

INNOCENT PARTY PROTECTION ACT

FEBRUARY 24, 2017.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. GOODLATTE, from the Committee on the Judiciary,  
submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 725]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 725) to amend title 28, United States Code, to prevent fraudulent joinder, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

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## Purpose and Summary

Congress has the authority to regulate the jurisdiction of the lower Federal courts. As an exercise of that authority, the Innocent Party Protection Act establishes a uniform standard for determining whether a defendant has been fraudulently joined to a lawsuit in order to defeat Federal diversity jurisdiction. It also makes clear that Federal courts may consider evidence outside the pleadings when deciding a motion to remand a case that has been removed to Federal court, as well as whether the plaintiff has shown a good faith intent to pursue a judgment against a non-diverse defendant.

## Background and Need for the Legislation

Current Federal court rules allow trial lawyers to keep their cases in state court if they sue a defendant from another state, as long as they also sue a local defendant in the state in which they are filing the case. Not surprisingly, these rules have been abused by trial lawyers who fraudulently sue local defendants, not because those local defendants have any real connection to the lawsuit, but because suing them allows the trial lawyers to keep their case in a preferred state court forum.

If a local defendant has “no real connection to the controversy,”<sup>1</sup> joinder of that defendant is referred to as “fraudulent joinder.” The Supreme Court has recognized, since the early 1900’s, the fraudulent joinder doctrine as an exception to the complete diversity rule. The doctrine allows the district court to disregard, for jurisdictional purposes, the citizenship of certain nondiverse defendants under certain circumstances. The doctrine of fraudulent joinder prevents plaintiffs’ “attempts to wrongfully deprive parties entitled to sue in the Federal courts of the protection of their rights in those tribunals.”<sup>2</sup> However, despite its importance, the Supreme Court has not clarified or elaborated upon the fraudulent joinder doctrine since first recognizing it in several cases in the early 1900’s.

Without guidance from the Supreme Court or Congress on the contours of fraudulent joinder, lower Federal courts, as described by one commentator, have been forced to grapple “with several issues raised by the doctrine, and in doing so, have created conflicts among the circuits with respect to the standard and procedure used to evaluate allegations of fraudulent joinder.”<sup>3</sup> Indeed, another commentator has observed that, “[p]resently, courts take divergent approaches when analyzing claims of fraudulent joinder. Predicting what test a court will apply to determine fraudulent joinder is difficult, as the standards can shift, even within the same opinion.”<sup>4</sup> According to another commentator, the present standards are “poorly defined and thus subject to . . . inconsistent interpretation and application.”<sup>5</sup> Yet another commentator has written that, “[r]ather than adopting one universal approach, courts at-

<sup>1</sup>Chesapeake & Ohio Ry. Co. v. Cockrell, 232 U.S. 146, 152 (1914).

<sup>2</sup>Alabama Great Southern Railway Co. v. Thompson, 200 U.S. 206, 218 (1906).

<sup>3</sup>E. Farish Percy, *Making a Federal Case of It: Removing Civil Cases to Federal Court Based on Fraudulent Joinder*, 91 Iowa L. Rev. 189, 206–207 (2005).

<sup>4</sup>Paul Rosenthal, *Improper Joinder: Confronting Plaintiffs’ Attempts to Destroy Federal Subject Matter Jurisdiction*, 59 Am. U.L. Rev. 49, 64 (2009).

<sup>5</sup>Peter G. Neiman, *Root, Root, Root for the Home Team: Pete Rose, Nominal Parties, and Diversity Jurisdiction*, 66 N.Y.U.L. Rev. 148, 156 (1991).

tempt to discern fraudulent joinder by applying a collection of amorphous approaches.” However, one aspect is consistent across different applications of the doctrine, and that is that in every court, the burden of proving fraudulent joinder is one of the heaviest burdens known to civil law.

The Framers included Federal diversity jurisdiction in the Constitution to provide a neutral Federal forum in which interstate controversies could be adjudicated. Accordingly, as the Supreme Court has held, the Constitution “presume[s] . . . that state attachments, state prejudices, state jealousies, and state interests, might sometimes obstruct, or control, or be supposed to obstruct or control, the regular administration of justice.”<sup>6</sup> This legislation will help ensure that Congress’s extension of Federal diversity jurisdiction is living up to the Framers’ intentions in a manner fair to everyone.

### Hearings

The Committee on the Judiciary held no hearings on H.R. 725.

### Committee Consideration

On February 2, 2017, the Committee met in open session and ordered the bill H.R. 725, favorably reported, with an amendment, by a rollcall vote of 17 to 4, a quorum being present.

### Committee Votes

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that the following rollcall votes occurred during the Committee’s consideration of H.R. 725.

1. Motion to report H.R. 725 favorably to the House of Representatives. The motion was agreed to by a rollcall vote of 17 to 4, a quorum being present.

### ROLLCALL NO. 1

	Ayes	Nays	Present
Mr. Goodlatte (VA), Chairman .....	X		
Mr. Sensenbrenner, Jr. (WI) .....			
Mr. Smith (TX) .....			
Mr. Chabot (OH) .....	X		
Mr. Issa (CA) .....	X		
Mr. King (IA) .....	X		
Mr. Franks (AZ) .....	X		
Mr. Gohmert (TX) .....			
Mr. Jordan (OH) .....	X		
Mr. Poe (TX) .....			
Mr. Chaffetz (UT) .....	X		
Mr. Marino (PA) .....	X		
Mr. Gowdy (SC) .....	X		
Mr. Labrador (ID) .....	X		
Mr. Farenthold (TX) .....			

<sup>6</sup>Martin v. Hunter’s Lessee, 14 U.S. (1 Wheat.) 304, 347 (1816).

**ROLLCALL NO. 1**—Continued

	<b>Ayes</b>	<b>Nays</b>	<b>Present</b>
Mr. Collins (GA) .....	X		
Mr. DeSantis (FL) .....			
Mr. Buck (CO) .....	X		
Mr. Ratchliffe (TX) .....	X		
Mr. Bishop (MI) .....	X		
Ms. Roby (AL) .....	X		
Mr. Gaetz (FL) .....			
Mr. Johnson (LA) .....	X		
Mr. Biggs (AZ) .....	X		
Mr. Conyers, Jr. (MI), Ranking Member .....			
Mr. Nadler (NY) .....			
Ms. Lofgren (CA) .....			
Ms. Jackson Lee (TX) .....			
Mr. Cohen (TN) .....			
Mr. Johnson (GA) .....		X	
Ms. Chu (CA) .....			
Mr. Deutch (FL) .....			
Mr. Gutierrez (IL) .....			
Ms. Bass (CA) .....			
Mr. Richmond (LA) .....			
Mr. Jeffries (NY) .....			
Mr. Cicilline (RI) .....			
Mr. Swalwell (CA) .....		X	
Mr. Lieu (CA) .....		X	
Mr. Raskin (MD) .....		X	
Ms. Jayapal (WA) .....			
Total .....	17	4	

**Committee Oversight Findings**

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee advises that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

**New Budget Authority and Tax Expenditures**

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

**Congressional Budget Office Cost Estimate**

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 725, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,  
CONGRESSIONAL BUDGET OFFICE,  
*Washington, DC, February 10, 2017.*

Hon. BOB GOODLATTE, CHAIRMAN,  
*Committee on the Judiciary,*  
*House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 725, the “Innocent Party Protection Act.”

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Robert Reese, who can be reached at 226–2860.

Sincerely,

KEITH HALL,  
DIRECTOR.

Enclosure

cc: Honorable John Conyers, Jr.  
Ranking Member

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**H.R. 725—Innocent Party Protection Act.**

As ordered reported by the House Committee on the Judiciary  
on February 2, 2015.

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H.R. 725 would require Federal courts to deny a motion to transfer a case to state court under certain circumstances. The bill also would amend the procedures under which Federal courts consider a motion to remove a case to state court by permitting parties to amend their pleadings.

Under current law, plaintiffs can choose to bring certain claims in Federal or state court. In some cases, plaintiffs may view state courts as more favorable because of litigation strategy or timing, whereas, defendants may view Federal courts as more desirable. In such cases, courts must determine which jurisdiction is proper. Under H.R. 725, Federal courts would have to deny a motion to transfer a case from Federal court to a state court if they find that the plaintiff has misrepresented a defendant’s state of citizenship or made a claim against a specific defendant that is not possible or plausible under state law or that is not made in good faith.

The legislation could have an effect on litigation strategies and lead to changes in the number of cases filed in state and Federal courts. However, based on information from the Administrative Office of the U.S. Courts, CBO expects that any change in the number of claims filed in Federal courts would not have a substantial effect on the workload of the Federal courts. Therefore, CBO estimates that any changes in discretionary costs to implement H.R. 725 would not be significant.

Enacting H.R. 725 would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply. CBO estimates that enacting H.R. 725 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2028.

H.R. 725 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act.

The CBO staff contact for this estimate is Robert Reese. The estimate was approved by H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

### **Duplication of Federal Programs**

No provision of H.R. 725 establishes or reauthorizes a program of the Federal Government known to be duplicative of another Federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

### **Disclosure of Directed Rule Makings**

The Committee estimates that H.R. 725 specifically directs to be completed no specific rule makings within the meaning of 5 U.S.C. § 551.

### **Performance Goals and Objectives**

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 725 is designed to prevent the fraudulent joinder of parties to lawsuits.

### **Advisory on Earmarks**

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 725 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(e), 9(f), or 9(g) of Rule XXI.

### **Section-by-Section Analysis**

The following discussion describes the bill as reported by the Committee. Following the text of the various provisions of the bill as reported is some commentary on those provisions.

*Sec. 1. Short title.* Section 1 sets forth the short title of the bill as the “Innocent Party Protection Act of 2017.”

*Sec. 2. Prevention of Fraudulent Joinder.* Section 2 contains the following provisions.

“(f) Fraudulent joinder. (1) This subsection shall apply to any case in which—(A) a civil action is removed solely on the basis of the jurisdiction conferred by section 1332(a);”

Since fraudulent joinder is only a problem in a subclass of cases involving diversity of citizenship jurisdiction, this provision makes clear that the bill applies only in cases that are removed under the general diversity statute, 28 U.S.C. § 1332(a), which states as follows:

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between—(1) citizens of different States; (2) citizens of a State and citizens or subjects of a foreign state, except

that the district courts shall not have original jurisdiction under this subsection of an action between citizens of a State and citizens or subjects of a foreign state who are lawfully admitted for permanent residence in the United States and are domiciled in the same State; (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and (4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

“(B) a motion to remand is made on the ground that—(i) one or more defendants are citizens of the same state as one or more plaintiffs, or—(ii) one or more defendants properly joined and served are citizens of the state in which the action was brought; and”

When a case is removed under 28 U.S.C. § 1332(a), there can be many grounds for a motion to remand other than those that implicate the fraudulent joinder doctrine. Some are jurisdictional like the amount-in-controversy requirement; others are procedural. If even one of those other grounds is well-taken, the case should be remanded whether or not the joinder is fraudulent. Paragraph (1)(B) specifies that the new provision applies when there is a motion to remand on the ground that the joinder of a co-defendant either destroys complete diversity or violates the forum defendant rule of 28 U.S.C. § 1441(b)(2).

Subparagraph (B)(ii) deals with situations where the objection to removal is based on violation of the forum defendant rule. This provision is necessary because courts apply the fraudulent joinder doctrine when a plaintiff who is not a citizen of the forum state names a citizen of the forum state as a defendant, implicating 28 U.S.C. § 1441(b)(2), which prohibits removal of a diversity case “if any of the parties in interest properly joined and served as defendants is a citizen of the State in which [the] action is brought.”

District courts apply the fraudulent joinder doctrine to forum defendants in the same way that they do to defendants who share citizenship with the plaintiff. As a district court in Missouri observed last year, “[t]he standards for determining whether a *resident* defendant is fraudulently joined are the same as the standards for determining whether a diversity-destroying defendant is fraudulently joined.”<sup>7</sup>

Paragraph (1)(B)(ii) codifies this line of cases because it represents sound policy. It would be very confusing to create a situation in which courts apply two different standards to two kinds of alleged fraudulent joinder, with a less rigorous standard for determining whether an in-state defendant has been fraudulently joined. This would be particularly anomalous in view of the fact that in most cases the defendant whose joinder is challenged is both a co-citizen of the plaintiff and a citizen of the forum state. In most instances the plaintiff would raise both objections; it would make no

<sup>7</sup>Byrd v. TVI, Inc., 2015 WL 5568454, at \*2 (E.D. Mo. Sept. 21, 2015) (emphasis added). Accord, *In re Ethicon, Inc., Pelvic Repair Sys. Prods. Liab. Litig.*, 2013 WL 6710345, at \*3 n.2 (S.D. W. Va. Dec. 19, 2013) (“In *Musewicz*, the issue is diversity of citizenship, while in *Hammons* and *Delacruz*, the issue is the home state defendant rule. However, the fraudulent joinder analysis remains the same in both instances.”). There are some district court cases on the other side, primarily in the Southern District of Illinois.

sense to apply different standards to each of the two. Nor would it make sense to apply different standards depending on which objection the plaintiff chose to raise.

Paragraph (1)(B)(ii) uses the exact language of 28 U.S.C. § 1441(b)(2), including the limitation to defendants “properly joined and served.” This avoids any implication that the provision resolves the ongoing dispute in the lower Federal courts over the propriety of removal before service of process on resident defendants.<sup>8</sup> However, the limitation is *not* included in paragraph (1)(B)(i), because “a defendant who is a citizen of plaintiff’s state destroys complete diversity, regardless of whether that defendant was properly served prior to removal.”<sup>9</sup>

“(C) the motion is opposed on the ground that the joinder of the defendant or defendants described in subparagraph (B) is fraudulent.”

Since fraudulent joinder is only a problem in a subclass of cases involving diversity of citizenship jurisdiction, this provision makes clear that the bill applies only in cases that are removed under the general diversity statute, 28 U.S.C. § 1332(a) and where the motion to remand is opposed solely on the ground that the joinder of the defendants described by subparagraph (B) is fraudulent. This provision is necessary because it confines the application of the bill to opposition to remand on grounds of fraudulent joinder, which is the subject of the bill. The bill does not apply, for example, to the related but distinct doctrine of fraudulent *misjoinder*.<sup>10</sup>

“(2) The joinder of the defendant described in paragraph (1)(B) is fraudulent if the court finds that—”

Paragraph (2) sets forth four situations in which a court should find joinder to be fraudulent and should, under paragraph (4), deny the motion to remand. With the exception of the adoption of a uniform “plausibility” standard in subparagraph (B), paragraph (2) is largely a codification of current fraudulent joinder practice. Subparagraph (C) resolves a conflict in the lower courts and makes clear that a plainly meritorious affirmative defense, whether under state or Federal law, can be the basis for finding fraudulent joinder.

H.R. 725 does not alter the burden of proving fraudulent joinder. As uniformly recognized by courts, the removing party must show Federal jurisdiction, and in cases covered by H.R. 725 this means showing that the in-state defendant has been fraudulently joined. The removing party does this by persuading the court that one or more of the criteria set forth in paragraph (2) are satisfied. If the removing party establishes this, then the district court must deny the motion to remand described in paragraph (1)(B). If the remov-

<sup>8</sup>See, e.g., *Breitweiser v. Chesapeake Energy Corp.*, 2015 WL 6322625, at \*2 (N.D. Tex. Oct. 20, 2015) (collecting cases and referring to the practice as “snap removal”).

<sup>9</sup>*Jennings-Frye v. NYK Logistics Americas Inc.*, 2011 WL 642653, at \*3 (C.D. Cal. Feb. 1, 2011) (citing cases).

<sup>10</sup>The distinction between the two doctrines was helpfully summarized by the court in *In re Plavix Prod. Liab. & Marketing Litig.*, 2014 WL 4544089, at \*5 (D. N.J. Sept. 12, 2014):

Fraudulent misjoinder, otherwise known as “procedural misjoinder”, occurs when a plaintiff attempts to defeat removal by misjoining the unrelated claims of non-diverse party plaintiffs against a defendant. *Geffen v. Gen. Elec. Co.*, 575 F.Supp.2d 865, 869 (N.D. Ohio 2008). While fraudulent joinder tests the viability of the claims against the defendant, fraudulent misjoinder tests the procedural basis of a party’s joinder.



ing party does not carry its burden, then the motion to remand must be granted.

If, however, the removing party carries its burden, no more is required. In particular, the removing party need not overcome any “presumption” in order to carry its burden.<sup>11</sup>

“(A) there is actual fraud in the pleading of jurisdictional facts with respect to that defendant;”

Fraudulent joinder requiring denial of a motion to remand is defined by prong (A) as including a situation in which actual fraud—that is, the making of false allegations—exists in the pleading of jurisdictional facts. Courts have long recognized actual fraud in the pleading of jurisdictional facts as a basis for fraudulent joinder, although it is seldom asserted.<sup>12</sup> In *Coffman v. Dole Fresh Fruit Co.*,<sup>13</sup> for example, the court defined “actual fraud” as involving “false allegations,” such as misrepresenting or concealing the citizenship of a party. The bill preserves this basis for finding fraudulent joinder. The bill’s language is taken directly from a two-part test articulated by the Fifth Circuit in the leading case of *Smallwood v. Illinois Central R.R. Co.*<sup>14</sup> Since then, the same two-part test has been used by many courts to define fraudulent joinder. For example, the Tenth Circuit said in 2013: “To establish [fraudulent] joinder, the removing party must demonstrate either: (1) actual fraud in the pleading of jurisdictional facts, or (2) inability of the plaintiff to establish a cause of action against the non-diverse party in state court.”<sup>15</sup>

“(B) based on the complaint and the materials submitted under paragraph (3), it is not plausible to conclude that applicable State law would impose liability on that defendant;”

Fraudulent joinder requiring denial of a motion to remand is defined in prong (B) as including a situation in which, based on the complaint and materials submitted under paragraph (3), it is not plausible to conclude, as a legal matter, that applicable state law would impose liability on each co-citizen or in-state defendant. Prong (B) adopts a single uniform standard in place of the many different verbal formulations used by the courts today.<sup>16</sup> In particular, prong (B) repudiates the “any possibility” standard adopted by some courts. Under that standard, “if there is *any possibility* that the state law might impose liability on a resident defendant under the circumstances alleged in the complaint, the Federal court cannot find that joinder of the resident defendant was fraud-

<sup>11</sup>No inference is intended with respect to the use of a presumption in removal cases not involving fraudulent joinder. See *Dart Cherokee Basin Operating Co. v. Owens*, 135 S. Ct. 547, 554 (2014) (“We need not here decide whether [a purported “presumption” against removal] is proper in mine-run diversity cases.”).

<sup>12</sup>See, e.g., *Boyer Snap-On Tools Corp.*, 913 F.2d 108, 111 (3d Cir. 1990); *Green v. Amerada Hess Corp.*, 707 F.2d 201, 205 (5th Cir.1983); *B., Inc. v. Miller Brewing Co.*, 663 F.2d 545, 549 (5th Cir.1981).

<sup>13</sup>927 F.Supp.2d 427, 434–35 (E.D. Tex. 2013).

<sup>14</sup>385 F.3d 568, 573 (5th Cir. 2004) (en banc).

<sup>15</sup>*Dutcher v. Matheson*, 733 F.3d 980, 988 (10th Cir. 2013).

<sup>16</sup>See, e.g., Paul Rosenthal, *Improper Joinder: Confronting Plaintiffs’ Attempts to Destroy Federal Subject Matter Jurisdiction*, 59 Am. U. L. Rev. 49, 64 (2009) (“Presently, courts take divergent approaches when analyzing claims of fraudulent joinder. Predicting what test a court will apply to determine fraudulent joinder is difficult, as the standards can shift, even within the same opinion.”).

ulent.”<sup>17</sup> Some courts have phrased this standard as requiring remand unless there is “no possibility” that the plaintiff can establish a claim against an in-state defendant under applicable state law in state court or no possibility of recovery by the plaintiff against an in-state defendant.<sup>18</sup>

The term “plausible” is taken from the Supreme Court’s jurisprudence interpreting Rule 8 of the Federal Rules of Civil Procedure, and the Court’s decisions provide substantial guidance as to the meaning of the term. Initially, in *Bell Atlantic Corp. v. Twombly*,<sup>19</sup> the Court distinguished between plausible claims and claims that are *speculative*: “Factual allegations must be enough to raise a right to relief above the speculative level.”<sup>20</sup> Later, in *Ashcroft v. Iqbal*,<sup>21</sup> the Court distinguished between a *probability* requirement, which is not part of the law, and the plausibility standard: “The plausibility standard is not akin to a “probability requirement,” but it asks for more than a sheer possibility that a defendant has acted unlawfully.” Plausibility thus stands between possibility and probability.

The *Twombly* opinion provided further guidance in the course of explaining why the Court was adopting the plausibility standard. Quoting from an opinion of the Seventh Circuit, the Court said:

[T]he costs of modern Federal antitrust litigation and the increasing caseload of the Federal courts counsel against sending the parties into discovery when there is *no reasonable likelihood* that the plaintiffs can *construct a claim* from the events related in the complaint.<sup>22</sup>

The “reasonable likelihood” test, which is synonymous with the plausibility standard, can readily be adapted to the fraudulent joinder context.<sup>23</sup> For challenges to the factual basis of the plaintiff’s claim against the co-citizen or in-state defendant, the court would look at “the complaint and [other] materials” and determine whether there is a reasonable likelihood that the plaintiff can muster factual support for each element of the state-law claim. This “demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation” or “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements.”<sup>24</sup> For legal challenges, the court would examine the “applicable state law” and determine whether there is a reasonable likelihood that the state courts would impose liability under the pleaded facts.

The “reasonable *likelihood*” standard is quite different from the “reasonable *basis*” and “reasonable *possibility*” standards used in some fraudulent joinder cases.<sup>25</sup> “Reasonable likelihood” is another

<sup>17</sup> *Florence v. Crescent Resources, LLC*, 484 F.3d 1293, 1299 (11th Cir. 2007) (emphasis added).

<sup>18</sup> *See, e.g., Hartley v. CSX Transp., Inc.*, 187 F.3d 422, 426 (4th Cir. 1999) (finding that the “any possibility” or “no possibility” standard requires remand if there a “glimmer of hope” for the plaintiff).

<sup>19</sup> 550 U.S. 544 (2007).

<sup>20</sup> *Id.* at 555.

<sup>21</sup> 556 U.S. 662, 678 (2009).

<sup>22</sup> *Twombly*, 550 U.S. at 558 (quoting *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984)) (emphasis added).

<sup>23</sup> For cases using the “reasonable likelihood” test in the Rule 8 context, *see, e.g.,* 16630 Southfield Limited Partnership v. Flagstar Bank, F.S.B., 727 F.3d 502, 504 (6th Cir. 2013) (quoting *Twombly*); *Ridge at Red Hawk, L.L.C. v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007).

<sup>24</sup> *Iqbal*, 556 U.S. at 778.

<sup>25</sup> For example, some courts have used “no reasonable basis” interchangeably with “no possibility of recovery.” *See, e.g., In re 1994 Exxon Chem. Fire*, 558 F.3d 378, 385 (5th Cir. 2009)

way of expressing the concept of plausibility, and that concept is drawn from *Twombly-Iqbal* jurisprudence, not fraudulent joinder cases.

Professor Martin H. Redish, one of the nation’s foremost scholars of Federal court jurisdiction, has written that “the *Twombly-Iqbal* plausibility standard represents the fairest and most efficient resolution of the conflicting interests” in the context of pleading.<sup>26</sup> It will similarly provide a fair and efficient approach in the context of fraudulent joinder.

Further, the very same plausibility standard used in this bill was adopted by the Federal circuit court of appeals in which fraudulent joinder cases arise with the greatest frequency.<sup>27</sup> Last Congress, Ranking Member Conyers said of the bill that it should “simply pick one of the existing articulations of the fraudulent joinder standard and codify [it] into law.”<sup>28</sup> At the time, the plausibility approach was applied by some district courts, but just last year the Fifth Circuit Court of Appeals adopted the same plausibility standard this bill contains in a case called *International Energy*,<sup>29</sup> in which the Fifth Circuit stated “we must consider whether [the plaintiff] pleaded ‘enough facts to state a claim to relief that is plausible on its face.’”<sup>30</sup> The plaintiff in that case petitioned for rehearing en banc, but that rehearing was denied, with not a single judge on the Fifth Circuit requesting a vote.<sup>31</sup> In just the last year, district courts in the Fifth Circuit have issued more than 40 fraudulent joinder decisions, without any difficulty, and with results that indicate just the sort of reasonable reform that would occur nationwide were Congress to settle the conflicts in the Federal courts by adopting the plausibility standard—namely, roughly two-thirds of the decisions hold the joinder to be fraudulent and retain the case, while the others grant the motion to remand. There is no evidence that the judges have any difficulty applying Federal pleading standards to state claims; on the contrary, they appear to be engaging in a routine and familiar judicial task. One such case is *Johnson v. The Travelers Home & Marine Ins. Co.*<sup>32</sup> In that case, district Judge Gray Miller found that the allegations against an in-state insurance adjuster didn’t satisfy the plausibility standard, stating:

These factual allegations are not pled with enough specificity to distinguish particular facts from legal conclusions. For example, Johnson alleges that Nice performed an “outcome oriented and unreasonable investigation,” but this allegation merely states a conclusion without identifying any

(stating that in the Fifth Circuit the test for fraudulent joinder is “whether the defendant has demonstrated that there is no possibility of recovery by the plaintiff against an in-state defendant, which stated differently means that there is no reasonable basis for the district court to predict that the plaintiff might be able to recover against an in-state defendant”) (quoting *Smallwood v. Ill. Cent. R.R. Co.*, 385 F.3d 568, 573 (5th Cir. 2004)).

<sup>26</sup> Martin H. Redish, “Pleading, Discovery, and the Federal Rules: Exploring the Foundations of Modern Procedure,” 64 Fla. L. Rev. 845, 850 (2012).

<sup>27</sup> See E. Farish Percy, *Making a Federal Case of It: Removing Civil Cases to Federal Court Based on Fraudulent Joinder*, 91 Iowa L. Rev. 189, 192 n. 9 (2005).

<sup>28</sup> Markup of H.R. 3624 at 46 (Feb. 3, 2016) (unofficial transcript), <https://judiciary.house.gov/wp-content/uploads/2016/02/02.03.16-Markup-Transcript-1.pdf> [hereinafter Markup Transcript] (remarks of Rep. Conyers).

<sup>29</sup> *International Energy Ventures Management LLC v. United Energy Group Ltd.*, 818 F.3d 193 (5th Cir. 2016).

<sup>30</sup> Id. at 208 (quoting language from the Supreme Court’s *Twombly* decision).

<sup>31</sup> Docket entry, July 13, 2016.

<sup>32</sup> 2016 WL 4061146 (S.D. Tex. July 29, 2016).

specific way in which Nice’s investigation was “unreasonable.” The remainder of Johnson’s allegations simply track the statutory language of [various provisions of the Texas Insurance Code] without alleging any case-specific facts . . . Johnson’s formulaic recitation of the statutory language is insufficient to fulfill Johnson’s obligation to provide the grounds on which he is entitled to relief.

The court therefore denied the motion to remand the case back to state court. Courts in the Fifth Circuit are now reviewing the joinder of innocent parties to cases for forum shopping purposes with more scrutiny, which should be the case in courts nationwide.

The Fifth Circuit also recognized that the plausibility standard is easy for district courts to apply and appellate courts to review, and avoids inconsistency. As the Fifth Circuit stated in its decision, “there are good practical reasons for Federal courts to use a Federal test, chief among which is that our district courts are intimately familiar with that test. They are able to apply it uniformly, and we are able to review their applications uniformly.”<sup>33</sup> The Fifth Circuit also recognized that applying different standards, as district courts within the Fifth Circuit had done previously, have “engendered confusion” and “uncertainty.”<sup>34</sup> The Innocent Party Protection Act would remedy that confusion.

In most cases, there will be no dispute as to which state’s law is the “applicable state law.” If there is a disagreement, the court must perform a choice of law analysis. Under the *Klaxon* rule, a Federal court sitting in diversity applies the choice-of-law rules of the state in which it sits.<sup>35</sup> The “reasonable likelihood” standard can be helpful here also. If there is a reasonable likelihood that the state court in which the Federal court sits would apply law that would impose liability on the co-citizen or in-state defendant, joinder is not fraudulent.

Applying the plausibility standard to fraudulent joinder does not require the court to decide any claims on their merits. Prong (B) uses the term “impose liability on,” drawn from fraudulent joinder jurisprudence.<sup>36</sup> And paragraph (4) makes clear that claims against defendants found to have been fraudulently joined must be dismissed *without* prejudice.

“(C) State or Federal law clearly bars all claims in the complaint against that defendant; or”

Fraudulent joinder requiring denial of a motion to remand is defined by prong (C) as including a situation in which state or Federal law clearly bars all claims in the complaint against the non-diverse or in-state defendants. This would occur, for example, through the affirmative defenses of statute of limitations expiration, Federal preemption, or state or Federal laws that provide immunity from suit. For example, the Fourth Circuit in *Johnson v. American Towers, LLC*,<sup>37</sup> held that the non-diverse defendant was fraudulently joined because “the Communications Act clearly pre-

<sup>33</sup> 818 F.3d 193, 208 (5th Cir. 2016).

<sup>34</sup> *Id.* at 201.

<sup>35</sup> *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941).

<sup>36</sup> *See, e.g.*, *Hornbuckle v. State Farm Lloyds*, 385 F.3d 538, 542 (5th Cir. 2004).

<sup>37</sup> 781 F.3d 693, 705–06 (4th Cir. 2015).

empties the [plaintiffs'] state-law tort claim against [that defendant] as a matter of law.” And in the leading case of *In re Briscoe*, the Third Circuit stated: “Courts have . . . recognized that a statute of limitations defense is properly considered in connection with a fraudulent joinder inquiry.”<sup>38</sup> However, some courts have held that affirmative defenses cannot be considered as a basis for finding fraudulent joinder; those decisions should no longer be followed.<sup>39</sup>

Subparagraphs (B) and (C), taken together, abrogate the “common defense” doctrine associated with the Fifth Circuit decision in *Smallwood v. Illinois Central R. Co.*<sup>40</sup> Under that doctrine, no matter how clear it is that the plaintiff’s claim against the in-state defendant is barred, the case must be remanded to the state court if the same defense also bars the claim against the out-of-state defendant. For reasons given by the dissenting opinions in *Smallwood*, the doctrine is seriously flawed.<sup>41</sup> Mandatory language in subparagraphs (B) and (C) make clear that in determining whether joinder is fraudulent, the court should consider only the claims against the defendants described in paragraph (B); the court should not examine the case against the diverse, out-of-state defendants.

“(D) objective evidence clearly demonstrates that there is no good faith intention to prosecute the action against that defendant or to seek a joint judgment including that defendant.”

Prong (D) codifies a proposition that the Supreme Court has long recognized: that in deciding whether joinder is fraudulent, courts may consider whether the plaintiff has a good-faith intention of seeking a judgment against the non-diverse defendant.<sup>42</sup> Consistent with Supreme Court precedent, courts continue to find fraudulent joinder requiring denial of a motion to remand when objective evidence clearly demonstrates there is no good faith intention to prosecute the action against all defendants or seek a joint judgment against them. As the Federal court in *Faulk v. Husvarna Consumer Outdoor Products N.A., Inc.*<sup>43</sup> said, “[w]here the plaintiff’s collective litigation actions, viewed objectively, clearly demonstrate a lack of good faith intention to pursue a claim to judgment against a non-diverse defendant, the court should dismiss the non-diverse defendant and retain jurisdiction over the case.” That is what Federal courts mean when they describe “objective evidence” in the context of fraudulent joinder, namely “collective litigation actions.” The Federal court decision in *In re Diet Drugs*

<sup>38</sup> *In re Briscoe*, 448 F.3d 201, 219 (3d Cir. 2006).

<sup>39</sup> See, e.g., *City of Columbus, Ohio v. Sunstar Columbus, Inc.*, 2015 WL 5775532, at \*5 (S.D. Ohio Oct. 2, 2015) (“Res judicata and collateral estoppel are affirmative defenses” that a court may not address when considering fraudulent joinder); *Huitron v. U.S. Foods, Inc.*, 2014 WL 4215656, at \*5 (C.D. Cal. Aug. 25, 2014) (“Consent [is] an affirmative defense to defamation” that is “not considered” in the fraudulent joinder inquiry). Some courts have mistakenly applied the “well-pleaded complaint” rule—a rule developed for federal-question jurisdiction—in the context of fraudulent joinder. These decisions too should no longer be followed.

<sup>40</sup> 385 F.3d 568 (5th Cir. 2004) (en banc) (9–7 decision).

<sup>41</sup> Other flaws are discussed in Case Note, 118 Harv. L. Rev. 1086 (2005).

<sup>42</sup> See *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 98 (1921) (“[T]he joinder was a sham and fraudulent—that is, . . . without any purpose to prosecute the cause in good faith against the [defendant]” and “with the purpose of fraudulently defeating the [other defendant’s] right of removal.”)

<sup>43</sup> 849 F.Supp.2d 1327, 1331 (M.D. Ala. 2012).

*Prods. Liab. Litig.*,<sup>44</sup> also illustrates how a court can find a lack of good faith intention based on a careful analysis of objective evidence.

The language of this provision is taken almost verbatim from an often-cited decision of the Third Circuit. In *In re Briscoe*,<sup>45</sup> the court said that joinder is fraudulent if “there is . . . no real intention in good faith to prosecute the action against the defendant or seek a joint judgment.” This language has been quoted in decisions throughout the country, and prong (C) codifies it, with added language to make clear that the court should not inquire into the subjective intent of the plaintiff or his or her lawyer, but rather look to objective evidence.

“(3) *In determining whether to grant or deny a motion under paragraph (1)(B), the court may permit the pleadings to be amended, and shall consider the pleadings, affidavits, and other evidence submitted by the parties.*”

Paragraph (3) codifies the widely followed judicial practice of considering affidavits and other materials outside the pleadings when determining whether joinder is fraudulent.<sup>46</sup> As one court aptly put it, “[i]n analyzing a claim of fraudulent joinder, a court is not held captive by the allegations in the complaint.”<sup>47</sup> For example, in *Legg v. Wyeth*,<sup>48</sup> the Eleventh Circuit ruled that a district court erred in refusing to consider affidavits submitted by local sales representatives supporting the assertion that the representatives were fraudulently joined as defendants.

Paragraph (3) also makes it clear that the district court may allow the plaintiff to amend the complaint to meet objections to remand. This provision addresses any concern that the plaintiff, having filed a complaint in state court under state procedural rules, may not have anticipated application of a “plausibility” or other Federal standard.

The two provisions of paragraph (3) work in tandem. Thus, in *Legg v. Wyeth*, *supra*, the court said:

The determination of whether a resident defendant has been fraudulently joined must be based upon the plaintiff’s pleadings at the time of removal, supplemented by any affidavits and deposition transcripts submitted by the parties.” The proceeding appropriate “for resolving a claim of fraudulent joinder is similar to that used for ruling on a motion for summary judgment under Fed.R.Civ.P. 56(b).<sup>49</sup>

H.R. 725 codifies this approach, with one important modification: the determination need not be based on the plaintiff’s pleadings at the time of removal; the plaintiff may amend the pleadings to meet objections to remand. However, the bill does not authorize any discovery beyond that which is permitted by existing rules and court decisions.

<sup>44</sup> 220 F.Supp.2d 414, 420–22 (E.D. Pa. 2002).

<sup>45</sup> 448 F.3d 201, 216 (3rd Cir. 2006).

<sup>46</sup> *See, e.g., Herkenhoff v. Supervalu Stores, Inc.*, 2014 WL 3894642, at \*3 (E.D. Mo. Aug. 18, 2014) (citing authorities).

<sup>47</sup> *Mills v. Allegiance Healthcare Corp.*, 178 F.Supp.2d 1, 5–6 (D. Mass. 2001) (citing cases).

<sup>48</sup> 428 F.3d 1317, 1320–23 (11th Cir. 2005).

<sup>49</sup> *Id.* at 1322–23 (internal quotations, citations, and emphasis deleted).

“(4) If the courts finds that all defendants described in paragraph (1)(B) have been fraudulently joined under paragraph (2), it shall dismiss without prejudice the claims against those defendants and shall deny the motion described in paragraph (1)(B).”

Paragraph (4) makes clear that when a district court determines that a defendant has been fraudulently joined, the court should dismiss the claims against that defendant without prejudice, thereby allowing for a refiling of those claims in state court, to be decided on the merits. In providing that the claims against the in-state or non-diverse defendants should be dismissed *without* prejudice, paragraph (4) adopts the position of all but one of the courts of appeals that have addressed the issue.<sup>50</sup> Only one court of appeals has ruled otherwise, in a single sentence without explanation.<sup>51</sup> That decision should no longer be regarded as authoritative.

With the dismissal of the fraudulently joined defendants, the district court can and should deny the motion to remand described in paragraph (1)(B).

### **Changes in Existing Law Made by the Bill, as Reported**

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (new matter is printed in italics and existing law in which no change is proposed is shown in roman):

## **TITLE 28, UNITED STATES CODE**

\* \* \* \* \*

### **PART IV—JURISDICTION AND VENUE**

\* \* \* \* \*

#### **CHAPTER 89—DISTRICT COURTS; REMOVAL OF CASES FROM STATE COURTS**

\* \* \* \* \*

#### **§ 1447. Procedure after removal generally**

(a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.

(b) It may require the removing party to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to such State court.

(c) 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

<sup>50</sup> See *Wivell v. Wells Fargo Bank, N.A.*, 773 F.3d 887, 896 (8th Cir. 2014) (citing cases from Third and Tenth Circuits).

<sup>51</sup> *Walton v. Bayer Corp.*, 643 F.3d 994, 1000–01 (7th Cir. 2011).

1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1442 or 1443 of this title shall be reviewable by appeal or otherwise.

(e) If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court.

*(f) FRAUDULENT JOINDER.—*

- (1) This subsection shall apply to any case in which—*
  - (A) a civil action is removed solely on the basis of the jurisdiction conferred by section 1332(a);*
  - (B) a motion to remand is made on the ground that—*
    - (i) one or more defendants are citizens of the same State as one or more plaintiffs; or*
    - (ii) one or more defendants properly joined and served are citizens of the State in which the action was brought; and*
  - (C) the motion is opposed on the ground that the joinder of the defendant or defendants described in subparagraph (B) is fraudulent.*
- (2) The joinder of a defendant described in paragraph (1)(B) is fraudulent if the court finds that—*
  - (A) there is actual fraud in the pleading of jurisdictional facts with respect to that defendant;*
  - (B) based on the complaint and the materials submitted under paragraph (3), it is not plausible to conclude that applicable State law would impose liability on that defendant;*
  - (C) State or Federal law clearly bars all claims in the complaint against that defendant; or*
  - (D) objective evidence clearly demonstrates that there is no good faith intention to prosecute the action against that defendant or to seek a joint judgment including that defendant.*
- (3) In determining whether to grant or deny a motion under paragraph (1)(B), the court may permit the pleadings to be amended, and shall consider the pleadings, affidavits, and other evidence submitted by the parties.*
- (4) If the court finds that all defendants described in paragraph (1)(B) have been fraudulently joined under paragraph (2), it shall dismiss without prejudice the claims against those defendants and shall deny the motion described in paragraph (1)(B).*

\* \* \* \* \*



### Dissenting Views

H.R. 725, the “Innocent Party Protection Act,” is the latest attempt by the Majority to tilt the civil justice playing field in favor of corporate defendants by making it more difficult for plaintiffs to pursue state law claims in state courts. The bill would dramatically alter existing law by overriding the century-old doctrine of fraudulent joinder, under which Federal courts must remand a diversity case to state court if one defendant that is a citizen of the same state as the plaintiff (hereinafter “in-state defendant”) was joined and where there is a reasonable basis under state law for a claim against that defendant. H.R. 725 also effectively repeals a statutory exception to diversity jurisdiction where a properly-joined out-of-state defendant is a citizen of the state in which the suit is originally brought, known as the “local defendant” exception. The bill would impose burdensome and vague new requirements on a Federal court when considering a motion to remand in a case that was removed to Federal court solely on the basis of diversity of citizenship and where there is both an in-state and an out-of-state defendant present or where there is a local defendant. Specifically, before a Federal court could grant a motion to remand, the bill would require the court to find, among other things, that there is no actual fraud in the pleading of jurisdictional facts, that the addition of the in-state or local defendant to a case is based on a “plausible” state law claim against that in-state or local defendant, and that the plaintiff has a good faith intention to pursue the action against the in-state or local defendant or to seek a joint judgment.

H.R. 725 raises several serious concerns that, taken together, threaten to delay and possibly deny justice for plaintiffs with meritorious state law claims. First, as with many civil justice measures that the Majority has proposed, the bill is a solution in search of a problem. As noted, current law already establishes a standard for courts to determine whether a party has been improperly joined, a standard that has been in place for a century. Tellingly, the U.S. Supreme Court has not seen fit to change this standard, and H.R. 725’s proponents offer no evidence that Federal courts have routinely failed to properly address fraudulent or otherwise improper joinder. Moreover, a defendant may be able to move to dismiss a claim in state court against an in-state defendant before removing the remaining claims to Federal court.

Second, by applying a vague and undefined “plausibility” standard to state law claims, H.R. 725 will generate tremendous uncertainty, complexity, and additional cost to the consideration of a motion to remand, which is ordinarily a common procedural matter considered at a nascent stage of a diversity case. The difficulty in applying a “plausibility” standard in the pleadings context is instructive in this regard, as this plausibility pleading standard has spawned much litigation over what constitutes a “plausible” claim. Similarly, the bill further heightens uncertainty and complexity by requiring a court to inquire into the “good faith” of the plaintiff’s subjective intentions during this jurisdictional stage of the case, providing no guidance as to what constitutes “good faith.” These various requirements would effectively mandate a trial on the merits of a state law claim against a state defendant at the early procedural stage of a case when a court is ill-equipped to make such

determinations and could even involve a defendant over which a Federal court may not have jurisdiction. In addition to adding burdens on litigants, these new requirements will strain already-limited Federal judicial resources.

Finally, H.R. 725 deeply intrudes on state sovereignty by denying state courts the ability to decide, and thereby shape, state procedural and substantive law; and by shifting that power to Federal courts. Indeed, it is out of respect for federalism and recognition that Federal courts are supposed to be courts of limited jurisdiction that the Supreme Court added the requirement of complete diversity and Congress specified a minimum amount in controversy requirement in order for a state case to be removed to Federal court. Respect for federalism is also why Federal courts developed the practice of construing removal statutes narrowly, as reflected in the current fraudulent joinder doctrine, which favors remand to state courts except in very limited circumstances. The bill runs counter to this fundamental constitutional value, while also denying plaintiffs the prerogative to choose a state forum for the adjudication of state law claims.

Given the bill's serious flaws, a broad coalition consisting of 54 consumer, environmental, and workers' rights organizations, including the Alliance for Justice, the Asbestos Disease Awareness Organization, the Center for Justice & Democracy, the Consumer Federation of America, the National Association of Consumer Advocates, the National Consumer Law Center, the National Employment Lawyers Association, the Natural Resources Defense Council, Public Citizen, and the Sierra Club, oppose H.R. 725.<sup>1</sup> They warn that the bill "would upend long established law in the area of Federal court jurisdiction" and "would result in needless micromanagement of Federal courts and a waste of judicial resources."<sup>2</sup> In addition, the Obama administration issued a strong veto threat with respect to a bill considered in the last Congress that was substantively identical to H.R. 725.<sup>3</sup> The Administration observed that the measure would "add needless complexity to civil litigation and potentially prevent plaintiffs from raising valid claims in State court."<sup>4</sup>

For the foregoing reasons, and those discussed below, we strongly oppose H.R. 725.

## DESCRIPTION AND BACKGROUND

### DESCRIPTION

H.R. 725 would impose a series of new requirements on courts considering motions to remand in certain types of diversity cases. As a general matter, all of these requirements will make it harder for plaintiffs to successfully have cases solely raising state law claims remanded back to state court.

Section 2 of the bill would add a new subsection (f) to 28 U.S.C. § 1447, the Federal statute governing remands of cases that have

<sup>1</sup>Letter from 54 consumer groups to Rep. Bob Goodlatte (R-VA), Chairman, and Rep. John Conyers, Jr.(D-MI), Ranking Member, H. Comm. on the Judiciary (Feb. 1, 2017) (on file with the Democratic Staff of the H. Comm. on the Judiciary).

<sup>2</sup>*Id.*

<sup>3</sup>Executive Office of the President, Office of Management and Budget, Statement of Administration Policy—H.R. 3624, Fraudulent Joinder Prevention Act of 2016 (Feb. 24, 2016).

<sup>4</sup>*Id.*

been removed to Federal court from state court. New section 1447(f)(1) specifies that the bill's requirements apply in cases where: (1) a civil action has been removed only on the basis of diversity jurisdiction (i.e., all plaintiffs are citizens of different states than all defendants); (2) a motion to remand the case back to state court is made on the ground that at least one of the defendants is a citizen of the same state as at least one of the plaintiffs (i.e., that there is no complete diversity of citizenship between the parties, as required by the diversity statute) *or* that one of the defendants is a citizen of the state in which the state court action was brought (such cases are currently an exception to diversity jurisdiction, provided for in 28 U.S.C. § 1441(b)(2)); and (3) the motion to remand is opposed on the ground that the joinder of an in-state or local defendant is fraudulent.

New proposed section 1447(f)(2) specifies the circumstances pursuant to which a court can find that joinder was fraudulent. These circumstances include a case where the court finds that there is actual fraud in the pleading of jurisdictional facts or where state or Federal law clearly bars all claims against in-state or local defendants. A court can also find that joinder of a party was fraudulent, based on evidence, if "it is not plausible" to conclude that state law would impose liability on an in-state or local defendant or where objective evidence "clearly demonstrates" that the plaintiff lacked the "good faith intention" to pursue the civil action against such a defendant or to seek a joint judgment.

The plausibility standard for determining whether remand would be appropriate appears to import the heightened pleading standard articulated in *Ashcroft v. Iqbal*<sup>5</sup> into the remand context. Additionally, the bill fails to define "good faith intention," a term that is not used in any other provision in title 28 of the U.S. Code. Such a determination would inherently require a subjective inquiry into the plaintiff's intention in adding the in-state defendant, rather than the objective inquiry under current law asking whether the plaintiff had a reasonable basis for pursuing such a claim.

New section 1447(f)(3), among other things, requires a court to consider pleadings, affidavits, and other evidence submitted by the parties in assessing whether joinder was fraudulent when considering a motion to remand.

#### BACKGROUND

Diversity jurisdiction refers to the jurisdiction of Federal courts over cases where the underlying claims arise solely under state law, but the parties are citizens of different states. A plaintiff may file a case in Federal court on diversity grounds or a defendant may remove a case filed in state court to Federal court on such basis.

The diversity jurisdiction of Federal courts is rooted in Article III, section 2 of the Constitution, which provides, in pertinent part, that the "judicial Power [of the United States] shall extend to . . . Controversies . . . between Citizens of different States. . . ."<sup>6</sup> Congress's statutory grant of diversity jurisdiction is narrower than the scope of this constitutional provision, requiring, for example, a

<sup>5</sup>556 U.S. 662 (2009).

<sup>6</sup>U.S. CONST. art. III, § 2, cl. 1.

minimum amount in controversy.<sup>7</sup> The Supreme Court has further limited the scope of diversity jurisdiction by requiring “complete” diversity—i.e., that no defendant can be a citizen of the same state as any plaintiff.<sup>8</sup>

The Federal diversity statute is codified at 28 U.S.C. § 1332 and provides, among other things, that Federal district courts shall have jurisdiction over all civil actions where the amount in controversy exceeds \$75,000 and is between citizens of different states.<sup>9</sup> Section 1332(c)(1) specifies that for purposes of the diversity statute and the Federal removal statute, a corporation is deemed to be a citizen of every state and foreign state where it is incorporated and where it has its principal place of business.<sup>10</sup> For class actions, section 1332(d)(2) requires at least \$5 million amount in controversy and recognizes diversity where any class member is a citizen of a different state than any defendant, among other things, making it relatively easier to remove class actions from state to Federal court.<sup>11</sup>

Under 28 U.S.C. § 1441(b), a defendant may seek to remove any civil action filed in a state court to a Federal court in the district where the state action is pending based solely on diversity jurisdiction, but the court must disregard the citizenship of defendants sued under fictitious names, and a case may not be removed if any of the parties properly joined and served as defendants is a citizen of the state in which the action is brought (the “local defendant” exception).<sup>12</sup> Section 1447 of title 28, United States Code, outlines procedures for the Federal courts to follow after removal.<sup>13</sup>

The judicially-created doctrine of fraudulent joinder is an exception to the requirement for complete diversity. Under the doctrine, a case may be removed to Federal court even if there is an in-state defendant in the case because the plaintiff failed to state a case against the in-state defendant.<sup>14</sup> In seeking to remove a state case to Federal court, defendants often assert that a plaintiff has fraudulently joined an in-state defendant solely to defeat diversity jurisdiction.

The test for determining whether joinder is improper under this doctrine is whether the defendant has demonstrated that there is no possibility of recovery by the plaintiff against the in-state defendant or no reasonable basis for a claim against such defendant, an extremely difficult and often impossible standard for a defendant to meet.<sup>15</sup> If the Federal court finds, upon removal, that the fraudulently joined party was not properly joined to the case, it must dismiss that party from the case.

The Supreme Court has recognized that federalism issues are always implicated in the removal context and, therefore, has made clear that removal statutes should be strictly and narrowly inter-

<sup>7</sup> 28 U.S.C. § 1332(a) (2017).

<sup>8</sup> *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806).

<sup>9</sup> 28 U.S.C. § 1332(a)(1) (2017).

<sup>10</sup> 28 U.S.C. § 1332(c)(1) (2017).

<sup>11</sup> 28 U.S.C. § 1332(d)(2) (2017).

<sup>12</sup> 28 U.S.C. § 1441(b) (2017).

<sup>13</sup> 28 U.S.C. § 1447 (2017).

<sup>14</sup> *The Fraudulent Joinder Prevention Act of 2015: Hearing on H.R. 3624 Before the Subcomm. on the Constitution and Civil Justice of the H. Comm. on the Judiciary*, 114th Cong. 3 (2015) (written statement of Lonny Hoffman, Law Foundation Professor of Law, University of Houston Law Center) [hereinafter “Hoffman Statement”].

<sup>15</sup> *Id.* at 3–4.

preted to resolve all doubts and ambiguities against removal.<sup>16</sup> The doctrine of fraudulent joinder reflects this general policy.<sup>17</sup>

#### CONCERNS WITH H.R. 725

##### I. H.R. 725 IS A SOLUTION IN SEARCH OF A PROBLEM

While seeking to further stack the deck against plaintiffs by making it harder to pursue state law claims in state court, the bill does not address any actual existing problem. H.R. 725's proponents offer no credible evidence that Federal courts are systematically ignoring improper joinder of in-state defendants in diversity cases or that the fraudulent joinder doctrine is ineffective. Ostensibly, the bill's proponents seek a uniform fraudulent joinder standard. Nevertheless, all articulations of the current century-old standard embody the same principle that unless there is *no* reasonable basis or possibility of recovery against an in-state defendant, the court should allow the in-state party to remain in the case and remand the case to state court. The fraudulent joinder doctrine is well-settled and is the same standard in substance in every circuit, whatever the semantic variances among different courts. Moreover, proponents offer no evidence that there is any problem with the way that Federal courts have applied the "local defendant" exception to diversity jurisdiction,<sup>18</sup> which H.R. 725 effectively repeals. Additionally, a defendant has the option of seeking to dismiss a non-meritorious claim against an in-state defendant in state court prior to removal to Federal court.<sup>19</sup> In short, H.R. 725 does not address an actual problem, but would, instead, create problems by upending longstanding rules and potentially wreak havoc on the Federal courts.

##### II. H.R. 725 WILL DRAMATICALLY INCREASE UNCERTAINTY, COMPLEXITY, AND COSTS RELATED TO THE CONSIDERATION OF REMAND MOTIONS

###### A. *The application of a vague and undefined "plausibility" standard will require a determination on the merits of a state law claim at a point in the case when a court is ill-equipped to do so.*

H.R. 725 requires that, prior to granting a motion to remand, a court must find that it is "plausible to conclude that applicable State law would impose liability" on an in-state or local defendant. Although this plausibility standard is inherently vague, the bill does not define "plausible" or provide any guidance as to how a court should apply the term. As Professor Lonny Hoffman, the Minority witness who testified last Congress at the Constitution Subcommittee hearing on this bill warned, this vague term "would force courts to struggle with determining what 'plausible' means for purposes of deciding whether to grant remand."<sup>20</sup> Professor Hoffman further noted that in addition to being ambiguous, the "plausibility" requirement is a new one, making it even more problematic

<sup>16</sup> *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108–09 (1941).

<sup>17</sup> Hoffman Statement at 5.

<sup>18</sup> 28 U.S.C. § 1441(b)(2) (2017).

<sup>19</sup> See 28 U.S.C. § 1446(b)(3) (2017) (providing that a case is removable within 30 days after initial pleadings if case has become removable within that time period).

<sup>20</sup> Hoffman Statement at 6.

by making it hard for courts to apply the standard in a consistent and coherent way.<sup>21</sup>

The bill seeks to import the Federal plausibility pleading standard into the standards for granting remand motions. The U.S. Supreme Court, in its 2009 *Ashcroft v. Iqbal* decision, established a new standard for judging the sufficiency of facts alleged in a civil complaint.<sup>22</sup> Prior to *Iqbal*, the Court had made clear that, in interpreting Federal Rule of Civil Procedure 8,<sup>23</sup> which governs pleadings in civil cases, a civil action should not be dismissed “unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”<sup>24</sup> According to commentators, the pre-*Iqbal* view was that Rule 8 should be “interpreted liberally” because “until the plaintiff can remain in court long enough to have an opportunity to examine those files and to question defendants and others, the merits of a case cannot be determined.”<sup>25</sup>

The Court’s holding in *Iqbal* reflected a decision to abandon more than half a century of established civil litigation practice. In *Iqbal*, the Court put forward a new test under which Federal judges are to determine which civil complaints will withstand a motion to dismiss. First, a complaint must contain factual allegations, rather than legal conclusions, and second, the factual allegations must be plausible, with plausibility “a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.”<sup>26</sup> Later, Justice Ruth Bader Ginsberg, in her comments about the decision, observed that the court’s “majority messed up the federal rules.”<sup>27</sup> Not surprisingly, *Iqbal* has spawned much litigation over what constitutes a “plausible” claim for purposes of pleading under Rule 8.<sup>28</sup>

The experience of Federal courts in attempting to apply a “plausibility” standard to pleadings is instructive. *Iqbal* has spawned numerous inconsistent and incoherent decisions attempting to define what constitutes a “plausible” pleading. As Professor Hoffman noted, the “attempt to incorporate plausibility into jurisdictional law would raise identical difficulties to those that now plague the cacophony of Rule 12(b)(6) decisional law [addressing whether pleadings raise “plausible” claims]. Yet, the proposed amendments [in H.R. 725] are oblivious to this danger and silent on how district courts are to determine whether the claims asserted against a non-diverse defendant are plausible.”<sup>29</sup> Seven years after the Supreme Court required that a “plausibility” standard be applied to Federal

<sup>21</sup>*Id.* at 7.

<sup>22</sup>556 U.S. 662 (2009).

<sup>23</sup>Rule 8 requires, among other things, that a complaint must contain “a short and plain statement of the claim showing that the pleader is entitled to relief. . . .” Fed. R. Civ. P. 8(a)(2).

<sup>24</sup>*Conley v. Gibson*, 355 U.S. 41, 46 (1957)

<sup>25</sup>Herman Schwartz, *The Supreme Court Slams the Door*, THE NATION, Sept. 30, 2009.

<sup>26</sup>556 U.S. at 679.

<sup>27</sup>Adam Liptak, *9/11 Case Could Bring Broad Shift on Civil Suits*, N.Y. TIMES, July 21, 2009.

<sup>28</sup>Although the Supreme Court first established the notion of a “plausibility” pleading requirement in 2007 in the antitrust case of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), it was in *Iqbal* that the Court expanded the “plausibility” pleading requirement to all civil suits. This new pleading requirement has been described as “an open door to judicial bias” and a “padlock on the courthouse door.” Tony Mauro, *Plaintiffs Groups Mount Effort to Undo Supreme Court’s Iqbal Ruling*, THE NAT’L L. J., Sept. 21, 2009. It is a significant departure from the “bare-bones complaint” and “mechanical” approach that had been established in the previous 50 years. Adam Liptak, *9/11 Case Could Bring Broad Shift on Civil Suits*, N.Y. TIMES, July 21, 2009.

<sup>29</sup>Hoffman Statement at 7.

pleadings, Federal courts still struggle with its application, and there is little reason to think that the same difficulties would not arise with respect to the application of such a standard in the context of remand motions, with tremendous time and money spent litigating the question of plausibility.

In addition to being vague and difficult to apply, H.R. 725's plausibility standard would force a court to conduct a mini-trial on the merits of a plaintiff's state law claims at a jurisdictional stage of the case, in the absence of discovery or the opportunity to fully develop the factual record and before the court's jurisdiction (i.e., the court's power to decide the case in the first place) is even established. For these reasons, current fraudulent joinder law does not impose such a requirement for merits review and instructs courts to avoid merits determinations. The fraudulent joinder doctrine requires a court only to take a limited look outside the pleadings and to avoid crossing the line from jurisdictional inquiry to a decision on the merits. Thus, in yet another way, H.R. 725 would dramatically change current law and practice.

In sum, H.R. 725's plausibility standard would introduce tremendous uncertainty and complexity into Federal courts' determinations of remand motions because of its inherent vagueness and the difficulty of its application. Moreover, the standard requires a Federal court, as part of a jurisdictional inquiry, to engage in an extensive merits review of a plaintiff's state law claims against an in-state or local defendant. These factors will spawn a tremendous amount of litigation over the application of what currently is a simple procedural motion, potentially making many state law cases cost-prohibitive for many plaintiffs to pursue.

*B. The requirement that a court determine a plaintiff's subjective "good faith intention" and some of the bill's other requirements are ambiguous, difficult to apply, and represent a significant departure from current law.*

As with its plausibility requirement, H.R. 725's mandate that a court find that a plaintiff had a "good faith intention to prosecute the action against" an in-state or local defendant or to seek a joint judgment is likewise vague and undefined. The bill provides no guidance as to the meaning of "good faith intention" or how such a standard is to be applied. The term "good faith intention" is not used anywhere in Title 28 of the United States Code. Moreover, like the plausibility requirement, the requirement that a court inquire into a plaintiff's subjective intentions is one that a court is ill-equipped to apply at a jurisdictional stage of the case.

In addition, the "good faith intention" requirement is a significant departure from current law. Under the fraudulent joinder doctrine, the term "fraudulent" is a term of art that does not require the proof of actual fraudulent intent on the plaintiff's part.<sup>30</sup> "Fraudulent" joinder typically refers to any improper joinder, regardless of the plaintiff's intent, and the court's inquiry is limited to whether there was some basis in law for the plaintiff's claim against the in-state defendant. Yet, H.R. 725 mandates that a court determine that a plaintiff joined an in-state or local defendant with the "good faith intention" of pursuing a claim against such a de-

<sup>30</sup>Hoffman Statement at 7.

fendant, changing longstanding law and introducing additional uncertainty into the consideration of remand motions.

Similarly, H.R. 725's requirement that a court find no "actual fraud in the pleading of jurisdictional facts" misdirects the court's attention toward a plaintiff's subjective intent when determining whether to grant a remand motion. As noted, current law requires a court only to look at whether there was a reasonable basis for the plaintiff's claim, regardless of the plaintiff's intent in naming a particular defendant. The "actual fraud" standard, like the "good faith intention" standard, is a major change to current fraudulent joinder law, one that would be very cumbersome to implement.

As with the plausibility requirement, the ambiguity and novelty of the "good faith intention" and "actual fraud" standards will spawn increased litigation over their meaning and application, leading to increased uncertainty and costs for litigants and unnecessary and harmful delay in resolving threshold jurisdictional questions.

*C. The bill's requirements open the door to dilatory tactics by defendants to further delay resolution of a case, deny plaintiffs the prerogative to choose the forum for their claims, and strain Federal judicial resources.*

Justice delayed is justice denied, and H.R. 725's various requirements will have the effect of significantly delaying the ultimate resolution of many plaintiffs' state law claims against in-state or local defendants. This factor may further incentivize out-of-state defendants to remove cases to Federal court and to prolong proceedings on motions to remand, knowing that the burden of sharply increased costs and length of litigation will fall disproportionately on plaintiffs, who typically have fewer litigation resources than the average out-of-state corporate defendant. This potential outcome may even have the effect of dissuading plaintiffs from filing suit in state court in the first place.

H.R. 725 also denies plaintiffs the prerogative to select the forum in which their claims will be heard by making it much easier for an out-of-state defendant to remove a case to Federal court, leaving the choice of forum in the defendant's hands in many more cases than currently. Additionally, the bill, if enacted, could result in a significant increase in the workload of Federal courts, straining already limited judicial resources.

This legislation must be seen as part of a longstanding effort to make it easier for defendants to remove purely state law matters to Federal court. For instance, more than a decade ago, Congress passed the Class Action Fairness Act of 2005 (CAFA).<sup>31</sup> Among other things, CAFA expanded Federal diversity jurisdiction for class actions, including eliminating the requirement for complete diversity in class actions, making it easier for defendants to remove class and "mass actions" from state to Federal courts. CAFA opponents—including Ranking Member John Conyers, Jr. (D-MI) and Representative Jerrold Nadler (D-NY)—argued that it was a blatant attempt to tilt the playing field in favor of defendants. They opposed expansion of Federal diversity jurisdiction as an unwarranted effort to make it "far more burdensome, expensive, and

<sup>31</sup>P.L. 109-2, 119 Stat. 4 (Feb. 18, 2005).



time-consuming for groups of injured persons” to use the class action mechanism to vindicate their rights under state law.<sup>32</sup> They expressed concern that CAFA would undermine state law by divesting state courts of the ability to interpret and develop state procedural and substantive law and that it would increase the workload of already over-burdened Federal courts.<sup>33</sup> H.R. 725 simply would continue to exacerbate this problem.

### III. H.R. 725 OFFENDS FEDERALISM AND REPRESENTS A SERIOUS INTRUSION INTO STATE SOVEREIGNTY

H.R. 725 raises serious federalism concerns by denying state courts the ability to shape state substantive and procedural law and by instead transferring that power to Federal courts. Indeed, many of us raised very similar federalism concerns in opposing CAFA more than 10 years ago, but H.R. 725 ignores these concerns.

Removal of a state court case to Federal court always implicates federalism concerns, which is why the Federal courts generally disfavor Federal jurisdiction and read removal statutes narrowly. As noted earlier, this is why the fraudulent joinder doctrine places a very high burden on a defendant opposing a remand motion to show that there was no reasonable basis for the addition of an in-state defendant, thus favoring remand to state courts except under very limited circumstances. By replacing this well-settled doctrine with sweeping and vaguely-worded new standards for the determination of when a state case may be remanded to state court, H.R. 725 denies state courts the ability to decide and, ultimately, to shape state law.

In addition, the bill further infringes state sovereignty by giving Federal courts the power to shape state pleading law. This is particularly true with respect to the application of the bill’s “plausibility” standard. When a suit is maintained in state court, the applicable pleading standard may not be the plausibility pleading standard articulated in *Iqbal*. Yet, when a Federal court is required to review a state law claim in the context of a remand motion, it will effectively be applying the heightened *Iqbal* pleading standard to the plaintiff’s claims against an in-state or local defendant, progressively undermining the authority of state courts to set their own pleading standards for state court cases. As a practical matter, any plaintiff who chooses to add an in-state defendant to a case filed in state court must meet the *Iqbal* pleading standard to support a remand back to state court should the case be removed to Federal court.

Finally, by effectively repealing the local defendant exception to diversity jurisdiction provided for in 28 U.S.C. § 1441(b)(2), H.R. 725 further chips away at state sovereignty, expanding the power of Federal courts to decide state law matters. This is particularly egregious in the case of repealing the local defendant exception because the principal concern justifying diversity jurisdiction—the risk of prejudice against an out-of-state defendant by a state court—is absent in the case of a defendant that is a citizen of the

<sup>32</sup> See H. Rep. 108–144 at 157–76, 108th Cong. (dissenting views to Committee report accompanying H.R. 1115, Class Action Fairness Act of 2003, which the House passed by a vote of 253–170).

<sup>33</sup> *Id.* at 166–70.

state where the suit was filed, as Congress clearly recognized by putting the local defendant exception into statute.

#### CONCLUSION

H.R. 725 is a blatant attempt to tilt the playing field in favor of corporate wrongdoers by making it far more burdensome, expensive, and time-consuming for injured people to obtain justice from such wrongdoers. The bill's proponents have failed to offer any credible evidence that there is a need to replace the well-settled fraudulent joinder doctrine. Moreover, the bill will impose novel, highly ambiguous, and difficult-to-apply requirements on Federal courts considering remand motions in certain circumstances. These new requirements will create tremendous uncertainty and introduce unnecessary complexity into the remand process. They will also increase the length and cost of litigation, delaying adjudication of potentially meritorious claims and burdening plaintiffs to the point where future plaintiffs may even be dissuaded from filing suit. Finally, the bill represents a serious intrusion into sovereignty by denying state courts the ability to shape state law and inappropriately shifting that power to Federal courts.

For the foregoing reasons, we respectfully dissent and urge our colleagues to stand on the side of justice and to join us in opposing H.R. 725.

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