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Pre-Service Removal in the Forum Defendant's Arsenal

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Pre-Service Removal in the Forum Defendant’s Arsenal

Saurabh Vishnubhakat*

ABSTRACT

This article is the first academic defense of pre-service removal in diversity cases by forum-state defendants under the “properly joined and served” language of 28 U.S.C. § 1441(b). Pre-service removal has proliferated nationally in recent years. Appellate courts, however, have been silent on the issue for two reasons: First, orders that remand a case to state court are statutorily non-reviewable on appeal. Second, cases retained in federal court and litigated to final judgment are highly unlikely, for reasons of judicial economy, to be voided for de novo adjudication in state court. After tracing the development of the removal statute and the historical concern of local prejudice, the article evaluates competing approaches of pre-service removal from U.S. District Court case law. The article concludes with a discussion of the Federal Courts Jurisdiction and Venue Clarification Act of 2011, currently being considered by Congress, and the changes it offers for removal jurisdiction.

TABLE OF CONTENTS

INTRODUCTION.....	148
I. CONGRESSIONAL INTENT: THE FORMULATION OF MODERN REMOVAL LAW.....	148
A. <i>A Historical Overview of Removability</i>	148
B. <i>The Problem of Local Prejudice</i>	151
II. GAMESMANSHIP: CIRCUMVENTING THE FORUM-STATE EXCEPTION ...	152
A. <i>The New Jersey Experience</i>	152
B. <i>Process vs. Outcome: Competing Threads of Jurisprudence</i>	155
C. <i>Appellate Silence</i>	156
III. ANALYTIC SENSE: THE MOVING PARTS OF REMOVAL	159
EPILOGUE: CURRENT LEGISLATION.....	161
CONCLUSION.....	163

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INTRODUCTION

The forum-state exception prohibits removal of diversity actions from state to federal court if even one “properly joined and served” defendant is a citizen of the forum state.¹ Forum defendants, however, have tried to circumvent the rule by removing lawsuits prior to being served, and recent U.S. District Court decisions are split on the legitimacy of this tactic. The U.S. Courts of Appeals have been silent on the issue for two reasons. First, an order remanding a case to state court is statutorily non-reviewable on appeal. Second, for those cases tried in federal court and subsequently appealed, judicial economy counsels against the reviewing court’s voiding of an entire federal proceeding only to remand it for readjudication in state court. This Article examines representative U.S. District Court case law on the issue of pre-service removal and argues for the legitimacy of pre-service removal.

I. CONGRESSIONAL INTENT: THE FORMULATION OF MODERN REMOVAL LAW

A. *A Historical Overview of Removability*

The jurisprudence of removal of cases from state to federal court has long looked to concerns of local prejudice where the parties are citizens of different states.² Rules of federal procedure addressed these historical concerns as recently as 1911, nearly a half century after the sectionalism of the Civil War. Indeed, the Judicial Code of 1911 provided separately for removal based on local prejudice,³ having provided elsewhere for removal based on diversity jurisdiction.⁴ This appreciation for the risk of prejudice remains today, serving as a premise for proposals for procedural reform rather than a matter of fundamental debate.⁵

The modern history of amendments to the removal statute implicates the concern with local prejudice in a number of ways. The first of these amendments came with

1. 28 U.S.C. § 1441(b) (2006).

2. See, e.g., W.S. SIMKINS, FEDERAL PRACTICE AND THE JURISDICTION OF ALL FEDERAL COURTS AT LAW AND IN EQUITY INCLUDING REMOVAL OF CAUSES 157-58 (rev. ed. 1923) (explaining that when local prejudice is a factor in diversity cases, the defendant may remove the case to federal court).

3. See Judicial Code of 1911, ch. 231, § 28, 36 Stat. 1087, 1094-95 (codified as amended in scattered sections of 28 U.S.C.) (providing a right of removal specifically on the grounds of local prejudice).

4. See *id.* § 28, 36 Stat. at 1094 (providing a separate right of removal on the grounds of diversity of citizenship).

5. See, e.g., RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 291-92 (1996) (proposing the diminution of diversity jurisdiction to those “classes of cases in which there is some basis for fearing that state courts might be prejudiced against nonresidents”). Implicit in Judge Posner’s position, of course, is the legitimate concern that local prejudice against non-resident litigants will *sometimes* be an issue. See *id.*

the Foreign Sovereign Immunities Act of 1976.⁶ Among other things, the 1976 amendment provided that a civil action brought in state court “against a foreign state . . . may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending.”⁷ In thus creating a new category of removal jurisdiction, Congress also provided that “the time limitations of [effecting removal]⁸ may be *enlarged* at any time for cause shown,” but not diminished.⁹

The next amendment to the removal statute was the Judicial Improvements Act of 1985. This Act was not substantive legislation with merely an incidental effect on removal, but was itself a procedurally-oriented law.¹⁰ Among other things, the amendment provided that the federal court to which a defendant had removed a civil action “is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim.”¹¹ As a procedure-remaking statute, this amendment was similar in scope to the Judicial Improvements and Access to Justice Act, which followed shortly in 1988.¹² The 1988 amendment expressly provided that “the citizenship of defendants sued under fictitious names shall be disregarded” for purposes of the federal court’s removal jurisdiction.¹³ Significantly, this procedural correction—indeed, all the technical improvements in the 1988 amendment—accompanied a larger program of judicial study and streamlining of the federal courts implemented by the same legislation.¹⁴

6. Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended in scattered sections of 28 U.S.C.).

7. *Id.* § 6, 90 Stat. at 2898.

8. 28 U.S.C. § 1446(b) (2006).

9. Foreign Sovereign Immunities Act of 1976 § 6, 90 Stat. at 2928 (emphasis added).

10. Judicial Improvements Act of 1985, Pub. L. No. 99-336, 100 Stat. 633 (1986) (codified as amended in scattered sections of the U.S. Code).

11. *Id.* § 3(a), 100 Stat. at 637.

12. Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, 102 Stat. 4642 (1988) (codified as amended in scattered sections of the U.S. Code).

13. *Id.* § 1016, 102 Stat. at 4669-70.

14. *Id.* § 102(b)(2), 102 Stat. at 4644 (noting that one of the purposes behind the Federal Courts Study Act, or title I of the Judicial Improvements and Access to Justice Act, is to “develop a long-range plan for the future of the Federal judiciary,” which includes assessments involving “alternative methods of dispute resolution;” “the structure and administration of the Federal court system;” “methods of resolving intracircuit and intercircuit conflicts in the courts of appeals;” and “the types of disputes resolved by the Federal courts”). Of particular note to the present discussion are “the structure and administration of the Federal court system” and “the types of disputes resolved by the Federal courts.” *Id.* § 102(b)(2)(B), (D), 102 Stat. at 4644.

The investigation prompted by the 1988 amendment gave way to the findings of the Judicial Improvements Act of 1990.¹⁵ These findings identified cost and delay as significant problems attending federal litigation¹⁶ and articulated their adverse effect on merits adjudication of disputes and access to the courts.¹⁷ The findings also proposed a framework of solutions.¹⁸ The solutions set forth by Congress notably included “the differential treatment of cases that provides for individualized and specific management according to their needs, complexity, duration, and probable litigation careers”¹⁹ This general congressional preference for fact-specific procedures would translate, among other things, into more nuanced removal rules.

As to the removal statutes themselves, the 1990 amendment continued the growing congressional trend of more finely tailoring the scope of removal jurisdiction in two ways. First, the amendment treated “separate and independent [anchor] claim[s] or cause[s] of action . . . joined with . . . otherwise non-removable claims or causes of action.”²⁰ The removability of such combined claims had previously required anchor claims “which would be removable if sued upon alone.”²¹ Such claims included both federal question cases and diversity cases.²² The 1990 amendment narrowed this criterion to make such combined claims removable only where the anchor claim fell “within the jurisdiction conferred by [28 U.S.C. §] 1331,” i.e., federal question cases.²³

Second, the amendment addressed the discretion of the federal district court to remand, or not, the matters within its jurisdiction.²⁴ The fate of such combined claims had previously been for the federal courts to “remand all matters not otherwise within its original jurisdiction.”²⁵ The 1990 amendment changed the contour of the courts’ apparent discretion to remand or retain, providing that courts “remand all matters in which State law predominates.”²⁶ By negative implication, then, the amendment guided the federal courts’ discretion to retain some matters not otherwise within their original jurisdiction in which state law *did not* predominate.

15. Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (codified as amended in scattered sections of the U.S. Code).

16. *Id.* § 102(1), 104 Stat. at 5089.

17. *Id.* § 102(2), 104 Stat. at 5089.

18. *Id.* § 102(5), 104 Stat. at 5089-90.

19. *Id.* § 102(5)(A), 104 Stat. at 5089.

20. 28 U.S.C. § 1441(c) (2006).

21. *Id.* § 1441 note (1990 Amendments).

22. *Id.* § 1441(c).

23. Judicial Improvements Act of 1990 § 312, 104 Stat. at 5114.

24. *Id.*

25. 28 U.S.C. § 1441(c).

26. Judicial Improvements Act of 1990 § 312, 104 Stat. at 5114.

Removal jurisdiction after the 1990 amendment has remained substantially unchanged²⁷ to the present day. Indeed, much of the case law discussed here arose in light of this language.

B. *The Problem of Local Prejudice*

The cumulative effect of congressional amendments from 1976 onward has been to tailor the scope of removal jurisdiction more finely, whether with regard to subject matter,²⁸ procedural origin,²⁹ fraudulent litigant conduct,³⁰ or remand discretion.³¹ Regardless of whether Congress, in a particular instance, contracted the scope of removal jurisdiction or expanded it, it was plain that Congress had affirmatively acted. The number and variety of amendments to federal removal jurisdiction undertaken by Congress demonstrates its interest in shaping and reshaping the contours of that jurisdiction.

The substance of these amendments, even as they affect removal, has been broader than merely the question of local prejudice. For example, the findings set forth in the 1990 amendment spoke generally of concerns such as cost and delay.³² Similarly, the program of judicial study contemplated by the 1988 amendment looked largely to “the structure and administration of the Federal court system” and “the types of disputes resolved by the Federal courts”³³ Whereas the relevance of local prejudice was historically a self-evidently motivating concern for removal jurisdiction, at least one study indicates that local prejudice is no longer a sole concern for parties seeking removal.³⁴

27. A clerical amendment came in 1991 to correct a scrivener’s error previously introduced by the 1990 amendment. Act of Dec. 9, 1991, Pub. L. No. 102-198, § 4, 105 Stat. 1623, 1623 (codified as amended at 28 U.S.C. § 1441(c) (2006)).

28. See Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891; *supra* notes 6-9 and accompanying text.

29. See Judicial Improvements Act of 1985, Pub. L. No. 99-336, 100 Stat. 633 (1986); *supra* notes 10-11 and accompanying text.

30. See Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, 102 Stat. 4642 (1988); *supra* notes 12-14 and accompanying text.

31. See Judicial Improvements Act of 1990, 104 Stat. 5089; *supra* notes 15-19 and accompanying text.

32. See *id.* § 102(1), 104 Stat. at 4669.

33. See Judicial Improvements and Access to Justice Act § 102(b)(2)(B), (D), 102 Stat. at 4644.

34. See, e.g., Marvin R. Summers, *Analysis of Factors that Influence Choice of Forum in Diversity Cases*, 47 IOWA L. REV. 933, 935-38 (1962) (stating that additional factors for selecting federal courts include, among other things, geographical convenience, more lenient discovery procedures, higher jury verdicts, and clients’ preference).

II. GAMESMANSHIP: CIRCUMVENTING THE FORUM-STATE EXCEPTION

While the empirical data is equivocal as to motivation, the case law is clear as to the effect of the language of the removal statute.³⁵ The operative statutory language regarding the forum-state exception holds that any action removed on the basis of diversity jurisdiction³⁶ “shall be removable only if none of the parties in interest *properly joined and served as defendants* is a citizen of the State in which such action is brought.”³⁷ The following is an analysis of the factual dilemmas posed by the statutory language and the interpretive approaches that courts have brought to bear in response.

A. *The New Jersey Experience*

The most compelling trend of procedural gamesmanship in removal comes from New Jersey. In *Frick v. Novartis Pharmaceuticals Corp.*,³⁸ plaintiff filed suit in New Jersey Superior Court on October 31, 2005.³⁹ Plaintiff advanced a personal injury claim, alleging injuries she sustained from ingesting prescription medication manufactured by defendants.⁴⁰ Though plaintiff was a citizen of Pennsylvania, defendant Novartis was a citizen of New Jersey,⁴¹ having its principal place of business there. Before the plaintiff had served any defendants, Novartis removed the case on November 15, 2005, to the U.S. District Court for the District of New Jersey, asserting diversity jurisdiction under 28 U.S.C. § 1332.⁴² Plaintiff moved to remand, arguing improvident removal.⁴³ The court denied the plaintiff’s motion to remand.⁴⁴

Similarly, in *Thomson v. Novartis Pharmaceuticals, Corp.*,⁴⁵ plaintiffs filed suit in the Superior Court of New Jersey, Atlantic County on December 19, 2006.⁴⁶ Plaintiffs advanced eight claims, all governed by state law.⁴⁷ Though plaintiffs were

35. The acceptability of that effect in individual cases is the subject of considerable dispute. *See, e.g.*, *Fields v. Organon USA Inc.*, No. 07-2922 (SRC), 2007 WL 4365312, at *4-5 (D.N.J. Dec. 12, 2007) (discussing differences between statutory language and legislative intent); *see also* discussion *infra* Part II.B.

36. 28 U.S.C. § 1332 (2006).

37. *Id.* § 1441(b) (emphasis added).

38. No. 05-5429(DRD), 2006 WL 454360 (D.N.J. Feb. 23, 2006).

39. *Id.* at *1.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at *3.

45. No. 06-6280 (JBS), 2007 WL 1521138 (D.N.J. May 22, 2007).

46. *Id.* at *1.

47. *Id.* The plaintiffs made the following claims: (1) products liability-failure to warn; (2) breach of express warranty; (3) violation of the New Jersey Consumer Fraud Act; (4) breach of implied warranty; (5) products liability-defective design; (6) punitive damages

citizens of Georgia, defendant Novartis was a citizen of New Jersey, having its principal place of business there.⁴⁸ Yet on December 9, 2006, prior to being served with process, Novartis removed the case to the U.S. District Court for the District of New Jersey, asserting both a federal question under § 1331⁴⁹ and diversity under § 1332. Plaintiffs moved to remand, arguing improvident removal.⁵⁰ The court denied the plaintiff's motion to remand on the grounds of diversity jurisdiction and so never reached the issue of federal question jurisdiction.⁵¹

In *Thomson*, as in *Frick*, the court reasoned that the plain language of the removal statute required Novartis to have been “joined and served” in order for it to be considered a forum-state defendant that would defeat removal.⁵² Because Novartis had removed the case prior to service, the removal was presumptively valid.⁵³ The court looked next to Thomson's argument that the purpose of the “joined and served” requirement is to prevent plaintiffs from joining forum-state parties specifically to defeat removal.⁵⁴ Because the requirement is meant to disincentivize plaintiffs from joining parties they do not intend to serve, Thomson argued, the requirement cannot take effect until at least one party has been served.⁵⁵ As a matter of policy, Thomson argued further that large corporate defendants, such as Novartis, may easily monitor dockets and immediately remove cases prior to service where grounds exist for diversity jurisdiction.⁵⁶

At the time, New Jersey law included a procedural idiosyncrasy which ostensibly strengthened Thomson's policy argument: In cases brought before New Jersey courts, plaintiffs must obtain a “track assignment number” prior to serving the complaint.⁵⁷ Inasmuch as this track assignment number may take as long as ten days to receive, an aggressively watchful defendant potentially enjoys a window of time during which it may remove the case.⁵⁸

To this, Thomson added that he had made “numerous attempts to serve” Novartis and had even visited Novartis's office on December 29, 2006, only to be told that no one was available to accept service until January 2, 2007.⁵⁹ In this regard, however, the court reasoned that the absence of personnel to accept service on

under common law; (7) wrongful death; and (8) a survival action. *Id.*

48. *Thomson*, 2007 WL 1521138, at *1.

49. *Id.* at *2. The defendant's § 1331 argument alleged federal preemption of plaintiffs' claims by the Food, Drug, and Cosmetic Act. *Id.*

50. *Thomson*, 2007 WL 1521138, at *2.

51. *Id.* at *4.

52. *Id.*

53. *Id.*

54. *Id.* at *3.

55. *Id.*

56. *Id.* at *3 n.4.

57. *Id.*

58. *Id.*

59. *Id.* at *3.

behalf of Novartis was to be expected given the holiday season, and there was no evidence to support the charge that Novartis had evaded service.⁶⁰

As to the underlying point of statutory construction, the court further reasoned that the guiding precedent⁶¹ obliged the court to give meaning to the plain language of the statute.⁶² The court held that institutional respect for the will of Congress superseded the admittedly colorable policy arguments advanced by Thomson.⁶³ Indeed, a plaintiff concerned about a corporate forum-state defendant avoiding process in order to remove under cover of the “joined and served” requirement could just as easily serve the designated corporate agent in the state, “as permitted by N.J. Court Rules, R. 4:4-4(a)(6).”⁶⁴

Frick, by contrast, was more straightforward in its application of the plain-language rule. Distinguishing the facts at bar from *Recognition Communications, Inc. v. American Automobile Ass’n*⁶⁵ and *Holmstrom v. Harad*,⁶⁶ the court in *Frick* noted that Novartis was the only named defendant and so did not require the consent of any other co-defendants.⁶⁷ The court also rejected a reading of *Holmstrom* requiring that a defendant could invoke the “properly joined and served” requirement only after the plaintiff had served at least one defendant.⁶⁸ Though the argument was plausible, said the court, it simply “does not adhere to the literal language of the statute.”⁶⁹

Both *Frick* and *Thomson* are notable for the symmetry of the litigants’ arguments. In each case, the plaintiff seeking remand asserted that the “joined and served” requirement takes effect only after one or more parties have been served, so that allowing pre-service removal would “essentially remove the ‘joined and served’ requirement from 28 U.S.C. § 1441(b).”⁷⁰ Defendant Novartis similarly argued that the “joined and served” requirement exists to prevent tactical joinder of a forum-state party and that denying pre-service removal would “read the words ‘and served’ out of the statute.”⁷¹ In other words, plaintiff’s interpretation would allow a party to join a

60. *Id.* at *4.

61. The Court adopted the reasoning of *Mitchell v. Horn*, 318 F.3d 523, 535 (3d Cir. 2003), and *Stan Winston Creatures, Inc. v. Toys “R” Us, Inc.*, 314 F. Supp. 2d 177, 180-81 (S.D.N.Y. 2003). See *Thompson*, 2007 WL 1521138, at *3-4.

62. *Thompson*, 2007 WL 1521138, at *4.

63. *Id.*

64. *Id.* at *4 n.5.

65. No. 3:97-CV-0945-P, 1998 WL 119528 (N.D. Tex. Mar. 5, 1998).

66. No. 05 C 2714, 2005 WL 1950672 (N.D. Ill. Aug. 11, 2005).

67. *Frick v. Novartis Pharm. Corp.*, No. 05-5429(DRD), 2006 WL 454360, at *2 (D.N.J. Feb. 23, 2006).

68. *Id.*

69. *Id.*

70. *Thomson v. Novartis Pharm., Corp.*, No. 06-6280 (JBS), 2007 WL 1521138, at *3 (D.N.J. May 22, 2007).

71. *Id.* at *4.

forum-state defendant with no intention of service, solely for the purpose of defeating removal.

This analytic tension has played itself out through two competing lines of jurisprudence pitting process against outcome as to whether the plain language of § 1441(b) is the end of the inquiry.

B. Process vs. Outcome: Competing Threads of Jurisprudence

Shortly after *Thomson*, the court in *Ripley v. Eon Labs Inc.*⁷² faced the question of pre-service removal in the slightly distinct context of multiple defendants. In that case, plaintiff Ripley was a citizen of California and sued defendants Eon Labs, Sandoz, and Novartis in New Jersey state court.⁷³ Eon Labs was a citizen of New York, Sandoz and Novartis were both citizens of New Jersey.⁷⁴ Sandoz removed the case prior to service, asserting complete diversity.⁷⁵ The court held, as in *Thomson*, that the plain language of the statute prevailed over policy arguments to the contrary.⁷⁶ In this, the court also noted that, similar to *Thompson*, none of the parties had yet been served.⁷⁷

By contrast, the court in *Fields v. Organon USA Inc.*⁷⁸ reached the opposite conclusion. In that case, plaintiff Fields was a citizen of California and sued defendant Organon and its affiliates in New Jersey state court.⁷⁹ Organon, a subsidiary of a named foreign defendant corporation, was a citizen of New Jersey, having its principal place of business there.⁸⁰ The court reasoned that the purpose of the forum-defendant rule was to “avoid possible prejudice to an out-of-state defendant.”⁸¹ Yet there is no need for such precaution “in cases where the defendant is a citizen of the state in which the case is brought.”⁸² Accordingly, the court determined that it lacked jurisdiction over the action and remanded the case.⁸³

72. 622 F. Supp. 2d 137 (D.N.J. 2007).

73. *Id.* at 139.

74. *Id.*

75. *Id.* at 139-40. Sandoz asserted that, under 28 U.S.C. § 1332, the parties were completely diverse and the amount in controversy exceeded the statutory requirement. *Id.*

76. *Ripley*, 622 F. Supp. 2d at 140.

77. *Id.*

78. No. 07-2922 (SRC), 2007 WL 4365312 (D.N.J. Dec. 12, 2007).

79. *Id.* at *1.

80. *Id.*

81. *Id.* at *3 (citing S. REP. NO. 85-1830, at 3 (1958), reprinted in 1958 U.S.C.C.A.N. 3099, 3102). The Senate Report explains, in relevant part, that “[t]he underlying purpose of diversity of citizenship legislation . . . is to provide a separate forum for out-of-state citizens against the prejudices of local courts and local juries by making available to them the benefits and safeguards of the federal courts.” S. REP. NO. 85-1830.

82. *Fields*, 2007 WL 4365312, at *3 (quoting *Lively v. Wild Oats Mkts., Inc.*, 456 F.3d 933, 940 (9th Cir. 2006)).

83. *Id.* at *9.

Recognizing and reiterating the symmetric arguments advanced in *Thomson*, the court concluded that “[r]emoval under such circumstances does not comport with the policy underlying the statutes providing for removal based upon diversity jurisdiction and frustrates the policy underlying the forum-defendant rule.”⁸⁴ The court duly acknowledged that the plain language of the removal statute did “appear to imply that a forum defendant may remove an action as long as it does so before being served.”⁸⁵ Nevertheless, the court said, “such a bizarre result cannot possibly have been the intent of the legislature.”⁸⁶ Accordingly, the court granted the petition for remand back to the state court.⁸⁷

C. Appellate Silence

The history of removal jurisdiction may also be understood by reference to its complementary procedural device—the remand order. In its present form, the remand statute, 28 U.S.C. § 1447(c), provides as follows:

A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.⁸⁸

Moreover, § 1447(d) imposes a further restriction: Orders to remand under § 1447(c) are “not reviewable on appeal or otherwise . . .”⁸⁹ Section 1447(d)’s restriction does exclude civil rights cases removed under 28 U.S.C. § 1443, but, in general, the statute denies appellate review of orders to remand.⁹⁰

For their part, courts have historically respected this statutory enumeration of criteria both for removal and for remand. When Congress began in 1976 to reshape the contours of removal jurisdiction, the remand statute read as follows:

If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs.⁹¹

84. *Id.* at *4.

85. *Id.*

86. *Id.*

87. *Id.* at *9.

88. 28 U.S.C. § 1447(c) (2006).

89. *Id.* § 1447(d).

90. *Id.*

91. 28 U.S.C. § 1447(c) (1976).

Courts at the time construed improvident removal to describe removals whose defects implicated congressionally prescribed statutory conditions of removal.⁹² By contrast, removal and remand based on common law “doctrines such as *forum non conveniens*, abstention or supplemental jurisdiction were held to be outside of § 1447(d)’s prohibition *because they were not tied to the statutory criteria for removal.*”⁹³

This distinction between statutory and common law grounds for removal demonstrates a historical respect by courts for the sanctity of statutory removal criteria. The distinction is particularly important in light of the Supreme Court’s decision in *Thermtron Products, Inc. v. Hermansdorfer*,⁹⁴ holding that the § 1447(d) bar on appellate review only applies to remand orders properly entered pursuant to the statutory remand criteria of § 1447(c).⁹⁵

The plaintiffs in *Thermtron* filed an action in Kentucky state court against *Thermtron*, an Indiana corporation, who then removed to the U.S. District Court for the Eastern District of Kentucky.⁹⁶ The District Court granted the plaintiffs’ motion to remand the case to state court due, in part, to the federal courts’ crowded civil docket, stating that “an adjudication of the merits of the case would be expedited in the state court.”⁹⁷ The motion was granted despite the plaintiffs’ insufficient showing of prejudice in state court.⁹⁸ *Thermtron* appealed the remand order, arguing that none of these grounds were tied to the § 1447(c) criteria for remand and that § 1447(d) did not bar appellate review of remand orders unauthorized by § 1447(c).⁹⁹

The U.S. Court of Appeals for the Sixth Circuit denied review on the grounds “that the District Court had jurisdiction to enter the order for remand” and “that [it] had no jurisdiction to review [the] order . . . because of the prohibition against appellate review contained in § 1447(d).”¹⁰⁰ The unreversed decision of the District Court specifically highlighted the risk of local prejudice to defendants, the initial right of plaintiffs to choose the forum, and the desirability of timely adjudication,¹⁰¹ themes historically associated with shaping removal doctrine.

The Supreme Court ultimately accepted *Thermtron*’s argument and held that § 1447(d) must be read *in pari materia* with § 1447(c).¹⁰² Accordingly, while

92. See, e.g., *Holmstrom v. Peterson*, 492 F.3d 833, 836 (7th Cir. 2007).

93. *Id.* (emphasis added) (citing *Snapper, Inc. v. Redan*, 171 F.3d 1249, 1255 (11th Cir. 1999)).

94. 423 U.S. 336 (1976), *abrogated on other grounds by Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706 (1996).

95. *Id.* at 351.

96. *Id.* at 336-38.

97. *Id.* at 339.

98. *Id.* at 341.

99. *Id.* at 343.

100. *Id.* at 341-42.

101. *Id.* at 340-41.

102. *Id.* at 345-46 (quoting *Emp’rs Reins. Corp. v. Bryant*, 299 U.S. 374, 380 (1937));

§ 1447(d) purports to foreclose review of virtually all remand orders, *Thermtron* narrowed the review prohibition to only those remand orders based on § 1447(c) grounds—“(1) any defect other than lack of subject matter jurisdiction [or] (2) lack of subject matter jurisdiction”¹⁰³—and attached the respective remand time limit of § 1447(d) accordingly.¹⁰⁴

In this context, the forum-state exception must be understood as an example of a procedural defect subject to the thirty-day remand time limit, not a defect based on lack of subject matter jurisdiction. The inaction of a plaintiff, therefore, may waive his or her right to seek remand, just as the inaction of a plaintiff in serving the defendant may produce the tactical removal in the first instance.

It is significant that the forum-state exception is of a procedural nature, for this procedural character has important implications for subsequent appeals taken by the plaintiff. The U.S. Courts of Appeal are not merely silent on the legitimacy of pre-service removal: some have expressly declined to consider the merits of the question.

For example, the Court of Appeals for the Seventh Circuit declined to consider the merits regarding the legitimacy of pre-service removal in *Holmstrom v. Peterson*.¹⁰⁵ The removing defendant Peterson was an Ohio citizen sued by the plaintiff Holmstrom, a New Jersey citizen.¹⁰⁶ Though the complaint also named an Illinois citizen as a defendant, Holmstrom had not yet served that forum defendant when Peterson removed.¹⁰⁷ The District Court granted Holmstrom’s subsequent motion to remand and Peterson appealed, arguing that the District Court erred by countermanding the plain language of the statute.¹⁰⁸

Quite apart from the merits of the case, the Court of Appeals held that the § 1447(d) bar to appellate jurisdiction arises from remand orders upon removals under § 1441(b).¹⁰⁹ The court rejected Peterson’s argument that the District Court was not applying § 1441(b) itself, but rather “a judicially crafted exception to it.”¹¹⁰ The Court of Appeals concluded that a removal premised on the “properly joined and served” language of § 1441(b) is not a judicial exception, but merely an interpretation

see also BLACK’S LAW DICTIONARY 862 (9th ed. 2009) (defining *in pari materia* as a canon of statutory construction whereby two or more statutes are “construed together, so that inconsistencies in one statute may be resolved by looking at another statute on the same subject”).

103. *Holmstrom v. Peterson*, 492 F.3d 833, 836 (7th Cir. 2007) (discussing *Thermtron*’s application of 28 U.S.C. § 1447(c)).

104. *Thermtron*, 423 U.S. at 346.

105. *Holmstrom*, 492 F.3d at 834-36 (holding that, under 28 U.S.C. § 1447(d), the court lacked appellate jurisdiction to review a federal trial order remanding a case originally removed from Illinois state court under the forum-state exception).

106. *Id.* at 834.

107. *Id.* at 834-35.

108. *Id.* at 835.

109. *Id.* at 839.

110. *Id.*

of the rule.¹¹¹ Accordingly, “failure to comply with the forum-defendant rule set forth in § 1441(b) is a ‘defect other than subject matter jurisdiction,’ as that term has come to be understood, subject to the review prohibition of § 1447(d).”¹¹² Thus, appellate review of the order to remand was not available.¹¹³

III. ANALYTIC SENSE: THE MOVING PARTS OF REMOVAL

This section attempts to reconcile the body of district court opinions with respect to three doctrinal dimensions of removal: the number of relevant defendants; any successful service of process upon defendants; and agreement among defendants as to removal. It also proposes a hierarchy of these criteria, whereby courts may reach a nuanced, but theoretically consistent, conclusion with regard to the procedural postures of removal.

The lone removant presents the simplest case of pre-service removal since such a litigant bears the sole tactical responsibility for the removal. Allowing a lone removant the victory of pre-service removal is the broadest possible pronouncement about the legitimacy of the tactic. Denying the removant pre-service removal, however, does not foreclose a more nuanced approach to complicated cases.

The historical pattern of specific congressional amendments to the language of the removal statute from 1976 onward counters the reasoning of *Fields*¹¹⁴ and similar cases holding that the procedural gamesmanship of pre-service removal is a bizarre outcome that could not have been contemplated by Congress. To the contrary, the active role Congress has taken in shaping removal jurisdiction, specifically, the number and variety of amendments to the removal statute, evinces congressional awareness that even small adjustments to the statutory language of removal create significant consequences in litigation. The nature of these amendments bears recalling: congressional changes have embraced the subject matter,¹¹⁵ procedural origin,¹¹⁶ fraudulent litigant conduct,¹¹⁷ and remand discretion¹¹⁸ attending the removal statute.

111. *Id.*

112. *Id.* at 838.

113. *Id.* (citing *Kircher v. Putnam Funds Trust*, 547 U.S. 633, 641 (2006)).

114. *Fields v. Organon USA Inc.*, No. 07-2922 (SRC), 2007 WL 4365312 (D.N.J. Dec. 12, 2007); *supra* notes 78-87 and accompanying text.

115. See Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, § 6, 90 Stat. 2891, 2898 (codified at 28 U.S.C. § 1441(d) (2006)).

116. See Judicial Improvements Act of 1985, Pub. L. No. 99-336, § 3(a), 100 Stat. 633, 637 (1986) (codified as amended at 28 U.S.C. § 1441(f) (2006)).

117. See Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 1016, 102 Stat. 4642, 4669-70 (1988) (codified at 28 U.S.C. § 471 note (2006)).

118. See Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 102, 104 Stat. 5089, 5089-90 (codified at 28 U.S.C. § 471 note (2006)).

By contrast, the court in *Fields* relied in part on the logic of an earlier case, *Stan Winston Creatures, Inc. v. Toys “R” Us, Inc.*,¹¹⁹ wherein the court opined that the presence of complete diversity among the parties determined whether service defeated removal for purposes of the “joined and served” requirement of § 1441(b).¹²⁰ That is, “where . . . [complete] diversity does exist between the parties, an unserved resident defendant may be ignored in determining removability”¹²¹ In contrast are those cases in which “the presence of a defendant who is a citizen of the same state as the plaintiff” would defeat complete diversity in the first instance.¹²² In these latter situations, *Winston* required considering the citizenship of all named defendants, “whether served with process or not,” to determine as a necessary precondition to removability whether diversity exists.¹²³

The *Winston* approach, however, is contrary to the plain language of the statute. It allows courts to condition pre-service removal by a forum-state removant among multiple defendants only where all are completely diverse with respect to the plaintiffs, regardless of service.¹²⁴ In other words, a removant who is not a citizen of the forum state is unable to engage in pre-service removal where any other defendant, even an unserved one, would defeat complete diversity. This interpretation would, in effect, write the “properly joined and served” language out of § 1441(b).¹²⁵

Specific issues also arise with respect to agreement among parties and service upon particular defendants. In the case of a nonforum removant tied to forum-state co-defendants, there is no countervailing consideration against the court’s need to give meaning to the plain language of § 1441(b).¹²⁶ Yet where a forum removant attempts pre-service removal on the strength of nonforum removants by virtue of their diversity, a subordinate question arises: which parties have been served?

Here, if the forum defendant has been served, then the court should deny removal even though nonforum defendants remain unserved. Indeed, this is the trivial case where the removal is not even *pre-service* with respect to defendants “properly joined and served” under § 1441(b). Yet the difficult case arises where the forum defendant has not been served and nonforum defendants have. This turns the underlying risk of local prejudice on its head. In such a case, the historically expressed intent of Congress must prevail and the removal allowed to stand.

119. 314 F. Supp. 2d 177 (S.D.N.Y. 2003).

120. *Id.* at 180-81.

121. *Id.* at 180 (alteration in original) (quoting *Ott v. Consol. Freightways Corp. of Del.*, 213 F. Supp. 2d 662, 665 (S.D. Miss. 2002)).

122. *Id.* at 181 (quoting *Ott*, 213 F. Supp. 2d at 663).

123. *Id.* (emphasis omitted) (quoting *Ott*, 213 F. Supp. 2d at 664).

124. *Id.* at 179-80.

125. See *Thomson v. Novartis Pharms., Corp.*, No. 06-6280 (JBS), 2007 WL 1521138, at *4 (D.N.J. May 22, 2007).

126. See *id.*

EPILOGUE: CURRENT LEGISLATION

The essential argument of this article has been that, notwithstanding charges of procedural gamesmanship, pre-service removal is a legitimate litigation strategy within both the language of § 1441(b) and the historical trajectory of the removal statute. To this, one final point bears mention with regard to the currently proposed Federal Courts Jurisdiction and Venue Clarification Act of 2011.¹²⁷

Among the provisions of the 2011 Act are a series of amendments to the substantive conditions as well as the procedures of removal and remand.¹²⁸ Significantly, the amendments to diversity-based removal under § 1441(b) are largely cosmetic. For example, one change preserves the immateriality to removal of “the citizenship of defendants sued under fictitious names,”¹²⁹ merely striking the text from the end of § 1441(a)¹³⁰ and reinserting it at a newly created subsection (b)(1).¹³¹

Yet the enabling language of pre-service removal is, if anything, even more hospitable to the strategy under the 2011 Act. The current language—

Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought¹³²

—is proposed to become the following:

A civil action otherwise removable solely on the basis of the jurisdiction under section 1332(a) of this title may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.¹³³

The same amendment also removes the first sentence of § 1441(b):

Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the

127. H.R. 394, 112th Cong. (2011) (as referred to S. Comm. on the Judiciary, Mar. 1, 2011). The U.S. House of Representatives passed this bill on February 28, 2011. *Bill Summary & Status*, THOMAS, <http://thomas.loc.gov/cgi-bin/bdquery/D?d112:l:/temp/~bd1yqw:@@R/home/LegislativeData.php> (last visited Oct. 17, 2011).

128. H.R. 394 § 103.

129. 28 U.S.C. § 1441(a) (2006) (appearing in the final sentence of subsection (a)).

130. H.R. 394 § 103(a)(2)(B).

131. *Id.* sec. 103(a)(3), § 1441(b)(1).

132. 28 U.S.C. § 1441(b) (appearing in the final sentence of subsection (b)).

133. H.R. 394 sec. 103(a)(3), § 1441(b)(2).

United States shall be removable without regard to the citizenship or residence of the parties.¹³⁴

To the extent that the 2011 Act modifies diversity removal under § 1441(b), these modifications are “intended to make it easier for litigants to locate the provisions that apply uniquely to diversity removal.”¹³⁵ Yet as for the “properly joined and served” language which enables pre-service removal, not only does it remain in the amended statute, but is also reframed in a form more amenable to pre-service removal.

Though the first sentence of § 1441 makes cases presumptively removable¹³⁶ where federal courts have original jurisdiction, the *form* of the forum-state exception is that of a condition precedent¹³⁷ to removability. Even this formalistic “only if” conception falls away under the 2011 Act, under which a diversity-only case henceforth “may not be removed if any of the parties in interest properly joined and served as defendants”¹³⁸ is a citizen of the forum state.

The substance of the exception, for its part, remains intact. Indeed, Congress itself recognized that the “[p]roposed paragraph 1441(b)(2) restates the substance of the last sentence of current subsection 1441(b), which relates only to diversity.”¹³⁹ In complement to this view of diversity removal as a separate issue warranting a separate subsection, the 2011 Act also limits its codification of the “rule of unanimity” regarding multiple defendants to cases involving federal question removals.¹⁴⁰ Pre-service removal under § 1441(b) is, therefore, at most a doctrine distinct to diversity jurisdiction, but far from a bizarre outcome, let alone one contrary to the intent of Congress.

The 2011 Act also responds to specific recent bodies of removal case law while leaving pre-service removal intact. The joint removability of federal and state law claims,¹⁴¹ for example, has come under fire both from judicial opinions¹⁴² and from scholars¹⁴³ finding the provision unconstitutional for granting a federal court

134. 28 U.S.C. § 1441(b) (appearing in the first sentence of subsection (b)).

135. H.R. REP. NO. 112-10, at 12 (2011) (discussing the effect of “Proposed Amendments to Section 1441”).

136. 28 U.S.C. § 1441(a) (beginning with the default, “[e]xcept as otherwise expressly provided by Act of Congress . . .”).

137. *Id.* § 1441(b) (adding the proviso, “shall be removable only if . . .”).

138. H.R. 394 sec. 103(a)(3), § 1441(b)(2).

139. H.R. REP. NO. 112-10, at 12 (discussing the effect of “Proposed Amendments to Section 1441”).

140. *Id.* at 13 (“Under [the rule of unanimity] . . . all defendants who have been properly joined and served must join in or consent to removal. Like current law, the new provision is limited to cases removed solely under section 1441(a); it has no application to other statutes under which removal is authorized.”).

141. 28 U.S.C. § 1441(c).

142. *See, e.g., Salei v. Boardwalk Regency Corp.*, 913 F. Supp. 993, 1009, 1014 (E.D. Mich. 1996).

143. *See, e.g., Douglas D. McFarland, The Unconstitutional Stub of Section 1441(c)*,

discretion to retain “separate and independent”¹⁴⁴ state law claims over which the court would have no original jurisdiction. Accordingly, the 2011 Act takes a “sever-and-remand approach [that] is intended to cure any constitutional problems while preserving the defendant’s right to remove claims arising under Federal law.”¹⁴⁵

As to diversity removal in particular, the current limitation of removal to one year from the filing date¹⁴⁶ has been the subject of plaintiffs’ own removal-defeating gamesmanship. Thus far, such tactics have survived on the view that the one-year time limit on removal is jurisdictional rather than procedural, a view similarly having support both from judicial opinions¹⁴⁷ and from scholars.¹⁴⁸ In light of ambiguous Supreme Court guidance on the matter,¹⁴⁹ the 2011 Act limitedly authorizes removal even beyond one year from the filing date where “the plaintiff has acted in bad faith in order to prevent a defendant from removing the action.”¹⁵⁰

Faced in these cases with conflicting judicial interpretations of statutory text, Congress is acting to amend the removal statute accordingly. Yet despite the conflicting jurisprudence surrounding pre-service removal and the structural barriers impeding a proper circuit split, Congress does not appear to believe that the fault lies with the text of § 1441(b).

CONCLUSION

Future congressional enactments will continue to find the forum-defendant rule peculiarly susceptible to analytic shifts, as the rule’s application is one of multiple criteria. The approach described in this article is advanced with the understanding that an all-inclusive procedural regime is ultimately the purview of Congress. To the extent, therefore, that Congress has turned out a removal statute describing the contours of jurisdiction rather than a comprehensive codification of fact scenarios, it remains incumbent on courts to balance procedural integrity with substantive fairness, and institutional consistency with judicial economy. Courts, however, should do so in light of the demonstrated intent of Congress.

54 OHIO ST. L.J. 1059, 1059-61 (1993) (exploring the unconstitutionality of “[s]eparate claim removal jurisdiction for federal question cases”).

144. 28 U.S.C. § 1441(c).

145. H.R. REP. NO. 112-10, at 12 (discussing the “Joinder of Federal law claims and state law claims”).

146. 28 U.S.C. § 1446(b) (2006).

147. *See, e.g.,* Pecherski v. Gen. Motors Corp., 636 F.2d 1156 (8th Cir. 1981).

148. *See, e.g.,* Brian W. Portugal, Comment, *More than a Legal Nicety: Why the Forum Defendant Rule of 28 U.S.C. Section 1441(b) Is Jurisdictional*, 56 BAYLOR L. REV. 1019 (2004).

149. *See* H.R. REP. NO. 112-10, at 15 (discussing ambiguity in the case law surrounding equitable tolling of a procedural, rather than jurisdictional, limit on the ability of federal courts to accept removals more than one year after the filing date).

150. H.R. 394, 112th Cong. sec. 103(b)(3)(C), § 1446(c)(1) (2011).

