let's see, one other one would be section 5, indexing the amount. You've got a little bit, Mr. Samp just—you all support the indexing. Mr. Samp, you say, probably should not do indexing, but let Congress retain the authority to revisit; and if we don't index, then we have an excuse to go back and take a look at it periodically.

I have to confess to you, I think you have more faith in Congress than we do. And for that reason, I'd probably favor the indexing. And then otherwise, we may get behind the ball and it may never—may not be revisited as often as you and I would like. So I probably will go with the indexing on that.

That leaves three other issues. Let's go to section 4(b)(3), removal in multi-defendant cases. Judge Hall, Professor Hellman, support it as it is. Okay, Mr. Samp, here you say, support but would suggest—and I was going to ask the other witnesses what they think—that the draft be changed to state "who have been properly joined and served."

He believes the draft as currently written would allow a plaintiff to argue that the failure of unserved defendants to join in or consent to the removal petition defeats removal. Defendants should be placed in the position of having to—should not be placed in the po-

sition of having to track down unserved defendants to obtain consent for removal.

Judge HALL. If I have the right section, this is a comment by Mr. Samp——

Mr. SMITH. Yes.

Judge HALL [continuing]. On the rule of unanimity codification. Is that correct? And I think that his suggestion certainly deserves looking at. I think it's a positive suggestion that would be helpful.

Mr. SMITH. Okay. Very good. "Deserves looking at," and "positive." Does that mean you're signing off on it, or not quite yet?

Judge HALL. I don't know if I have authority for the Judicial Conference.

Mr. SMITH. Oh, okay.

Judge HALL. But I think that it certainly is consistent with what we're attempting to do in our proposal.

Mr. SMITH. Okay. Get back to us. Just know that this is the direction we're going in, unless we hear otherwise.

Judge HALL. I understand. Okay.

Mr. SMITH. Okay. Now we're down to two sections left, section 4(b)(4), the 1-year rule for removal, and section 4(b)(4), the amount in controversy.

On the 1-year rule for removal, Judge Hall supports keeping the 1-year rule, but allowing limited exceptions. And then both, as I recall, Professor Hellman and Mr. Samp, you want complete elimination of the 1-year rule.

I don't know that there is any reconciliation of that, but Judge Hall, tell us why you feel strongly about that, and why you feel the way you do.

Judge HALL. Certainly. Thank you, Mr. Chairman. The Judicial Conference came at this from the point of view that there had been an amendment in 1988 which was enacted by Congress to address a problem I believe they saw; which is the sort of slow removal and the last-minute pre-trial—or in the middle of trial—attempts to remove that were very disruptive and costly. So it enacted this section that we're talking about amending in 1988.

I think, unfortunately, no one anticipated that the rule would be used by plaintiffs as a means to seek to prevent removal where in fact a defendant was entitled to remove.

As I said at the beginning, our goal in making these proposals was to amend or to correct current law, to clarify, and to improve certainty among parties so they would know where jurisdiction lies. I think that our proposal of allowing equitable considerations to toll the 1 year, in effect, or to allow removal after the 1 year, will address the problems that have arisen, but will keep in place, in my view, what was a good idea of Congress; which is the idea that we ought to have timely removal, and not have removal when the case is well underway and it would be disruptive.

The proposal to do away with the year completely, in my mind, raises more problems, or some other problems, perhaps. For example, a defendant in one of the Texas cases—it was a tobacco case. There was a joinder of a defendant who was really a non-party, but they added the convenience store seller of the cigarettes. It destroyed diversity. So the tobacco company was kept in State court.

Now, I don't know in Texas if you have a lot of summary judgments, but in Connecticut we don't in State court. So that case would go to trial. And at the end of the plaintiff's case, the defendant would stand up and say, "I move to dismiss, direct the verdict, because you don't have a cause of action against the seller of the tobacco product." And the judge would grant that, under the newly developed Texas law that came out in some of these cases.

At that point, under the removal of the 1-year limit, the defendant could stand up and say, "All right, I'm going to remove to Federal court," because there would be no limit, and the event of diversity jurisdiction just arose.

Now, I mean, I'm all for giving every defendant who's entitled to their diversity jurisdiction and the right to remove the right to remove, but I'm not in favor of that happening, say, after the plaintiff has put their whole case on and rested.

And so I guess I can understand the reasons articulated by the other speakers, but my view is that what the Congress did in '88 was a good policy, and that our proposed amendment deals with the problems that have arisen, the manipulation of that idea, and takes that away so that it can't be manipulated any more. And obviously, if it's not going to be manipulated, and I assume in most cases—in fact, I would dare say, close to every case—service will be made, the diversity issue will arise, and there will be removal in less than the 1 year.

Mr. SMITH. Okay. Professor Hellman and Mr. Samp, real briefly, now that you've heard Judge Hall's explanation, are you ready to reconsider your position? Or do you still feel it ought to be eliminated?

Mr. HELLMAN. Well, first, I think there are other middle grounds. But I do think it's important generally to look at rules, as economists would say, ex ante: what sort of incentives do they create? And if you eliminate the 1-year rule, or narrow it to a very, very limited class of circumstances, you reinforce the incentives that already exist for a plaintiff to do what he can to move his case along. And I think we do want to do this and, of course, we do want to know at the earliest possible time.

My problem with the Judicial Conference proposal is that when you recognize an equitable exception, whichever party has the burden of persuasion, you're providing the occasion for satellite litigation. And for every one or two cases like the one that Judge Hall describes that gets a more just result, you may have litigation in ten or 20. I entirely agree with Mr. Samp, that in the jurisdictional threshold issues there's as value on having bright-line rules.

Now, in my statement, I do suggest a much more limited exception to the 1-year rule that would say if, after 1 year and after the trial has begun, or within 30 days of the scheduled trial, then there's no removal. That's a bright-line rule, and it avoids the kind of situation that Judge Hall has described.

So I think something like that would address Judge Hall's concerns, but would also avoid the kind of manipulation.

Mr. SMITH. Okay. Mr. Samp, real quickly, what do you think of that idea?

Mr. SAMP. I think that having a bright line somewhere near trial would certainly be very reasonable. But I definitely support the

idea of bright lines. And I'm just afraid that saying equitable considerations can be considered is going to lead to an awful lot of litigation, and I would therefore—and there are obviously lots of constraints already on the defendant because of the 30-day rule, so that, except in the case of the last-minute dismissal of a plaintiff, he's never going to be able to remove in any event.

Mr. SMITH. Okay. Thank you all. I'm going to have one more question after Mr. Berman asks his questions on 4(b)(4), the amount in controversy. I want to get to that. But Mr. Berman is recognized for his questions.

Mr. BERMAN. Mr. Samp, if you were told you had two choices, the 1-year rule or an ability of a judge to look at equitable concerns, which one would you take?

Mr. SAMP. There's no question that the rule proposed here is a big improvement over the current rule, so I would take——

Mr. BERMAN. So a rule that promotes Federal litigation is okay in situations where it helps corporate defendants?

Mr. SAMP. No, any sort of defendants. A rule that allows the jurisdiction, diversity jurisdiction, that we've historically had not to be defeated would be a good thing. I don't believe it's an ideal solution.

Mr. BERMAN. Well, I think eliminating the 1 year for some of the same reasons that Judge Hall mentioned allows defendants who want to be spoilers, people who perhaps aren't sure where they want that case tried—they have one interest, and that is avoiding losing; and are playing the system as long as they can, until they conclude that, "Let's get it out of State court; now it makes sense to get into the Federal court," because that will result in further delays.

So the 30 days before trial—they do it on the 31st day before trial. They do it after all the depositions. They do it after that State judge ruled against them on a bunch of preliminary motions. They do it after the depositions are revealed. They do it because they think, if they can delay longer, a key witness for the plaintiff will die.

In other words, I can create as many hypothetical manipulative reasons for defendants to game the system as plaintiffs. And that's why there seems to me a little bit of logic in this "equitable considerations" sort of out to the flat 1-year bar.

But anyway, I have a few more questions. I want to talk about 1441(c), on removal. As I understand now—well, two questions. First, a person who files in Federal court, he has Federal causes of action, and there are also attendant with the right—it's been a very long time——

Judge HALL. Well, it's supplemental jurisdiction over States——

Mr. BERMAN. There's State——

Judge HALL. That are related.

Mr. BERMAN. Yes. The district judge has the ability to hear them all, or to abstain and defer—hold onto jurisdiction, but defer the State claims to a State court action. Isn't that right?

Judge HALL. Under certain circumstances, if the Federal claim goes away. Is that what you mean?

Mr. BERMAN. No, I'd rather have—let's say the Federal claim is a constitutional claim. I'd like to see this issue—see if it can be de-

cided without reaching the constitutional questions. I'm going to abstain and essentially remand, in effect, or tell a party to litigate the State case issues first; I'll hold onto jurisdiction of the constitutional case till we see what happens. Maybe the issue goes away. Isn't that—I mean, I know that's done in Federal court because—he did it.

Mr. SAMP. Yes, if there are separate cases, you are permitted, if you are the Federal judge, to slow down the Federal case to allow the State case to go forward. I don't think that's an issue of removal, though, generally.

Mr. BERMAN. Right. But I guess what I'm saying is, what's the basis for saying that a Federal judge should not have the authority, once a case is removed——

Judge HALL. Oh, okay.

Mr. BERMAN [continuing]. Then to force him to sever and remand, rather than give him the discretion to.

Judge HALL. The "shall remand" language, you're talking about?

Mr. BERMAN. Yes.

Judge HALL. That's because what's being described there is a situation where what's been removed is a Federal cause of action. And with it, in the same case in State court, is an unrelated State cause of action; doesn't rely on the same set of facts; doesn't really arise out of the same controversy. So I could give you——

Mr. BERMAN. Well, what if it does.

Judge HALL. If it does, then we would keep the jurisdiction. We would not remand the State claim. The only time is when there is a State claim that's unrelated which would not have Federal jurisdiction even as a supplement to a Federal question jurisdiction.

There was—I'm trying to think of an example for you. There is a case in which a defendant removed a lawsuit against it by a plaintiff who claimed a violation of the Fair Debt Collection Act practices—clearly, Federal jurisdiction; clear right to remove by that defendant.

However, the plaintiff had also sued that same defendant for contempt of court; a cause of action that arose under a State statute having to do with the collection action. The facts to support the contempt of court cause of action were entirely unrelated to the fair debt collection violation. That's an unrelated case that doesn't have Federal jurisdiction. And that's why this proposal would send that piece of the legislation back. They're really two separate cases. It's that situation.

Mr. BERMAN. This says "and remand—" "—mandates remanding of non-removable claims."

Judge HALL. Correct.

Mr. BERMAN. But it could be about the same——

Judge HALL. No, then it would be removable, and it wouldn't be remanded.

Mr. BERMAN. Well——

Judge HALL. A situation where I sue someone for antitrust violation as well as a violation of the State unfair trade practices law, because of how they conducted their business, a defendant would remove that under Federal question jurisdiction, and would keep the State claim.

Mr. BERMAN. Well, I could give you a real case——

Judge HALL. Okay.

Mr. BERMAN [continuing]. That I was very interested in, that I followed very closely, to raise this issue. But let me ask a question that I did want to ask you. Under existing removal statute, if a plaintiff pleads only a State law claim, and defendant asserts a counterclaim for patent or copyright infringement, the case cannot be removed to Federal court.

Judge HALL. Under current law.

Mr. BERMAN. Yes. In June of this year, legislation was introduced, the Intellectual Property Jurisdiction Clarification Act, which provided a removal statute specific to patents, plant variety protection, and copyrights. You could call this the IP removal statute.

Judge HALL. Uh-huh.

Mr. BERMAN. Here, unlike the existing law on removal, a patent or a copyright counterclaim is grounds for removal of jurisdiction to Federal district court. What if we pass that, so we have this removal statute and we have that? Do we need to change that in some way, or will that prevail in those situations?

Judge HALL. I believe that will prevail. But that's a good example of what our proposal is trying to address. In that situation, let's say that the "ABC" company sued the "D" company for a breach of contract, failure to deliver goods. And the "D" company counterclaims and said, "Oh, by the way, you've also violated my patent. Here's my counterclaim against you." It's got nothing to do with the contract that the original suit is on.

Under that proposed legislation, that could be removed to Federal court, because the patent case belongs in Federal court; at least Congress makes that judgment. But once it got here, this proposal would then have the court look at whether that original contract claim really belongs in Federal court or not. But it wouldn't affect the removal of the patent case, and the patent case would stay in Federal court. Our proposal would have no effect on that.

Mr. SMITH. Okay. Thank you, Mr. Berman. The gentleman from California, Mr. Issa, is recognized for his questions.

Mr. ISSA. Thank you, Mr. Chairman. And I'd like to follow right on. Mr. Berman is insightful beyond all possible mortal capabilities, because he hit on the area that I'm concerned about.

Mr. SMITH. Did the gentleman from California say what I thought he said? [Laughter.]

Mr. BERMAN. If I said something that he liked.

Mr. ISSA. Howard, you said something I like.

But, no, Mr. Berman really did hit on something, Your Honor. This language says "shall." And you know, we love saying "shall"; and you love hearing "may." And oddly enough, you're now coming to us with "shall," and we're—Mr. Berman and I, I think, are questioning why it shouldn't be "may."

The discretion of whether something is related normally—correct me if I'm wrong—goes beyond a question of: is it actually a Federal issue? For example, if the patent case were to go away, does the other case go away? Or does it become so de minimis that parties will probably settle? That's a decision that is a "may" decision of a district court all the time.

Additionally, by serendipity or something, to my particular copy of today, I had a Senate bill that, of all things, tried to clarify our famous old vessel hull design protection amendments, which is the old plug mold. And being a Californian, we know about the plug mold cases.

There are lots of State cases in which you can allege unfair competition. Now, your understanding, I think, is that that would be related.

Judge HALL. Yes, I would think so, if it's related to the same conduct that underlies the antitrust claim, yes.

Mr. ISSA. Okay. But when we put in "shall" language, don't we take away your ability not to have to fight for what is related-unrelated? You become somebody who, because we've said "shall," then whether your "shall" applies becomes an obligation for which they can go over your head to, in my case, the Ninth/Twelfth Circuit.

To me, it would seem like having language which makes it something we believe should be done, but at the same time making it a "may." And a decision clearly within the purview of the district judge seems to be in your best interests. Why would it not be?

Judge HALL. Because I believe it may raise some constitutional issues. There is a case which really is one of the reasons the Judicial Conference began to address this question and makes this proposal to you. It's called the Morales case. I think it's out of Michigan. And in that case, an employee sued his employer under the collective bargaining agreement—Federal question; should have been removable by the employer. He also sued a co-worker for hitting him—assault and battery.

Mr. ISSA. You can make a Federal issue out of anything; can't you?

Judge HALL. Well, in that case, the Morales court said, "We don't have jurisdiction over this case, because we don't have jurisdiction over the assault and battery," and sent it all back to State court; in our view, frustrating the right of the defendant to remove the labor question to the Federal court.

Now, to get to your question, the use of the word "shall" depends upon—only if implemented—if the court has determined it's not a related case under the article III case——

Mr. ISSA. Okay, but let's go back to the original question just a little further back.

Judge HALL. Yes.

Mr. ISSA. Today, you have a lot more ability to include all the counterclaims. If you are sitting there through the discovery process, hopefully, settlement conferences and the like, you have the ability to hold onto these. And by holding onto them, often you can save the State court.

Judge HALL. That's correct.

Mr. ISSA. So if we give you the "may" send all or part that are not Federal questions back to the State courts—which I think is an appropriate power—but we don't force you to take it back—even if it's unrelated and yet, for example, de minimis—isn't that a power that is in your best interests; since your job is not just to try the Federal issue; your job, I believe, is not to send frivolous subparts back to the State?

Now, having said that, I understand you would choose to bifurcate the case. You would choose to say, "Look, we're not going to try—"

Judge HALL. The assault and battery.

Mr. ISSA. "—the assault. On the other hand, unless the plaintiff wants to move to split that case and send that part back, we're going to let it just sit there." Now, presently, I think you have that authority. Why would you want to lose it?

Judge HALL. I hate to disagree with a Congressman who wants to give me discretion. I find myself in a really awkward situation.

Mr. ISSA. It's shocking. It's shocking here.

Judge HALL. I always think discretion is a fine thing for judges. But in this instance, I think it's problematic. Because I think, were we to have discretion, that infers we have the power to keep it. And the situations we're trying to address with this legislative fix, in effect, are situations where we don't believe the court has the power to hear that case.

In other words, it's not that—we're not sending back any related case controversy, or anything that's a part of a case in a controversy that's wrapped up in the Federal piece of the case. All we're talking about is situations where a completely unrelated claim—lots of State courts allow you to pull together all kinds of unrelated controversies into one action. And so when those kinds of cases get removed, we have no authority, we would suggest, effectively under the Constitution; that there's no basis in jurisdiction to hear that.

Mr. ISSA. If I could, Mr. Chairman, I think I have one more comment here.

Go ahead.

Mr. HELLMAN. Oh, thank you. Yes, just to supplement what Judge Hall has said, there are two statutes that govern the presentation of claims joined to Federal claims. The other statute, which we really haven't talked about very much here, is section 1367. That makes clear that the district court, that Judge Hall, would have the authority to keep and decide all related claims.

So the proposed 1441(c) deals only with those statutes that are not only outside original grants of jurisdiction, like 1332 or 1331, but are also outside supplemental. And the supplemental jurisdiction statute, I think it's important to emphasize, does grant precisely the kind of discretion, in section 1367(c), that you describe.

So 1367(c) gives that discretion; does it for all the cases that are within the scope of judicial power; 1441(c) addresses those that are outside the scope of the judicial power. Thank you.

Mr. ISSA. So essentially, as long as our report language makes clear that "C" still applies, you don't see a conflict in putting "shall"?

Mr. HELLMAN. That's right. It's only the cases that are outside judicial power altogether.

Mr. ISSA. Thank you, Mr. Chairman.

Mr. SMITH. All right, thank you, Mr. Issa. The gentleman from California, Mr. Schiff, is recognized for his questions, with a caveat that he has a high standard to meet. Mr. Issa referred a few minutes ago to Mr. Berman as being inspired beyond mere mortals—

or something along those lines. And I just hope you can rise to the challenge and try to equal that standard.

Mr. SCHIFF. I don't think I can. But in fairness, the reason that my colleague, Mr. Issa, made that observation was because Mr. Berman was in agreement with him. Which might in his view mean that Mr. Berman is brilliant. In my view, it calls into serious question Mr. Berman's judgment. [Laughter.]

Mr. BERMAN. Would the gentleman yield?

Mr. SCHIFF. I would be happy to yield.

Mr. BERMAN. There are other issues where Mr. Issa has said I have been sort of below mortals. [Laughter.]

Mr. SMITH. Mr. Berman told me a while ago that I should hear what you had to say, Mr. Issa, about him when you disagree with him.

The gentleman from California, Mr. Schiff, is recognized.

Mr. SCHIFF. Thank you, Mr. Chairman. I just have a couple of questions. And I apologize if you already covered this before I had a chance to get here.

In looking at the amount that would be now indexed to inflation of 75,000, Judge, I wanted to ask you, I see from your analysis that had this formula been applicable beginning in 2000, you'd already be at 95,000. And I guess if this formula had been applicable back in 1997 or 1998, when you last adjusted the amount, you'd probably be at 100,000.

And I guess the question is, the proposal suggests that we start at 75 and now index going forward. Has thought been given to raising the amount to 100,000, and indexing it forward? And what would your thoughts be on that?

Judge HALL. My thoughts are that's for Congress to address, as to whether the threshold is still a meaningful one, in light of inflation. Our proposal is really designed, as most of the others are, to carry forward Congress' intention. In establishing 75,000, that was meant to be a meaningful threshold for diversity jurisdiction. And unfortunately, in our inflationary economy, that becomes eroded over time.

So the idea of indexing is to at least keep pace with the value of the dollar, vis-á-vis that threshold amount. And Congress is, of course, always free to revisit whether that base amount—now 75,000, or whatever it might become if indexed—continues to be the appropriate level of, shall we say, entry into diversity jurisdiction.

I mean, the levels have been—I think, as Mr. Samp points out in his testimony, they've been sort of all over the place historically. But I think, as I say, our goal is here both to clarify and in this instance to give meaning to that threshold. And should Congress wish to address and consider and take up the question of changing the base amount, that's, I guess I'd say, for you to decide.

Mr. SCHIFF. Well, would, you know, the other two witnesses think this was inappropriate or inequitable, to begin at 100,000 and index to inflation?

Mr. HELLMAN. Well, I agree it's a policy judgment. I'm not sure that the difference between 75,000 and 100,000 these days is huge. But if you're going to move it up at all, that probably makes some sense.

Mr. SAMP. I agree that it probably doesn't make a whole lot of difference what amount you choose. One of the things that I mentioned earlier was that, at least in personal injury cases where you can sue for punitive damages and pain and suffering, the plaintiff can choose to call their claim for more than 100,000 if they want, or less than 100,000. So that my suggestion is, if you're really trying to cut down on Federal court caseloads, that the jurisdictional amount is probably not a major issue one way or the other.

Mr. SCHIFF. Okay. Under one of the sections, the proposal would allow the latest-served defendant in a multiple-defendant case 30 days after service to file a removal petition in order to be fair to late-served defendants. How would this, though, affect the trial date, if a defendant were purposely evading service? And how do you deal with those circumstances?

Judge HALL. Well, the current legislation of course has the 1-year limit. But working back from that, I'm not sure there's many cases that get to trial in less than 1 year. Certainly, a defendant who's brought in very late always is in a good position to suggest trial ought not to proceed immediately, because they haven't had the benefit of discovery.

I think that one thing that we should remember about this particular section or proposal is not just that it gives fairness to the last-served defendant, but the plaintiff can control this in many respects. They can choose to serve everyone right away, and then there will be just a very short period for removal.

This provision is designed when, as you say, someone is deliberately not served, to not take away from them their right to remove.

Mr. SCHIFF. Is there any ground in between the kind of broad discretion and potential satellite legislation that equitable consideration would give, and a bright line on the other hand? Is there any—Judge, any contours you could define a little more narrowly than "equitable discretion"?

Judge HALL. Well, "equitable considerations" has meaning in the case law. It's sort of the concept used in tolling situations when statutes of limitations are suspended.

Mr. SCHIFF. Is that less than "good cause"?

Judge HALL. It's different than "good cause." Because "good cause" only really looks at one side of the equation. The "equitable considerations" is looking at both parties' conduct, I think. That's how I would view the different standards.

The danger I see in trying to codify or legislate the particular things that would be considered, one, I don't have the same confidence that the others have that this would minimize litigation. There's often a lot of litigation over iterations of considerations. What do they mean? Do they mean others can't be considered? You know, the old "one thing is included; others are excluded" doctrine. So I'm not sure it would minimize litigation.

And second, unfortunately, as humans, I think we're limited in our capacity to imagine all of the factors that would be appropriate to consider.

Mr. SCHIFF. But some of us are not human. We are beyond the comprehension of mere mortals—like Mr. Berman. [Laughter.]

So we're not limited in those ways that most people are.

Judge HALL. Well, then perhaps that person could write the list of what you should say. [Laughter.]

Mr. SCHIFF. Well, Mr. Chairman, on that, I'll yield back.

Mr. SMITH. Thank you, Mr. Schiff.

That concludes our questions. Thank you all for your expert testimony today. It's much appreciated. And oftentimes—or it's not that often, I should say, that witnesses testify and soon thereafter see the result of their testimony reflected in legislation that we'll be drafting and, hopefully, marking up. But this is one of those rare instances, if that is a source of some satisfaction to you all.

Judge HALL. It is. Thank you very much.

Mr. SMITH. So thank you again for being here. And we will look forward to proceeding on the legislation.

Judge HALL. Thank you, Mr. Chairman.

Mr. HELLMAN. Thank you.

Mr. SAMP. Thank you.

[Whereupon, at 5:12 p.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF THE HONORABLE HOWARD L. BERMAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA, AND RANKING MEMBER, SUBCOMMITTEE ON COURTS, THE INTERNET, AND INTELLECTUAL PROPERTY

Mr. Chairman, thank you for scheduling this hearing on a committee print designed to clarify elements of federal court jurisdiction. The topic of diversity jurisdiction and civil procedure is opaque and any illumination is helpful. Therefore, I am looking forward to our witnesses' testimony.

This hearing concerns the complexities of diversity jurisdiction, and the concept of federalism, which holds an assurance of an impartial forum for parties in lawsuits filed in courts in states other than their own, and facilitates a continued open dialogue between the federal and state systems. Some of the amendments in the committee print appear to be technical in nature, while others address some of the core policy considerations behind federal diversity jurisdiction. Because application of diversity jurisdiction is complicated, and greatly affects an already overburdened federal court, it is important that we consider the impact of these provisions.

Reducing redundant or unnecessary litigation is a laudable goal. We should clarify when federal diversity jurisdiction exists and help those who appear before courts understand where the bright lines of diversity jurisdiction exist. Furthermore, it is my understanding that specific provisions of the proposed legislation will achieve the original intention of Congress when passing the underlying legislation. These witnesses who are here today will help outline how this legislation will do that, and explain the advantages of passing the proposed text in the Federal Courts Jurisdiction Clarification Act.

Thank you Mr. Chairman. I yield back the balance of my time.

PREPARED STATEMENT OF THE HONORABLE JOHN CONYERS, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN, AND MEMBER, COMMITTEE ON THE JUDICIARY

I am pleased that we are considering a largely non-controversial bill that clarifies the jurisdiction of the federal courts. There are, however, minor issues that I hope to resolve with the Chairman and Ranking Member as we move forward.

Section two first clarifies that a citizen of a state and a lawful permanent resident alien living in that state do not have diversity jurisdiction for purposes of federal law.

Section three of the legislation states that corporations would be citizens of the states where they are incorporated and where they have their principal place of business. The purpose is to remove federal court jurisdiction in situations where a foreign corporation is sued by a citizen of a state where it has its principal place of business and where a citizen of a foreign country sues a U.S. corporation that has an overseas location as its principal place of business.

Finally, the bill suggests changes to the federal removal and remand statutes. For instance, it would permit an extension of the one-year removal deadline for later-served defendants, who would not have time to prepare the necessary filings. At the same time, we must ensure that defendants who avoid service cannot game the system. Plaintiffs who make reasonable but unsuccessful efforts to serve defendants should be able to rely on the deadline.

This section also seems to imply that injunctive relief would need to be converted into damages to determine whether the "amount in controversy" threshold is met for federal court. This would require careful consideration prior to passage.

SUPPLEMENTARY PREPARED STATEMENT OF ARTHUR D. HELLMAN, PROFESSOR, UNIVERSITY OF PITTSBURGH SCHOOL OF LAW

Oversight Hearing on
"Federal Courts Jurisdiction Clarification Act"
November 15, 2005

Supplementary Statement of
Arthur D. Hellman

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

In the statement I submitted at the hearing, I suggested that Congress (and the Subcommittee in the first instance) should consider using the rulemaking process to create an orderly system for limited appellate review of remand orders in removed cases. In this supplementary statement, I will briefly elaborate on that suggestion.

Currently, section 1447(d) of Title 28 establishes what appears to be an absolute prohibition against appellate review of remand orders (except in a very limited class of civil rights cases). The section provides: "An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise …" There are four reasons why I believe that this prohibition should be replaced by a system of limited appellate review.

First, notwithstanding the seemingly absolute language of § 1447(d), some remand orders *do* get reviewed. But the doctrines that allow this are themselves a source of confusion and litigation. A leading treatise on Federal Practice includes a section entitled "Appealability of orders relating to removal." That section prints out to 60 dense pages of analysis and citations.[1] Like the other statutory provisions discussed in the Judicial Conference statement, this is certainly an area in need of clarification.

---

[1] 14C WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 3740 (updated 2005).

Second, much is at stake. If the district court erroneously remands a case to the state court, it has denied the defendant the federal forum that is entitled to under Article III and an Act of Congress. That is a serious consequence. This point is thoroughly elaborated by Mr. Samp, and I need only refer to the discussion in his statement.

Third, remand motions often raise questions that are difficult and close. It is very easy for the district court to "get it wrong."

Finally, many of the questions are recurring ones. This is significant, because decisions of district courts are not binding on other districts; they are not even binding on other judges in the same district. In a large circuit like the Fifth or Ninth, the same issue can be litigated again and again before different judges. This is not a good use of litigant resources or of judicial resources.

For all of these reasons, I believe it would be desirable for Congress to institute a carefully designed system of appellate review of remand orders. The best way to do this is through the rulemaking process. Congress has already authorized the use of rulemaking to "define when a ruling of a district court is final for the purposes of appeal under section 1291," so this is little more than an application of a policy judgment that Congress has already reached.[2]

---

[2] See 28 USC § 2072(c). Indeed, it can be argued that this section already authorizes rulemaking of the kind I am suggesting. Section 2072(b) provides: "All laws in conflict with [rules prescribed by the Supreme Court] shall be of no further force or effect after such rules have taken effect." The implication of §§ (b) and (c) taken together is that the rulemaking process could be used to override the command of § 1447(d). However, I do not believe that this step should be taken without explicit authorization from Congress.

PROPOSED DRAFT OF THE "FEDERAL JURISDICTION CLARIFICATION ACT" BY THE ADMINISTRATIVE OFFICE OF THE COURTS

109th CONGRESS
1st Session

To amend title 28, United States Code, to clarify the jurisdiction of the Federal courts, and for other purposes.

IN THE SENATE / HOUSE OF REPRESENTATIVES

A BILL

To amend title 28, United States Code, to clarify the jurisdiction of the Federal courts, and for other purposes.

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

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the "Federal Courts Jurisdiction Clarification Act of 2005".

(b) TABLE OF CONTENTS.—The table of contents for this Act is as follows:

SEC. 2. RESIDENT ALIEN PROVISO.

Section 1332(a) of title 28, United States Code, is amended by striking the last sentence and inserting at the end of subsection (2) before the semicolon the following: ", except that the district courts shall not have original jurisdiction of an action between a citizen of a State and a citizen or subject of a foreign state admitted to the United States for permanent residence and domiciled in the same State."

SEC. 3. CITIZENSHIP OF CORPORATIONS AND INSURANCE COMPANIES WITH FOREIGN CONTACTS.

(a) Section 1332(c) of title 28, United States Code, is amended by striking in the first clause of subsection (1) all that precedes the first comma and inserting in lieu thereof the following: "a corporation shall be deemed to be a citizen of every State and foreign state by which it has been incorporated and of the State or foreign state where it has its principal place of business".

(b) Section 1332(c)(1) of title 28, United States Code, is amended by striking all that follows the term "party-defendant," and inserting in lieu thereof the following: "such insurer shall be deemed a citizen of every State and foreign state of which the insured is a citizen, as well as of every State or foreign state by which the insurer has been incorporated and of the State or foreign state where it has its principal place of business; and".

SEC. 4. REMOVAL AND REMAND PROCEDURES.

(a) Section 1441(c) of title 28, United States Code, is amended by striking the text therein and inserting in lieu thereof the following:

"(c)(i) If a civil action includes—

"(A) a claim arising under the Constitution, laws or treaties of the United States (within the meaning of section 1331 of this title), and

"(B) a non-removable claim that is not part of the same case or controversy (within the meaning of Article III of the Constitution) as the claim described in subsection (A),

the entire action may be removed if the action would be removable absent the inclusion of the claim described in subsection (B).

"(ii) Upon removal of an action described in (c)(i), the district court shall sever from the action all claims described in subsection (B) and shall remand the severed claims to the State court from which the action was removed. For purposes of this subsection, only defendants against whom a claim described in subsection (A) has been asserted must join in or consent to the removal.".

(b) Section 1446 of title 28, United States Code, is amended—

(1) by adding at the end of the title of the section "in a civil action"; and

(2) in subsection (a)—

(A) by deleting "or criminal prosecution";

(B) by deleting "signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing" and inserting in lieu thereof the following: ". The notice of removal shall be signed in the same manner and to the same effect as a pleading, written motion, or other paper in a civil action in a district court of the United States and contain";

(3) in subsection (b)—

(A) by inserting "(1)" immediately after "(b)"; and

(B) by inserting after the first paragraph the following new subsection:

"(2) In actions involving two or more defendants, all defendants must join in or consent to the removal of the action. A defendant shall have thirty days after receipt by or service on that defendant of the initial pleading or summons as specified in subsection (b)(1) of this section to remove the action. Even though they may not have previously initiated or consented to removal, earlier-served defendants may consent to a subsequent removal during the thirty-day period following service on later-served defendants. Unserved defendants may join in or consent to a removal otherwise timely under this subsection during the thirty-day period following service on any defendant.";

(4) by inserting at the beginning of the present second paragraph the following: "(3)" and adding at the end of that paragraph before the period "unless equitable considerations warrant removal"; and

(5) by inserting at the end of subsection (b) the following new subsection:

"(4) If removal is sought on the basis of the jurisdiction conferred by section 1332(a) of this title, the sum demanded in good faith in the initial pleading shall be deemed to be the amount in controversy; however, the notice of removal may assert the amount in controversy if the initial pleading seeks (i) non-monetary relief; or (ii) a money judgment but the State practice either does not permit demand for a specific sum or permits recovery of damages in excess of the amount demanded. The defendant may remove on the basis of the amount in controversy asserted and removal is proper if the district court finds by the preponderance of the evidence that the amount in controversy exceeds the amount specified in section 1332(a) of this title. Information in the record of the state proceeding, or in responses to discovery, shall be treated as an "other paper" within the meaning of subsection (b)(3). If such a paper first appears during trial or within 30 days before the date set for trial, removal may be had only upon a finding that the plaintiff deliberately failed to disclose the actual amount in controversy to prevent removal. If the notice has been filed more than 1 year after commencement of the action, such a finding shall be deemed to satisfy the equitable considerations in subsection (b)(3) of this section so as to permit removal.".

(c) by deleting subsections (c) and (e), and re-designating present subsection (d) as "(c)" and present subsection (f) as "(d)".

(d) by inserting in the table of contents for Chapter 89 at the end of the title of section 1446 the phrase "in a civil action.".

(e) title 28, United States Code, is amended—

(1) by inserting the following new section:

"**§ 1446a. Procedure for removal of a criminal prosecution**

(a) A defendant or defendants desiring to remove any criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such prosecution is pending a notice of removal. The notice of removal shall be signed in the same manner and to the same effect as a pleading, written motion, or other paper in a criminal prosecution in a district court of the United States and contain a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

(b)(1) A notice of removal of a criminal prosecution shall be filed not later than thirty days after the arraignment in the State court, or at any time before trial, whichever is earlier, except that for good cause shown the United States district court may enter an order granting the defendant or defendants leave to file the notice at a later time.

(2) A notice of removal of a criminal prosecution shall include all grounds for such removal. A failure to state grounds which exist at the time of the filing of the notice shall constitute a waiver of such grounds, and a second notice may be filed only on grounds not existing at the time of the original notice. For good cause shown, the United States district court may grant relief from the limitations of this paragraph.

(3) The filing of a notice of removal of a criminal prosecution shall not prevent the State court in which such prosecution is pending from proceeding further, except that a judgment of conviction shall not be entered unless the prosecution is first remanded.

(4) The United States district court in which such notice is filed shall examine the notice promptly. If it clearly appears on the face of the notice and any exhibits annexed thereto that removal should not be permitted, the court shall make an order for summary remand.

(5) If the United States district court does not order the summary remand of such prosecution, it shall order an evidentiary hearing to be held promptly and after such hearing shall make such disposition of the prosecution as justice shall require. If the United States district court determines that removal shall be permitted, it shall so notify the State court in which prosecution is pending, which shall proceed no further.

(c) If the defendant or defendants are in actual custody on process issued by the State court, the district court shall issue its writ of habeas corpus, and the marshal shall thereupon take such defendant or defendants into custody and deliver a copy of the writ to the clerk of such State court.".

(2) by inserting in the table of contents for Chapter 89 after section 1446, "1446a. Procedure for removal of a criminal prosecution.".

SEC. 5. INDEXING THE AMOUNT IN CONTROVERSY.

(a) Section 1332(a) of title 28, United States Code, is amended by inserting after "$75,000," the following: "as adjusted by subsection (f) of this section,".

(b) Section 1332 of title 28 is amended by inserting at the end thereof the following new subsection:

"(f)(1) Effective on January 1 of each year that immediately follows a year evenly divisible by 5, the dollar amount then in effect as the minimum amount in controversy applicable under section 1332(a) shall be adjusted as provided in subsection (2).

"(2) Before the end of each year that is evenly divisible by five, the Director of the Administrative Office of the United States Courts shall compute the percentage increase in the Consumer Price Index for the month of September of such year over the Consumer Price Index for the month of September of the fifth year preceding such year. Such percentage shall be applied to the amount in controversy then in effect. The resulting amount shall be rounded to the nearest five thousand dollars and then added to the amount in controversy then in effect. By November 15 of the year in which the calculation is made, the Director shall submit for publication in the *Federal Register* the percentage increase, the resulting dollar amount of the increase to be added to the minimum amount in controversy, and any new minimum amount in controversy.

"(3) As used in this subsection, the term 'Consumer Price Index' means the most recent version of the U.S. City Average All Items Consumer Price Index for All Urban Consumers (CPI-U) published by the Bureau of Labor Statistics of the U.S. Department of Labor.".

SEC. 6. EFFECTIVE DATE.

Unless otherwise specified, the amendments made by this Act shall take effect upon enactment of this Act, and they shall apply to any action or prosecution commenced on or after the date of enactment of this Act.

SECTION-BY-SECTION ANALYSIS
FEDERAL COURTS JURISDICTION CLARIFICATION ACT OF 2005
109TH CONGRESS

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

This section names the bill the "Federal Courts Jurisdiction Clarification Act of 2005," and it lists the sections in a table of contents.

SEC. 2. RESIDENT ALIEN PROVISO.

The Constitution provides the basis for federal court jurisdiction over disputes between citizens of different states ("diversity jurisdiction") and over disputes involving citizens of the United States and citizens or subjects of foreign states ("alienage jurisdiction"). As currently codified, diversity jurisdiction attaches whenever the matter in controversy exceeds $75,000 and is between citizens of different states. *See* 28 U.S.C. § 1332(a)(1). Under the long-standing complete diversity requirement, no plaintiff can be from the same state as any defendant for diversity jurisdiction to be available. *See Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806). The traditional reason given for providing for diversity jurisdiction is "a fear that state courts would be prejudiced against those litigants from out of state." C. Wright & M. Kane, *The Law of Federal Courts*, 144 (6th ed. 2002).

Although the Constitution permits the assertion of federal jurisdiction over disputes involving aliens, established law bars the assertion of jurisdiction over a dispute that involves only aliens. Alienage jurisdiction exceeds the limits of Article III unless a citizen of the United States also appears as a party. *See Hodgson v. Bowerbank*, 9 U.S. (5 Cranch) 303 (1809). Cognizant of this long-standing constitutional limitation, section 1332 makes provision for jurisdiction over aliens in two situations, both of which involve U.S. citizens. First, section 1332(a)(2) applies to disputes between citizens of a state and citizens or subjects of a foreign state. Second, section 1332(a)(3) applies to disputes between citizens of different states and in which citizens or subjects of a foreign state are additional parties. Jurisdiction based on section 1332(a)(2) or (3) is still subject to the minimum amount in controversy requirement.

In general, the federal courts have taken a fairly narrow view of the scope of section 1332(a)(2) jurisdiction, declining on statutory grounds to assert jurisdiction over disputes in which aliens appear on both sides of the litigation. *See, e.g., Ed & Fred, Inc. v. Puritan Marine Ins. Underwriters Corp.*, 506 F.2d 757 (5th Cir. 1975). Even though U.S. citizens may appear on one side of the litigation, the presence of aliens as opposing parties (even aliens from different foreign countries) has proven fatal to the assertion of jurisdiction. *See generally Allendale Mutual Ins. Co. v. Bull Data Systems, Inc.*, 10 F.3d 425, 428 (7th Cir. 1993); 15 Moore's Federal Practice, sec. 10277 (3d ed. 2001). In actions proceeding under section 1332(a)(3), this rule has not been applied with the same rigor. More specifically, when a claim between diverse U.S. citizens grounds the jurisdiction and aliens appear as additional parties on both sides of the litigation, jurisdiction has been upheld. *See Transure, Inc. v. Marsh & McLennan, Inc.*, 766 F.2d 1297, 1298-99 (9th Cir. 1985) (upholding jurisdiction under section 1332(a)(3)); *Dresser Industries, Inc. v. Underwriters at Lloyds of London*, 106 F.3d 494, 500 (3d Cir. 1997) (same).

In 1988, Congress added the resident alien proviso to section 1332(a) through enactment of the Judicial Improvements and Access to Justice Act (Pub. L. No. 100-702). The proviso states that "an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled." 28 U.S.C. § 1332(a). The purpose of that 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, thereby also reducing in a reduction of the caseload of the federal courts. *See, e.g., China Nuclear Energy Industry Corp. v. Anderson, LLP*, 11 F. Supp. 2d 1256, 1258 (D. Co. 1998). In such situations, the permanent resident alien has appreciable connections to the state, and there was perceived to be no need to provide for a federal forum so as to protect the alien against possible bias in state court.

While the 1988 amendment curtailed alienage jurisdiction in one setting, the "deeming" feature created an arguable basis for expansion of alienage jurisdiction in other settings – a problem with which the courts have struggled. *See, e.g., Arai v. Tachibana*, 778 F. Supp. 1535 (D. Haw. 1991), and *Saadeh v. Farouki*, 107 F.3d 52 (D.C. Cir. 1997). Under section 1332(a)(1), two resident aliens from different states might each be deemed to be a citizen of his or her respective state of domicile and claim access to federal diversity jurisdiction in circumstances that would appear to violate the venerable rule of *Hodgson v. Bowerbank* (described *supra*). Under sections 1332(a)(2)-(3), additional possibilities emerge for litigants involved in litigation with resident aliens to seek to expand their access to federal court beyond what was available before the deeming proviso took effect in 1988. For example, in *Singh v. Daimler-Benz AG*, 9 F.3d 303 (9th Cir. 1993), the court allowed a permanent resident alien in one state to proceed against a U.S. citizen in another state and a non-resident alien, even though the configuration of parties would have apparently failed to support a finding of jurisdiction under either section 1332(a)(2) or (a)(3) in the absence of the deeming provision.

To correct the problem, section 2 of the proposed bill eliminates the resident alien proviso and its deeming feature altogether, along with its potential for jurisdictional expansion. By eliminating the proviso, resident aliens would no longer be treated as U.S. citizens for purposes of jurisdiction, thereby avoiding the possibly anomalous results under section 1332(a)(1)-(3). In place of the proviso, section 2 would provide that the district courts shall not have diversity of citizenship jurisdiction under section 1332(a)(2) of a claim between a citizen of a state and a citizen or subject of a foreign state admitted to the United States for permanent residence and domiciled in the same state. This provision directly restricts the exercise of jurisdiction over disputes between citizens of a state and citizens or subjects of a foreign state admitted to the United States for permanent residence and domiciled in the same state. Section 2 would thus achieve the goal of modestly restricting jurisdiction, which Congress sought to accomplish when it first enacted the resident alien proviso, and would avoid the threat of jurisdiction expansion now posed by the proviso. By attaching this modest restriction only to section 1332(a)(2), the amendment would permit resident aliens to appear as additional parties to disputes under section 1332(a)(3), without their status as deemed U.S. citizens of their state of residence being treated as a basis for either establishing or defeating the diversity of U.S. citizenship that grounds jurisdiction under this provision. (References to sections 1335 (interpleader) and 1441 (removal) are no longer necessary in the replacement sentence because

1335 is dependant upon diversity jurisdiction under section 1332, and similarly, section 1441 applies only when district courts have original jurisdiction – which here would be through diversity.)

SEC. 3. CITIZENSHIP OF CORPORATIONS AND INSURANCE COMPANIES WITH FOREIGN CONTACTS

Section 3 amends section 1332(c)(1) of title 28, United States Code, to specify the treatment of citizenship in diversity actions involving corporations, as well as insurance companies involved in direct actions. The purpose is to clarify how foreign contacts should affect the determination of whether diversity of citizenship is present for these entities when a case is filed in or removed to federal court.

Actions involving corporations

When one of the parties to a civil action is a corporation, section 1332(c) deems that corporation to be a citizen of any "State" in which it has been incorporated "and of the State where it has its principal place of business." The quoted phrase was added to section 1332(c)(1) in 1958 to give essentially multiple citizenship to corporations. The intent was to preclude diversity jurisdiction over a dispute between an in-state citizen and a corporation incorporated or primarily doing business in the same state. In either situation, neither parties face a threat of bias if the action were to be resolved in state court.

For example, today under section 1332(c), if a corporation incorporated in Delaware has its principal place of business in Florida, it is deemed to be a citizen of both Delaware and Florida. If a Florida citizen or a Delaware citizen sues that corporation, diversity jurisdiction would be defeated because both the plaintiff and defendant would be treated as citizens from the same State (Florida or Delaware).

When an action involves a U.S. corporation with foreign contacts or foreign corporations that operate in the United States, federal courts have struggled with applying this statute. *See* C. Wright & M. Kane, *supra*, 170. This difficulty occurs primarily because section 1332(c)(1) refers to a "State" and makes no reference to a corporation with either of these two types of foreign contacts (country of incorporation or principal place of doing business). Subsection (d) of section 1332 defines "States" as including the Territories, the District of Columbia, and the Commonwealth of Puerto Rico. Some courts have noted that because the word "States" in the subsection begins with a capital "S," it applies only to the fifty states and the other places specified in the definition and therefore does not apply to citizens of foreign states (or countries). *See, e.g., Torres, supra,* at 543; *Barrantes, supra*, at 1559. Other courts applying section 1332(c)(1) have concluded that the word "States" should mean foreign states, as well as States of the Union. *See, e.g., Nike, Inc. v. Comercial Iberica de Exclusivas Deportivas, S.A.*, 20 F.3d 987, (9th Cir. 1994).

Following are examples of how the courts have reached different conclusions in trying to apply the provision in the absence of specific references to "foreign states." The Fifth Circuit has treated a U.S. corporation with its principal place of business abroad as a citizen only of its place of incorporation. *See, e.g., Barrantes, supra* (plaintiffs from Costa Rico (aliens) brought suit against Standard Fruit Company, a Delaware corporation with its principal place of business in Latin America); *Torres, supra* (alien plaintiffs brought suit against Delaware corporation with principal place of business in Peru). Such treatment of the corporations as citizens of Delaware while ignoring their foreign contacts resulted in decisions upholding the availability of federal alienage jurisdiction and allowing the actions to proceed in federal court.

The Ninth Circuit, in contrast, has rejected any distinction between foreign and domestic corporations; each would be deemed a citizen of both its place of incorporation and its principal place of business. *See Nike, Inc. v. Comercial Iberica de Exclusivas Deportivas*, S.A., 20 F.3d 987, 990 (9th Cir. 1994). Although technically dicta as applied to U.S. corporations with business centers abroad, the Ninth Circuit's approach has been applied to U.S. corporations in a number of district court decisions. *See* note, David A. Greher, *The Application of 28 U.S.C. § 1332(c)(1) to Alien Corporations: A Dual Citizenship Analysis*, 36 Va. J. Int'l L. 233, 251 n.92 (1995) (collecting cases). Such an approach would result in a denial of alienage jurisdiction over suits brought by aliens against U.S. corporations that have business centers abroad.

The amendment in section 3(a) would resolve this division of authority by implementing the diversity-curtailing intent of this provision with regard to corporations with foreign activities. It would insert the words "foreign state" in two places in section 1332(c)(1) to make it clear that all corporations, foreign and domestic, would be regarded as citizens of both their place of incorporation and their principal place of business. The amendment would result in a denial of diversity jurisdiction in two situations: (1) where a foreign corporation with its principal place of business in a state sues or is sued by a citizen of that same state, and (2) where a citizen of a foreign country (alien) sues a U.S. corporation with its principal place of business abroad. Such a change would bring a degree of clarity to an area of jurisdictional law now characterized by the conflicting approaches of the lower federal courts.

By extending citizenship to corporations with foreign ties, the legislation would deny access to a federal court in a small range of cases for which a federal forum might be available today. For example, a company might have its principal place of business in a foreign state and nonetheless chose to incorporate in the United States. Such incorporation would make the corporation a citizen of its state of incorporation and, according to some lower courts, enable the corporation to claim access to a federal court in a dispute with another foreign national. (When such disputes arise from allegedly tortious conduct overseas, the federal courts will often assert jurisdiction only to dismiss under the doctrine of forum non conveniens.) Section 3(a) of this proposed bill would alter the jurisdictional analysis by deeming the corporation to be a citizen of its state of incorporation and of the foreign state where it has its business center, blocking jurisdiction on the well-established ground that disputes between two aliens do not satisfy the jurisdictional requirements of section 1332(a). The statute would have no impact on the freedom of corporations to incorporate where they see fit, or to do business in accordance with their own

business plan. It would simply treat them as citizens of their place of incorporation and principal place of business on a basis consistent with the treatment of domestic corporations.

The change made by this amendment follows the definition Congress used for corporate citizenship in the Multiparty, Multiforum Trial Jurisdiction Act of 2002 (Pub. L. No. 107-273). More specifically, that law provided that "a corporation is deemed to be a citizen of any State, and a citizen or subject of any foreign state, in which it is incorporated or has its principal place of business, and is deemed to be a resident of any State in which it is incorporated or licensed to do business or is doing business." This definition is now codified as 28 U.S.C. § 1369(c)(2)).

Section 3(a) also revises the wording of section 1332(c)(1) so that a corporation shall be deemed a citizen of "*every* State and foreign state by which it has been incorporated," instead of "*any* State . . . ." (Emphasis added.) Although corporations can incorporate in more than one state, the practice is rare. In applying the present wording of the subsection, most courts have treated such multi-state corporations as citizens of every state by which they have been incorporated. The amendment in this section would codify the leading view as to congressional intent and treat corporations as citizens of every state of incorporation for diversity purposes. *See* C. Wright & M. Kane, *supra*, at 167-68.

Direct actions against insurance companies

Subsection (b) of section 3 also amends section 1332(c)(1) to extend parallel language to insurance companies in direct action litigation. That subsection presently includes "deeming" language for determining the citizenship of an insurance company involved in direct action litigation, which was added by Congress in 1964 (Pub. L. 88-439, 78 Stat. 445). More specifically, the provision now reads as follows:

> in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business.

28 U.S.C. § 1331(c)(1).

In a direct action case, the plaintiff sues the liability insurance company directly without naming as a defendant the insured party whose negligence or other wrongdoing gave rise to the claim. Section 1332(c) seeks to prevent such direct actions from qualifying for diversity jurisdiction by deeming the insurance company to be a citizen of the state of which the insured is a citizen, as well as of every state by which the insurer has been incorporated and of the state where it has its principal place of business.

The provision was enacted primarily in response to a surge in diversity case filings against insurance companies in Louisiana federal court. Sen. Rep. No. 1308, 88th Cong., 2d

Sess. (1964), reprinted in 1964 U.S. Code Cong. & Admin. News, p. 2778. That increase followed adoption of a state statute there in 1959 allowing direct actions against insurance companies. "Because of the broad review of jury verdicts that the Louisiana practice permits, lawyers for plaintiffs in that state greatly preferred to be in federal court rather than in state court. They were able to convert what otherwise would have been a routine automobile-accident case between two Louisiana citizens into a diversity action by taking advantage of the state statute permitting suit directly against the insurer without joinder of the insured." C. Wright & M. Kane, *supra,* at 171. Wisconsin also had enacted a state statute permitting direct actions. *Id.*; *Inman v. MFA Mutual Ins. Co.*, 264 F. Supp. 727 (E.D. Ark. 1967); *Carvin v. Standard Accident Ins. Co.*, 253 F. Supp. 232 (E.D. Tenn. 1966). The 1964 amendment was successful at preventing such direct actions from proceeding in federal court under diversity jurisdiction. *Northbrook National Ins. Co., v. Brewer*, 493 U.S. 6 (1989) (in applying the provision, the Supreme Court set forth the legislative history).

Today, direct actions continue to exist in some states through specific statutes (*e.g.*, Louisiana, Wisconsin, Arkansas, and Connecticut) and other states through examination of the nature of certain causes of action authorized in that state (*e.g.*, Mississippi, North Carolina). Yet, for diversity purposes, the citizenship of the insurer in such actions should be no different than that provided for corporations and should recognize the insurer's foreign contacts. As stated in the 1964 Senate Judiciary Committee Report accompanying the prior amendment, the purpose was to eliminate diversity jurisdiction in such direct actions brought against a non-resident insurance carrier. Sen. Rep., *supra.* And at least one court has held that the 1964 amendment should be applied to insurance companies incorporated abroad so as to carry out the intent of the statute and deny diversity jurisdiction. *See Newsom v. Zurich Ins. Co.*, 397 F.2d 280 (5th Cir. 1968).

Subsection (b) of section 3, therefore, amends section 1332(c)(1) to provide the same definition of citizenship for an insurance company engaged in direct action litigation as that proposed in subsection (a) for corporations with foreign contacts. It inserts references to "foreign states" so as to address situations where insurance companies are incorporated abroad or have their principal place of business abroad. (As a practical matter, this amendment would only affect the limited number of states where direct actions are permitted under state law or such actions are determined to exist.)

SEC. 4. REMOVAL AND REMAND PROCEDURES.

Section 4 amends title 28, United States Code, to accomplish the following: (1) require district courts to retain a federal claim and remand unrelated state law claims when they are joined together; (2) separate the removal provisions in section 1446 into two statutes, with one governing civil proceedings and the other criminal; (3) replace the specific reference to Rule 11 of the Federal Rules of Civil Procedure with a generic reference to the rules governing pleadings and motions in civil actions in federal court; (4) address multiple-defendant situations in three ways – by codifying the requirement that all defendants join in or consent to a notice of removal, by giving each defendant 30 days in which to have the opportunity to remove or consent to

removal, and by permitting earlier-served defendants, who did not remove within their own 30-day period, to consent to a timely notice of removal by a later-served defendant; (5) authorize district courts to permit removal of diversity proceedings after the present one-year deadline when equitable considerations justify it; and (6) commence the 30-day period for removal when it becomes known, through responses to discovery or information that enters the record of the state proceeding, that the amount in controversy exceeds the statutory minimum figure, as well as create an exception to the one-year removal deadline upon a showing of plaintiff's deliberate non-disclosure of the amount in controversy. Each of these amendments is described more fully below.

Joinder of federal law claims and state law claims

Subsection (a) of section 4 amends section 1441(c) to clarify the right of access to federal court upon removal for the adjudication of separate federal law claims that are joined with (unrelated) state law claims. Section 1441(c) presently authorizes a defendant to remove the entire case whenever a "separate and independent" federal question claim is joined with one or more non-removable claims. That subsection also now states that, following removal, the district court may either retain the whole case, or remand all matters in which state law predominates.

Some federal district courts have declared the provision unconstitutional or raised constitutional concerns because, on its face, section 1441(c) purports to give courts authority to decide state law claims for which the federal courts do not have original jurisdiction (*e.g.*, *Salei v. Boardwalk Regency Corp.*, 913 F. Supp. 993, 1007 (E.D. Mich. 1996)). Other courts have chosen simply to remand the entire case to state court, thereby defeating access to federal court (*e.g.*, *Moralez v. Meat Cutters Local 539*, 778 F. Supp. 368 (E.D. Mich. 1991)). Many commentators have recognized the problem, and a leading treatise on the subject declares that "the present statute is useless and ought to have been repealed." C. Wright & M. Kane, *The Law of Federal Courts* 235 (6th ed. 2002).

Section 4(a) of this bill is intended to better serve the purpose for which the statute was originally designed, namely to provide a federal forum for the resolution of federal claims that fall within the original jurisdiction of the federal courts. The amendment to section 1441(c) would permit the removal of the case but require that a district court remand unrelated state law matters. This sever-and-remand approach is intended to cure any constitutional problems while preserving the defendant's right to removal in claims arising under federal law.

Separating the removal statute into civil and criminal statutes

Sections 4(b)(1), (b)(2)(A), and (d) amend section 1446 to change the section title and strike certain references to "criminal prosecutions" so as to separate the removal provisions relating to civil and criminal proceedings into two statutes. Section 1446 presently contains several subsections, some of which are applicable to removal of both civil and criminal cases, some applicable only to civil cases, and some pertaining only to criminal cases. Separating them into two statutes would assist litigants in knowing which provisions were applicable to their type of case.

To complete the implementation of this change, section 4(e) codifies the new statute for criminal proceedings as section 1446a. The statute for civil proceedings would continue to be section 1446. To make conforming changes for this amendment, current subsections (c)(1)-(5) and (e) of section 1446 would be deleted and re-codified in the new section 1446a. Also, current sections 1446(d) and (f) would be re-designated as subsections (c) and (d), respectively.

Rule 11 reference

Section 4(b)(2)(B) amends section 1446(a) to replace the specific reference to Rule 11 of the Federal Rules of Civil Procedure with a generic reference to the rules governing pleadings and motions in civil actions in federal court. (A parallel amendment would be made to the new removal statute governing criminal proceedings, section 1446a.) The statute now requires that the notice of removal be signed pursuant to Rule 11 of the Federal Rules of Civil Procedure. Rule 11 applies to "[e]very pleading, written motion, and other paper" filed in a civil action, but does not specifically refer to a notice of removal. The intent is to make clear that the requirements of Rule 11 apply to a "notice of removal" while avoiding any specific reference to Rule 11 so as to prevent any confusion should the Federal Rules of Civil Procedure ever be revised or renumbered.

Removal in multiple-defendant cases

Section 4(b)(3) begins by amending section 1446(b) by numbering the paragraphs to become subsections and revising them. It creates a new subsection (2) within section 1446(b) that codifies the present rule of unanimity regarding consent by all defendants to removal. *See* C. Wright & M. Kane at 244. It then addresses the main objective of this new subsection, namely to eliminate confusion surrounding the timing of removal when all of the defendants are not served at the outset of the case. The statute currently specifies a 30-day period for "the defendant" to remove the action, but it does not address situations with multiple defendants, particularly where they are served over an extended period of time during and after the expiration of the first-served defendant's 30-day period for removal. In those situations, federal courts have differed in determining the date on which the 30-day period begins to run. *Compare Marano Enterprises v. Z-Teca Restaurants, LP*, 254 F.3d 753 (8th Cir. 2001) (holding that each defendant has 30 days to effect removal, regardless of when or if other defendants had sought to remove) *and Brierly v. Alusuisse Flexible Packaging, Inc.*, 184 F.3d 527 (6th Cir. 1999) (holding that time for removal in case involving multiple defendants runs from the date of service on the last-served defendant, and permitting defendant who failed to remove within own 30-day period to join the timely removal petition of a later-served defendant) *with Getty Oil Corp., v. Ins. Co. of North America*, 841 F.2d 1254 (5th Cir. 1988) (holding that the first-served defendant and all then-served defendants must join in the notice of removal within 30 days after service upon the first-served defendant); *cf. McKinney v. Board of Trustees of Mayland Community College*, 955 F.2d 924 (4th Cir. 1992) (holding that each defendant may have 30 days to file note of removal, and rejecting the Getty Oil argument that served defendants must join a petition for removal within the time specified for the first-served defendant).

Section 4(b)(3) of this proposed bill addresses the problem by affording a later-served defendant 30 days from his or her own date of service (or receipt of initial pleading) to seek removal. The amendment would also allow earlier-served defendants to consent to removal

during the 30-day removal period of a later-served defendant. Fairness to later-served defendants, whether they are brought in by the initial complaint or an amended complaint, necessitates that they be given their own opportunity to remove, even if the earlier-served defendants chose not to remove initially. Such an approach does not allow an indefinite period for removal; plaintiffs could still choose to serve all defendants at the outset of the case, thereby requiring all defendants to act within the initial 30-day period. In addition, the amendment allows unserved defendants to join in a removal initiated by a served defendant. This new subsection clarifies the rule of timeliness and provides for equal treatment of all defendants in their ability to obtain federal jurisdiction over the case against them without undermining the federal interest in ensuring that defendants act with reasonable promptness in invoking federal jurisdiction.

Authorizing removal after one year

Section 4(b)(4) amends section 1446(b) to authorize district courts to permit removal after the one-year period specified in current law upon a finding that equitable considerations warrant removal. In 1988, Congress amended this statute to prohibit the removal of diversity cases more than one year after their commencement. This change encouraged prompt determination of issues of removal in diversity proceedings, and it sought to avoid the disruption of state court proceedings that might occur when changes in the case made it subject to removal. The change, however, led some plaintiffs to adopt removal-defeating strategies designed to keep the case in state court until after the one-year deadline passed. In those situations, some courts have viewed the one-year time limit as "jurisdictional" and therefore an absolute limit on the district court's jurisdiction. Other courts have viewed the period as "procedural" and therefore subject to equitable tolling (*e.g.*, *Tedford v. Warner-Lambert Co.*, 327 F.3d 423 (5th Cir. 2003)).

To resolve the conflict, section 4(b)(4) grants district court judges discretion to allow removal upon a finding that equitable considerations warrant it. In determining the equities, the district court will presumably consider such factors as whether the plaintiff had engaged in manipulative behavior, whether the defendant had acted diligently in seeking to remove the action, and whether the case had progressed in state court to a point where removal would be disruptive.

Amount in controversy and removal timing

Section 4(b)(5) amends section 1446(b) by inserting a new subsection (4) to address issues relating to uncertainty of the amount in controversy when removal is sought and state practice either does not require or permit the plaintiff to assert a sum claimed or allows the plaintiff to recover more than an amount asserted. While current practice allows defendants to claim that the jurisdictional amount is satisfied and remove, several issues complicate this practice. First, the circuits have adopted differing standards governing the burden of showing that the amount in controversy is satisfied. The "sum claimed" and "legal certainty" standards that govern the amount in controversy requirement when a plaintiff originally files in federal court have not translated well to removal, where the plaintiff often may not be permitted to assert a sum claimed or, if asserted, may not be bound by it. Second, many defendants faced with uncertainty regarding the amount in controversy feel compelled to remove immediately – rather

than waiting until future developments provide needed clarification – for fear that waiting and removing later will be deemed untimely. In these cases, federal judges often have difficulty ascertaining the true amount in controversy, particularly when removal is sought before discovery occurs. As a result, judicial resources may be wasted and the proceedings delayed when little or no objective information accompanies the notice to remove.

Section 4(b)(5) responds by amending section 1446(b) to allow a defendant to assert an amount in controversy different from that in the initial pleading if the complaint seeks non-monetary relief or a money judgment but the state practice either does not permit demand for a specific sum or permits recovery of damages in excess of the amount demanded. The removal will succeed if the district court finds by a preponderance of the evidence that the amount in controversy exceeds the amount specified in 28 U.S.C. § 1332(a), presently $75,000. If the defendant lacks information with which to remove within the 30 days after the commencement of the action, the defendant may take discovery in the state court with a view toward ascertaining the amount in controversy. If a statement appears in response to discovery or information appears in the record of the state proceeding indicating that the amount in controversy exceeds the threshold amount, then the new subsection deems it to be an "other paper" within the meaning of section 1446(b)(3), thereby triggering a 30-day period in which to remove the action. The district court must still find by the preponderance of the evidence that the jurisdictional threshold has been met. However, if such an "other paper" appears in response to discovery or as part of the record and trial is underway or is to begin within 30 days, then the defendant must show, and the district court must find, that the plaintiff deliberately sought to conceal the true amount in controversy.

In addition, if the removal notice has been filed more than one year after commencement of the action, such a finding shall satisfy the equitable considerations in section 1446(b)(3) so as to permit removal.

SEC. 5. INDEXING THE AMOUNT IN CONTROVERSY.

Section 5 amends section 1332 to enable the minimum amount in controversy for diversity of citizenship jurisdiction, which is presently $75,000, to be adjusted periodically in keeping with the rate of inflation. Such an automatic adjustment would avoid the need to revisit the underlying amount specified in the statute and to then enact large increases. This change would also keep a meaningful limitation on the types of diversity cases that could be filed in federal court.

Section 5(a) inserts language to accompany the present minimum amount in controversy, $75,000, and indicate that that amount may have been adjusted as provided by new subsection (f) of section 1332. It is anticipated that any new minimum amounts in controversy would be published within the notes following section 1332, after their publication in the *Federal Register*.

Section 5(b) adds a new subsection (f) to section 1332, which subsection would set forth the formula for adjusting the amount in controversy. It provides that effective on January 1 of each year immediately following a year evenly divisible by 5, the jurisdictional amount shall be adjusted according to a formula tied to the Consumer Price Index for All Urban Consumers (CPI-U). The CPI-U, which measures the average change in the prices paid by urban consumers for a representative basket of goods and services, is the most widely used gauge of price changes as a means of adjusting dollar values. Under this section's formula, the Director of the Administrative Office of the U.S. Courts would be required, before the end of each year that is evenly divisible by five, to compute the percentage increase in the CPI-U for September of such year in relation to the price index for September of the fifth year preceding such year. The percentage increase would be rounded up or down to the nearest $5,000 and then added to the amount in controversy then in effect. The new figure, as well as the percentage change and the resulting dollar amount, would be submitted for publication in the *Federal Register* by November 15 of the year in which it is computed.

If this formula had been applicable beginning in 2000, the formula would have operated as follows. The change in the CPI-U for September 2000 as compared to 1995 provided a cumulative CPI-U increase of 13%. Applying that increase to the amount in controversy would yield $9,750 (13% x $75,000), which figure, rounded to the nearest $5,000, would become $10,000. The resulting figure would be added to the amount in controversy ($75,000 + $10,000), resulting in a new amount in controversy of $85,000, effective January 1 of 2001. The next review would have been in 2005 (the next year evenly divisible by 5). The change in the CPI-U for September 2005 as compared to 2000 would provide a cumulative CPI-U increase of 12.33% (assuming a 3% CPI increase for 2005). Applying that percentage to the amount in controversy ($85,000) would yield $10,480, which, rounded to the nearest $5,000, would become $10,000. This figure would be added to the amount in controversy ($85,000 + $10,000) to make it $95,000, effective January 1 of 2006. (Note that the CPI-U as applied to the amount in controversy must yield at least $2,500, which would then be rounded to $5,000, so as to have any effect and generate a new amount in controversy.)

Congress has previously enacted similar indexing provisions. For example, in the Bankruptcy Reform Act of 1994, Congress authorized adjustments every three years of certain dollar amounts applicable to bankruptcy actions so as to keep pace with inflation as reflected by changes in the CPI-U. *See* 11 U.S.C. § 104(b); 66 Fed. Reg. 10910-02 (2001). In addition, in the Federal Civil Penalties Inflation Adjustment Act of 1990, Congress authorized Executive agencies to adjust civil monetary penalties at least once every four years so as to "allow for regular adjustment for inflation," which adjustment is also based on the Consumer Price Index. Pub. L. No. 101-134 (codified as a note under 28 U.S.C. § 2461); *see, e.g.*, FTC application at 16 C.F.R. Pt. 1.

The minimum amount in controversy for diversity jurisdiction was last increased in 1997

when Congress raised the amount from $50,000 to $75,000. (*See* Federal Courts Improvement Act of 1996, Pub. L. No. 104-317.) Prior to that, the minimum amount in controversy had been $10,000 until Congress raised it to $50,000 in 1988 through enactment of the Judicial Improvements and Access to Justice Act (Pub. L. No. 100-702). However, the present $75,000 threshold amount has not been adjusted by Congress in eight years, while the true value of that amount has decreased significantly. As a result, an increase is clearly needed to place the threshold amount at a level in keeping with today's economy. This indexing provision will allow the dollar figure for the amount in controversy to keep pace in the future with inflation and to avoid the need for large increases after lengthy intervals.

SEC. 6. EFFECTIVE DATE.

The bill provides for a general effective date that is the date of enactment. In addition, the bill specifies that the amendments apply only to cases filed after the effective date. Regarding section 5's indexing of the amount in controversy, that formula, if enacted prior to 2010, would first become applicable in 2010. The statutes of title 28, United States Code, that are affected by this proposed bill are as follows: § 1332(a), (c), and (f) (new subsection); § 1441(c); § 1446; and § 1446a (new section).

For further information,
contact the Office of Legislative Affairs,
Administrative Office of the U.S. Courts,
202-502-1700.

○