Statement of the U.S. Chamber of Commerce

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ON: The Fraudulent Joinder Prevention Act of 2015

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

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

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

Litigants from Different States Should Have Access to Neutral Federal Courts

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[6] U.S. Const. art. III, § 2.

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

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

Current Approaches to Fraudulent Joinder Strongly Favor Plaintiffs and Allow Abuse

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

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

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

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

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

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

[10] 28 U.S.C. § 1447.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

How the System is Abused

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

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

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

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

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

[33] *See* 28 U.S.C. § 1446(c)(1).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Solution

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

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

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

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

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

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

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

[53] *See supra* note 26.

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

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

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

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

* * *

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

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

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