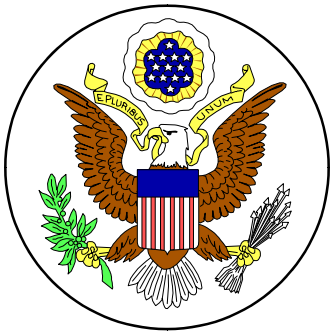
JUDICIAL CONFERENCE OF THE UNITED STATES

STATEMENT OF
THE HONORABLE JANET C. HALL

JUDGE, UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT



FOR THE
SUBCOMMITTEE ON COURTS, THE INTERNET, AND
INTELLECTUAL PROPERTY
OF THE
COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES

HEARING ON
THE FEDERAL COURTS JURISDICTION CLARIFICATION ACT

November 15, 2005

Administrative Office of the U.S. Courts, Office of Legislative Affairs
Thurgood Marshall Federal Judiciary Building, Washington, DC 20544, 202-502-1700

SUMMARY OF STATEMENT OF JUDGE JANET C. HALL
ON BEHALF OF THE JUDICIAL CONFERENCE OF THE UNITED STATES
November 15, 2005

The Judicial Conference of the United States has transmitted to the 109th Congress five legislative proposals entitled the "Federal Courts Jurisdiction Clarification Act of 2005." These proposals clarify federal jurisdictional statutes in title 28, United States Code, and thereby reduce needless litigation. Because of differing interpretations as to the operation of certain such statutes, parties do not know with certainty whether they should pursue a claim in state versus federal court. Enactment of this proposal will eliminate much confusion and thereby reduce unnecessary judicial proceedings.

Among other things, the proposed legislation would re-cast the "resident alien proviso" so that parties cannot successfully assert that the proviso expands, instead of constricts, access to diversity jurisdiction. It also updates the definition of "citizenship" for corporations, as well as insurance companies involved in certain diversity litigation, by allowing courts and parties to consider foreign business contacts in determining where corporations are incorporated and have their principal place of business. In addition, several changes are made to the removal and remand procedures, including providing guidance as to whether removal is possible after one year and when removal is appropriate in situations where several defendants are served at different times. The proposed bill also indexes the minimum amount in controversy ($75,000) required to invoke diversity jurisdiction so that it will keep pace with inflation and serve as a meaningful threshold. Recently, the Judicial Conference has submitted an additional proposal for inclusion in this legislation that it adopted in September, which proposal would facilitate the use of declarations to evidence that less than $75,000 in damages is being sought and thus a federal forum based on diversity jurisdiction is not appropriate.

Together these proposals clarify when federal jurisdiction is appropriate, thereby saving time and money for litigants and the judicial branch of government.

STATEMENT OF JUDGE JANET C. HALL
ON BEHALF OF THE JUDICIAL CONFERENCE OF THE UNITED STATES
November 15, 2005

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 corporations. 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 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. 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.

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