# THE *TEDFORD* EQUITABLE EXCEPTION PERMITTING REMOVAL OF DIVERSITY CASES AFTER ONE YEAR: A WELCOME DEVELOPMENT OR THE OPENING OF PANDORA'S BOX?

E. Farish Percy*



*Jessie D. Puckett, Jr., Lecturer and Associate Professor of Law, University of Mississippi School of Law.

## I. INTRODUCTION

It is undisputed that plaintiffs generally prefer to litigate civil cases in state court while defendants generally prefer to litigate in federal court.[1] Thus, plaintiffs typically file their cases in state court with the goal of preventing removal to federal court.[2] Defendants, on the other hand, remove cases from state court to federal court and resist plaintiffs' motions to remand such cases back to state court, even when there is clearly no basis for removal.[3] Over the past decade, removal/remand litigation to determine

[1] *See* Arthur D. Hellman, *Another Voice for the "Dialogue": Federal Courts as a Litigation Course*, 53 ST. LOUIS U. L.J. 761, 768 (2009); Howard B. Stravitz, *Recocking the Removal Trigger*, 53 S.C. L. REV. 185, 185 (2002). For a discussion of some of the factors that influence these preferences, *see* Gregory P. Joseph, *Trial Balloon Federal Litigation–Where Did It Go Off Track?*, 34 LITIG. 5, 5–6 (Summer 2008) (enumerating fairly recent developments in federal law that may cause plaintiffs to prefer state court, including the greater frequency of summary judgments in federal courts, the obstacles to introduction of expert testimony created by the Federal Rules of Evidence and Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), and the heightened pleading requirements first introduced by Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955 (2007) and later solidified by Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009)); 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 n.110 (2005) (discussing many possible explanations for these preferences). Interestingly, many of these factors indicate that defendants' preference for federal court may be based on the fact that many federal procedural and evidentiary rules are more favorable to defendants than the corresponding state procedural and evidentiary rules, suggesting that defendants' preference for federal court may not be predominately motivated by actual or perceived prejudice against foreign defendants in state courts. *See* Joseph, *supra* note 1, at 5–6; Percy, *supra* note 1, at 206 n.110.

[2] *See* Erik B. Walker, *Keep Your Case in State Court*, 40 TRIAL 22, 22–30 (Sept. 2004) (providing instruction to plaintiffs' lawyers on how to resist removal and keep litigation in state court); E. Martin Estrada, *The Ephemeral Right to Remand, Nine Pointers for Federal Practitioners*, 50 FED. LAW. 22 (Sept. 2003) (providing similar instruction).

[3] *See, e.g.*, Garcia v. Amfels, Inc., 254 F.3d 585, 587 (5th Cir. 2001) (affirming the district court's finding that the "[d]efendant's removal of the case was frivolous"); *In re* Estate of Luis v. Gonzales, No. H-06-3686, 2006 WL 3716665, at *1 (S.D. Tex. Dec. 14, 2006) (finding that the defendant "had no objectively reasonable basis to believe removal of this case was proper"); Taylor-Sammons v. Bath, 398 F. Supp. 2d 868, 878 (S.D. Ohio 2005) (holding that the "defendant's argument for removal . . . was 'devoid of even fair support'"); Barnes v. Ford Motor Co., No. 4:03-CV-0018-DFH., 2003 WL 21277209, at *6 (S.D. Ind. May 30, 2003) (finding that the "defendant's removal . . . was contrary to settled law"); *see also* Michael W. Lewis, *Comedy or Tragedy: The Tale of Diversity Jurisdiction Removal and the One-Year Bar*, 62 SMU L. REV. 201, 228–29 (2009) (observing that defendants wrongfully remove cases "on the gamblers' chance

the final forum has significantly escalated and has become a critical feature of modern day civil litigation practice.[4] Given the actual or perceived high stakes involved,[5] it should not be surprising that plaintiffs and defendants often attempt to manipulate the removal statutes to their advantage.[6]

In order to remove a case based on diversity jurisdiction, there must be complete diversity and more than $75,000.00 in controversy.[7] In addition, no properly joined and served defendant can be a citizen of the forum state.[8] Section 1446(b) was amended in 1988 and now prohibits removal based on diversity more than one year after commencement of the action.[9] This one-

that an advantage could be gained from the present uncertainty" in the law).

[4] *See* Hellman, *supra* note 1, at 768–69; Lewis, *supra* note 3, at 229; Percy, *supra* note 1, at 191; Georgene Vairo, *Developments in the Law: Federal Jurisdiction and Forum Selection*, 37 LOY. L.A. L. REV. 1393, 1393 (2004). One law professor has suggested that removal/remand litigation is so commonplace that the "law and strategy of removal should be a pervasive part of a Federal Courts course." Hellman, *supra* note 1, at 768.

[5] There is empirical evidence suggesting that removal negatively impacts a plaintiff's chance of success. *See* Kevin M. Clermont & Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction*, 83 CORNELL L. REV. 581, 593 (1998) (finding that removal reduced a plaintiff's chances of winning from fifty-eight percent to thirty-seven percent). *But see* Theodore Eisenberg et al., *Litigation Outcomes in State and Federal Courts: A Statistical Portrait*, 19 SEATTLE U. L. REV. 433, 434 (1996) (finding that "plaintiff win rates in jury trials in state and federal court are strikingly similar").

[6] Although most commentary focuses on forum manipulation by plaintiffs—*see, e.g.*, Lewis, *supra* note 3, at 207–27 (discussing the ways in which the one-year bar allows plaintiffs to manipulate the amount in controversy requirement); Scott R. Haiber, *Removing the Bias Against Removal*, 53 CATH. U. L. REV. 609, 609–10 (2004) (listing the devices plaintiffs use to prevent removal)—defendants also engage in forum manipulation. *See* Hellman, *supra* note 1, at 773–74 (discussing examples of "gamesmanship" by defendants). One example involves the Section 1441(b) prohibition of removal of diversity cases when one of the "properly joined and served" defendants is a citizen of the forum state. 28 U.S.C. § 1441(b) (2000); *see* Hellman, *supra* note 1, at 773. In cases where the plaintiff has named a non-forum defendant and a forum defendant but has not yet served the forum defendant, the defendants remove, arguing that removal is not barred by the literal language of the statute because there is no properly served forum defendant. *See, e.g.*, Ethington v. Gen. Elec. Co., 575 F. Supp. 2d 855, 857–58 (N.D. Ohio 2008) (the defendants removed before the plaintiff served the non-forum defendants); Mohammed v. Watson Pharm., Inc., No. SA CV09:0079 DOC(ANx), 2009 WL 857517, at *1 (C.D. Cal. Mar. 26, 2009) (the defendants removed before the plaintiff served any defendant); *see also* Hellman, *supra* note 1, at 773 (observing that defendants have removed numerous cases based on this argument).

[7] 28 U.S.C. § 1332; *id.* § 1441(a).

[8] § 1441(b). Complete diversity requires that no plaintiff and defendant be citizens of the same state. Strawbridge v. Curtiss, 7 U.S (3 Cranch) 267, 267 (1806).

[9] 28 U.S.C. § 1446(b). "'Commencement' in this context refers to when the action was initiated in state court, according to state procedures." Bush v. Cheaptickets, Inc., 425 F.3d 683,

year bar gives plaintiffs the incentive to manipulate removal by adding a non-diverse or in-state defendant, against whom they have an arguable claim but from whom they do not intend to recover, and then dismissing such defendant after the expiration of the one-year period.[10] In cases involving complete diversity, the plaintiff may attempt to manipulate removal by concealing the true amount in controversy until after expiration of the one-year period, either by specifically requesting an amount not greater than $75,000.00 and then amending the state court complaint after one year, or by omitting any request for a specific sum of damages and then concealing the true amount in controversy until after expiration of the one-year period.[11] Plaintiffs may also sue the non-diverse defendant and amend the complaint to add the diverse defendant more than one year later.[12]

688 (9th Cir. 2005). *See also* 14B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3723 (4th ed. 2009). In most states, a civil action is commenced upon the filing of a complaint. *See, e.g.*, MISS. R. CIV. P. 3(a) ("A civil action is commenced by filing a complaint with the court."); OKLA. STAT. ANN. tit. 12, § 2003 (West 1993) ("A civil action is commenced by filing a petition with the court.").

[10] *See* David D. Siegel, Commentary on 1988 Revision of Section 1447, *noted following* 28 U.S.C.A. § 1447, at 400 (West 2006); *see, e.g.*, *In re* Propulsid Prods. Liab. Litig., MDL No. 1355, 2007 WL 1668752, at *1 (E.D. La. June 6, 2007) (the plaintiffs sued diverse and non-diverse defendants in drug litigation and dismissed all non-diverse defendants after expiration of the one-year period without having served discovery requests on them, designating experts against them, or deposing them); *In re* Rezulin Prods. Liab. Litig., MDL No. 1348, 2003 WL 21355201, at *2 (S.D.N.Y. June 4, 2003) (the plaintiff sued diverse and non-diverse defendants in drug litigation and nonsuited the non-diverse defendant five days after expiration of the one-year period without propounding any discovery on the non-diverse defendant). If a plaintiff attempts to manipulate the complete diversity requirement by bringing a claim against a diverse defendant in state court and joining a clearly non-meritorious claim against a non-diverse or in-state defendant, the diverse defendant may remove the case to federal court and allege that the plaintiff fraudulently or improperly joined the non-diverse or in-state defendant. *See* Percy, *supra* note 1, at 206 (discussing the historical development of the fraudulent joinder doctrine and its modern day application). The district court will then ignore the citizenship of the fraudulently joined defendant and assume jurisdiction over the case. *See id.*; *see also* E. Farish Percy, *Defining the Contours of the Emerging Fraudulent Misjoinder Doctrine*, 29 HARV. J.L. & PUB. POL'Y 569, 571–72 (2006) (discussing a recent procedural variant of traditional fraudulent joinder). Although not entirely uniform, most courts consider whether the plaintiff has a possibility or reasonable possibility of recovering from the non-diverse or in-state defendant in order to determine whether the plaintiff fraudulently joined such defendant. *See id.* at 574, 576–77.

[11] *See* Lewis, *supra* note 3, at 228; *see, e.g.*, Brown v. Descheeny, No. 03:09-CV-21-HTW-LRA, 2010 WL 114156, at *1–2 (S.D. Miss. Mar. 22, 2010) (the plaintiff sought $74,000.00 in damages in the original complaint but sent a demand letter for $100,000.00 more than two years after commencement); Vidaurri v. H.M.R. Props., No. SA-CA-1124-FB, 2007 WL 1512029, at *5–7 (W.D. Tex. Mar. 2, 2007) (the plaintiffs sought $60,000.00 in damages in the original

Courts and commentators have bemoaned plaintiffs' manipulative tactics to avoid removal.[13] In an effort to redress plaintiffs' forum manipulation, a minority of courts has recognized an equitable exception to the one-year period.[14] Most notably, in *Tedford v. Warner-Lambert Co.*,[15] the Fifth Circuit found that equity required the one-year period be extended in a case where the plaintiff nonsuited the sole non-diverse defendant just days after expiration of the one-year period.[16] In doing so, the court held that the one-year bar was procedural, and therefore subject to equitable exceptions and waiver.[17] Most courts, however, have taken the position that they are unable to prevent plaintiffs' forum manipulation given the clear

complaint and then, more than a year after commencement, produced a document indicating more than $89,000.00 in damages). Amendment may not be necessary in some states where the rules allow recovery of more than the amount requested in the complaint. *See* Lewis, *supra* note 3, at 226.

[12] *See, e.g.*, Janeau v. Pleasant Grove Indep. Sch. Dist., No. 5:07CV162, 2008 WL 4951727, at *1 (E.D. Tex. Nov. 17, 2008) (the plaintiff sued a non-diverse school district for injuries she received when a Polaris Ranger driven by a student crushed her leg, and more than one year later, the plaintiff amended the complaint to add the diverse manufacturer of the Polaris Ranger).

[13] *See, e.g.*, Tedford v. Warner-Lambert Co., 327 F.3d 423, 427 (5th Cir. 2003) (arguing that Congress did not intend for Section 1446(b) to allow plaintiffs to completely circumvent removal based on diversity jurisdiction and "thereby undermin[e] the very purpose of diversity jurisdiction"); A.L.I., FEDERAL JUDICIAL CODE REVISION PROJECT 466 (2004) [hereinafter A.L.I., JUDICIAL CODE PROJECT] (observing that "[c]urrent law invites contrivance to frustrate defendants' legitimate rights of removal by a variety of stratagems").

[14] *See* 28 U.S.C. § 1446(b) (2000); 14C CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3731 (4th ed. 2009) (observing that most courts apply the one-year bar literally even in the face of obvious tactical maneuvering by the plaintiff because such courts believe it is up to Congress to alter the "plain meaning" of the statute, but noting that a minority of courts has recognized an equitable exception). For a more detailed discussion of the two contradictory approaches taken by federal courts, see *infra* notes 89–130 and accompanying text. Many commentators agree that the statutory language poses an absolute bar to removal after expiration of the one-year year period, regardless of forum manipulation by the plaintiff. *See, e.g.*, Lewis, supra note 3, at 233; E. Kyle McNew, *Are Rules Just Meant to be Broken? The One-Year Two-Step in* Tedford v. Warner-Lambert Co., 62 WASH. & LEE L. REV. 1315, 1361–62 (2005). *But see* Haiber, *supra* note 6, at 664 (arguing that there is "no statutory prohibition . . . against the application of traditional equitable exceptions to the one-year bar when a plaintiff has engaged in gamesmanship to defeat removal").

[15] *See Tedford*, 327 F.3d at 423–29.

[16] *See id.* at 427–29.

[17] *See id.* at 426–29. In addition, the Third Circuit Court of Appeals has held that the one-year bar is procedural, rather than jurisdictional, and therefore subject to waiver, suggesting that equitable tolling may be available in the Third Circuit as well. *See* Ariel Land Owners, Inc. v. Dring, 351 F.3d 611, 614–15 (3d Cir. 2003).

and unambiguous language in Section 1446(b) providing that "a case may not be removed on the basis of [diversity] jurisdiction . . . more than 1 year after commencement of the action."[18] For example, the Fourth and Sixth Circuits have found that the one-year bar is absolute.[19]

Even if one assumes that the one-year bar is procedural, and therefore subject to equitable exceptions, the question remains whether recognizing an equitable exception is good policy.[20] At first blush, it appears reasonable for courts to prevent plaintiffs' blatant forum manipulation by recognition of such an exception based on basic principles of fairness—it is simply unfair for plaintiffs to manipulate jurisdiction to prevent removal to federal court.[21] In an effort to preserve defendants' right to remove, serious proposals have been made to amend Section 1446(b) so as to allow removal more than one year after commencement based on equitable considerations or in the interest of justice.[22] Based on its determination that the one-year period is "overbroad and easily abused,"[23] the American Law Institute proposed deleting the one-year bar from Section 1446(b) and amending Section 1447(b) so as to grant district courts discretion to remand diversity cases removed more than one year after commencement when remand is "in the interest of justice."[24] Interestingly, the Fifth Circuit approvingly cited a tentative draft of the A.L.I. recommendation in its *Tedford* opinion.[25] Most

[18] *See, e.g.*, Brock v. Syntex Labs., Inc., Nos. 92-5740, 92-5766, 1993 WL 389946, at *1 (6th Cir. Oct. 1, 1993) (holding that the courts are without power to alter the unmistakably clear language of the statute); Jones Mgmt. Servs., LLC v. KES, Inc., 296 F. Supp. 2d 892, 894 (E.D. Tenn. 2003) (following Sixth Circuit precedent and observing that "[a]ny attempt to read into the statute an 'equitable' exception amounts to judicial legerdemain"); Russaw v. Voyager Life Ins. Co., 921 F. Supp. 723, 725 (M.D. Ala. 1996) (noting that "the language of § 1446(b) contains no exceptions to the one-year limitation" and that "Congress intended that administrative expediency in allowing a case to proceed to trial in state court should outweigh the necessity of access to diversity jurisdiction").

[19] *See* Lovern v. Gen. Motors Corp., 121 F.3d 160, 163 (4th Cir. 1997) (characterizing the one-year limitation as an "absolute bar to removal"); *Brock*, 1993 WL 389946, at *1 (finding the one-year bar jurisdictional and absolute).

[20] *See* McNew, *supra* note 14, at 1360, 1362.

[21] *See* Katherine L. Floyd, *The One-Year Limit on Removal: An Ace Up the Sleeve of the Unscrupulous Litigant?* 24 GA. ST. U. L REV. 1073, 1089 (2008) (arguing it is "important and fair" to protect a defendant's right to remove).

[22] A.L.I., JUDICIAL CODE PROJECT, *supra* note 13, at 453.

[23] *Id.* at 466.

[24] *Id.* at 436–37, 463.

[25] *See* Tedford v. Warner-Lambert Co., 327 F.3d 423, 427 n.10 (5th Cir. 2003) (citing A.L.I., FEDERAL JUDICIAL CODE REVISION PROJECT 157–58 (Tentative Draft No. 3 1999)).

recently, the Federal Courts Jurisdiction and Venue Clarification Act of 2009 was introduced in the House of Representatives and is currently awaiting action by Congress.[26] The bill authorizes removal more than one year after commencement based upon equitable considerations, including bad faith forum manipulation by the plaintiff.[27] Given the circuit court split and the current proposals to legislatively recognize an equitable exception to the one-year bar, it is critical to examine whether the equitable exception works effectively and creates benefits sufficient to warrant sacrificing the efficiency and certainty of an absolute bar.[28]

While one of the clear drawbacks of the equitable exception is that it requires costly case-by-case analysis of the equities involved in each case removed after the one-year period, another unavoidable difficulty is that it will result in vague and varying standards, given that each judge will apply the equitable exception differently.[29] An additional problem created by the exception is that its broadness invites defendants to remove cases when there is only a weak argument for application of the exception.[30] Defendants are very rarely sanctioned for erroneously removing a case, and even if the case is remanded, the defendant benefits from the delay and disruption of the state court proceedings.[31] Examination of post-*Tedford* cases removed based upon an alleged equitable exception demonstrates that district courts remand the vast majority of cases after finding no equitable justification for removal after one year.[32] This high remand rate suggests that defendants are purposefully abusing removal to gain a strategic delay in state court after forcing plaintiffs to expend resources filing and litigating remand motions.[33] In addition to disrupting and delaying state court

[26] *See* Federal Courts Jurisdiction and Venue Clarification Act of 2009, H.R. 4113, 111th Cong. (as introduced on Nov. 19, 2009). The bill is supported by the Judicial Conference of the United States and was largely drafted by its Committee on Federal-State Jurisdiction. Admin. Office of the U.S. Courts, *Pending Bills Await Action in 111th Congress*, The Third Branch, http://www.uscourts.gov/News/The Third Branch/10-08-01/Pending_Bills_Await_Action_in_111th_Congress.aspx (last visited Aug. 14, 2010).

[27] H.R. § 105.

[28] *See id.*; WRIGHT ET AL., *supra* note 14, at 609.

[29] For a discussion of district court cases applying the *Tedford* equitable exception in an inconsistent manner, see *infra* notes 256–73 and accompanying text.

[30] *See infra* Part VII for a more detailed discussion of these issues.

[31] *See infra* Part VII for a more detailed discussion of these issues.

[32] *See infra* Part VI for a more detailed analysis of the post-*Tedford* cases involving an alleged equitable exception to the one-year bar.

[33] *See infra* Part VII for a more detailed discussion of these issues.

proceedings and increasing the overall cost of litigation, recognition of the equitable exception will also increase the federal courts' docket at a time when many district courts are already burdened by removal/remand litigation.[34] Such litigation is so prevalent in some areas that pending remand motions outnumber all other pending motions combined.[35] When determining whether the equitable exception is good policy, not only must one weigh these unwelcome and inevitable consequences against the expected benefits, but one must also consider the federalism concerns raised by removal based upon diversity, which are even greater when a case is removed to federal court well after commencement.[36]

This Article examines whether an equitable exception to the one-year bar causes more evils than it cures. Part II discusses the federalism concerns raised by the exercise of removal jurisdiction based upon diversity. Part III reviews the statutory law governing removal and then examines the legislative history of the one-year bar. Part IV describes the contradictory judicial interpretations of the bar. Part V summarizes and critiques the current proposals to legislatively codify an equitable exception. Part VI examines the wealth of district court cases involving the equitable exception decided since *Tedford* to determine what patterns emerge and what conclusions may be drawn therefrom.[37] Significantly, in the overwhelming majority of analyzed cases, more than eighty-three percent, the district courts found that the facts did not warrant recognition of an equitable exception.[38] In light of this staggering remand rate and the

[34] *See* Martin v. Franklin Capital Corp., 546 U.S. 132, 140 (2005) ("The process of removing a case to federal court and then having it remanded back to state court delays resolution of the case, imposes additional costs on both parties, and wastes judicial resources.").

[35] *See, e.g.*, Arnold v. State Farm Fire and Cas., 277 F.3d 772, 774 (5th Cir. 2001) (commenting on the prevalence of removal/remand litigation in Mississippi federal courts); Tom Lee, *Comments From the Bench: Honorable Tom S. Lee, U.S. District Court Judge for the Southern District of Mississippi*, THE MISS. LAWYER 27, 27 (Oct.-Nov.-Dec. 2004) (reporting that seventy-five percent of all pending motions were removal/remand related motions).

[36] *See* A.L.I., JUDICIAL CODE PROJECT, *supra* note 13, at 471 (acknowledging that removal after one year can raise federalism concerns); *see also infra* notes 37–58 and accompanying text (discussing the federalism concerns).

[37] In the more than seven years since *Tedford* was decided by the Fifth Circuit, district courts have cited *Tedford* in more than one hundred cases involving removal more than one year after commencement. For a thorough discussion and analysis of these cases, see *infra* notes 230–62, the accompanying text, Table A (included in Part VI), and Tables B, C, D, E, F, G, H, and I attached hereto.

[38] *See infra* Tables A, B, C, D, E, F, G, H, and I.

federalism concerns raised by removal based upon diversity jurisdiction, Part VII considers whether the recognition of the equitable exception is a welcome improvement in the law or is more akin to the opening of Pandora's box,[39] and argues that the equitable exception should not be judicially recognized or legislatively established because the costs of the resulting removal/remand litigation will far outweigh the likely marginal benefits.[40]

## II. FEDERALISM CONCERNS RAISED BY THE EXERCISE OF DIVERSITY JURISDICTION

Diversity jurisdiction, and consequently removal based upon diversity, raises serious federalism concerns.[41] Generally, judicial power should be coextensive with legislative power; state courts should have the authority and ability to interpret and apply state laws.[42] State courts should also be allowed to establish and fully develop state common law.[43] Diversity jurisdiction, however, restricts state judicial power because it authorizes federal courts to hear cases based on state law in the absence of an opportunity to appeal to the state's highest court.[44] Not only does diversity jurisdiction impede the development of state law by diverting cases from state to federal court, but, in cases involving novel or ambiguous issues of state law, it also requires federal courts to predict state law by making an *Erie* guess.[45] Federal prediction of state law is problematic because federal

[39] "Pandora's box" refers to a source of troubles and is based upon the Greek myth in which the gods gave Pandora a box but forbid her to open it. *See* WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 850 (1987). When she did open it, she "loosed a swarm of evils upon mankind." *Id.*

[40] *See infra* Part V.

[41] *See* Univ. of S. Ala. v. Am. Tobacco Co., 168 F.3d 405, 411 (11th Cir. 1999) (stating that "removal jurisdiction raises significant federalism concerns"); A.L.I., JUDICIAL CODE PROJECT, *supra* note 13, at 471 (acknowledging that removal poses federalism concerns); Scott Dodson, *In Search of Removal Jurisdiction*, 102 NW. U. L. REV. 55, 70–71 (2008) (discussing the federalism concerns raised by diversity jurisdiction); Percy, *supra* note 1, at 201–03 (discussing the federalism concerns raised by diversity jurisdiction).

[42] Alexander Hamilton made this same argument to justify the need for a federal judiciary. *See* THE FEDERALIST NO. 80, at 474–75 (Alexander Hamilton) (Clinton Rossiter ed., 1961); *see also* A.L.I., STUDY OF THE DIVISION BETWEEN STATE AND FEDERAL COURTS 99 (1969) [hereinafter A.L.I., STUDY OF THE DIVISION].

[43] *See* A.L.I., STUDY OF THE DIVISION, *supra* note 42, at 99–100.

[44] *See id.*

[45] *See id.*; HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 142–43 (1973); Dolores K. Sloviter, *A Federal Judge Views Diversity Jurisdiction Through the Lens of*

courts often err in predicting state law.[46] More importantly, however, when federal courts predict state law, they are essentially making the very same policy considerations that were reserved to the states by the Constitution. [47]

Removal based upon diversity jurisdiction exacerbates the federalism concerns because it "plucks a case from a state court of competent jurisdiction, without the state court's consent, and deposits the case in the federal system, all at the whim of one of the parties" and often "after the state court has become invested in it and expended judicial resources overseeing it."[48] Due to these very substantial concerns, the Supreme Court has long held that courts must strictly construe statutes conferring diversity and removal jurisdiction.[49] For instance, in *Healy v. Ratta*, the Court held:

> The policy of the statute [conferring diversity jurisdiction] calls for its strict construction. The power reserved to the states, under the Constitution . . ., to provide for the determination of controversies in their courts, may be restricted only by the action of Congress in conformity to the judiciary sections of the Constitution . . . . Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined.[50]

Relying on the precedent from *Healy* and congressional intent to restrict removal jurisdiction, the Court later held that removal statutes must also be construed narrowly.[51] Congress should carefully weigh these same

*Federalism*, 78 VA. L. REV. 1671, 1675–77, 1680 (1992).

[46] *See* Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism After Erie*, 145 U. PA. L. REV. 1459, 1500 (1997); Sloviter, *supra* note 45, at 1680–81.

[47] *See* Clark, *supra* note 6, at 1501–02; Sloviter, *supra* note 45, at 1687 ("When federal judges make state law . . . judges who are not selected under the state's system and who are not answerable to its constituency are undertaking an inherent state court function."). Some have argued that these federalism concerns are so great that diversity jurisdiction should be abolished entirely. *See, e.g.*, Sloviter, *supra* note 45, at 1673–74.

[48] *See* Dodson, supra note 41, at 70.

[49] Healy v. Ratta, 292 U.S. 263, 270 (1934).

[50] *Id.*

[51] *See* Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 108–09 (1941). Since *Shamrock* was decided, almost seventy years ago, courts have strictly construed removal statutes. *See, e.g.*, Syngenta Crop Prot., Inc. v. Henson, 537 U.S. 28, 32 (2002) (holding that removal statutes must

federalism concerns when considering any legislation that is likely to increase removal based upon diversity jurisdiction.[52]

## III. REMOVAL, THE ONE-YEAR BAR, AND LEGISLATIVE HISTORY

### *A. The Controlling Removal Statutes*

The provision in Section 1446(b)[53] prohibiting removal based on diversity more than one year after commencement of the action was added in 1988 as part of an effort to reduce the federal court caseload and to prevent removal to federal court after "substantial progress has been made in state court."[54] The amendment not only curbs the administrative inefficiency created by requiring a second judge to become familiar with a case after substantial progress has been made in another jurisdiction, but it also avoids the wasteful delay and disruption of cases that are nearing, or are in the midst of, trial.[55] Before the amendment, there was nothing to prevent a diverse defendant from removing to federal court if the plaintiff settled with the non-diverse defendant just prior to or during trial in state court.[56] For example, if the plaintiff settled with the sole non-diverse defendant after the case had been completely tried but while the jury was still reaching a verdict, the diverse defendant could remove at that time, thereby necessitating an entirely new trial in federal court.[57] The statutory language clearly states that "a case may not be removed on the basis of [diversity] jurisdiction . . . more than 1 year after commencement of the action"[58] and makes no provision for an equitable exception to the one-year

be strictly construed). For an argument that congressional inaction in the wake of *Shamrock* and its progeny indicates that Congress essentially agrees with and has ratified strict construction of removal statutes, see McNew, *supra* note 14, at 1328–36. For an argument discounting the federalism concerns raised by diversity jurisdiction and arguing that strict statutory construction is unwarranted, see Haiber, *supra* note 6, at 611–12.

[52] *See, e.g.*, A.L.I., STUDY OF THE DIVISION, *supra* note 42, at 99–100.

[53] 28 U.S.C. § 1446(b) (2000).

[54] H.R. REP. NO. 100-889, at 44–45, 72 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5982, 6005, 6032–33.

[55] *See id.* at 72.

[56] *See id.*

[57] *See id.*

[58] 28 U.S.C. § 1446(b).

limitation even though the removal statutes contain an equitable exception elsewhere.[59]

In order to fully understand the effect of the 1988 amendment to Section 1446(b), a brief review of the controlling removal statutes is essential. To be removable, the case must be one that the plaintiff could have originally filed in federal district court.[60] All cases within the federal district court's original jurisdiction, however, are not removable.[61] Section 1441(b) prohibits removal of diversity cases in which an in-state defendant has been properly "joined and served." [62] Thus, a case may be properly removed to federal court based on diversity jurisdiction if the parties are completely diverse, more than $75,000.00 is in controversy, and no defendant is a citizen of the forum state.[63]

If the case is removable based upon the original complaint, the defendant may remove within thirty days after receiving a copy of the complaint.[64] If the case is not initially removable, the defendant may remove within thirty days after receipt of "an amended pleading, motion, order or other paper" from which it is first ascertainable that the case "is or has become removable."[65] The notice of removal must be filed in the district court for the district and division in which the state court sits and must state the grounds for removal jurisdiction.[66] Once the defendant has filed the notice of removal in federal district court, served all parties with a copy of the notice, and filed a copy of such notice with the state court clerk, the removal is effected and the state court no longer has jurisdiction.[67]

---

[59] *See id.* § 1441(d) (providing that in cases removed by a foreign state, "the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown").

[60] *Id.* § 1441(a) (providing that "any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants").

[61] *Id.* § 1441(b) (providing that cases removed based on jurisdiction other than federal question jurisdiction "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").

[62] *Id.*

[63] *Id.* §§ 1332, 1441(a)–(b); Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267, 267 (1806).

[64] 28 U.S.C. § 1446(b) ("The notice of removal of a civil action . . . shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief . . . .").

[65] *Id.*

[66] *Id.* § 1446(a).

[67] *Id.* § 1446(d) (providing that once removal is effected, "the State court shall proceed no further unless and until the case is remanded"). There is some confusion over exactly when the

After a case has been removed, the plaintiff then has thirty days to file a motion to remand based on any defect other than lack of subject-matter jurisdiction.[68] A motion to remand for lack of subject-matter jurisdiction may be made at any time.[69] As the party invoking jurisdiction, the removing defendant bears the burden of proving jurisdiction.[70] If the court remands the case and also finds that the removing defendant had no "objectively reasonable basis" for removal, the court may award the plaintiff costs, including attorneys' fees, incurred as a result of the erroneous removal.[71] Generally, a defendant may not appeal the district court's remand order, even if the court erred in determining there was no removal jurisdiction.[72]

### *B. The 1988 Amendments and Their Legislative History*

In 1988, Congress enacted the Judicial Improvements and Access to Justice Act, thereby amending many of the statutes governing original subject-matter jurisdiction and removal.[73] Congress established the bar on removal of diversity cases more than one year after commencement[74] to

state court is divested of jurisdiction; some courts hold that divestment occurs upon filing the notice of removal in federal district court, while others hold that divestment does not occur until a copy of the notice of removal has been filed in state court. *See* A.L.I., JUDICIAL CODE PROJECT, *supra* note 13, at 571–72.

[68] *See* 28 U.S.C. § 1447(c).

[69] *Id.*

[70] *See* Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994) (holding that the removing defendant must overcome the presumption against jurisdiction that arises because federal courts are courts of limited jurisdiction).

[71] 28 U.S.C. § 1447(c); *see also* Martin v. Franklin Capital Corp., 546 U.S. 132, 141 (2005).

[72] 28 U.S.C. § 1447(d). Prior to 1875, the Supreme Court reviewed remand orders by writs of mandamus. *See* Thomas F. Lamprecht, *How Can It Be Wrong When It Feels So Right? Appellate Review of Remand Orders Under the Securities Litigation Uniform Standards Act*, 50 VILL. L. REV. 305, 311 (2005). In 1875, the remand statutes were amended to authorize appellate review of remand orders. *Id.* The Court was overwhelmed with such appeals, prompting the 1887 legislation prohibiting appellate review of remand orders. *See id.* at 311–12. The Supreme Court has carved out a narrow exception to the general rule barring appellate review of remand orders, which exception authorizes appeals in cases where the district court's remand is based on grounds other than lack of subject-matter jurisdiction or a timely raised procedural defect. *See* Things Remembered, Inc. v. Petrarca, 516 U.S. 124, 127–28 (1995); Thermtron Prods., Inc. v. Hermansdorfer, 423 U.S. 336, 346, 351 (1976).

[73] *See* Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, 102 Stat. 4642 (1988).

[74] *Id.* at 4669.

prevent delay and disruption in state court.[75] Congress was aware that the prohibition would curtail federal jurisdiction[76] and give plaintiffs an incentive to engage in gamesmanship in order to defeat removal.[77]

Many of the other amendments in the 1988 Act were also clearly intended to reduce the federal court caseload and/or decrease wasteful litigation over forum.[78] The 1988 Act increased the minimal amount in controversy requirement for diversity cases from more than $10,000.00 to more than $50,000.00 for the explicit purpose of decreasing the federal court docket.[79]

The 1988 Act also amended Section 1447(c) so as to require the plaintiff to file a motion to remand based on a procedural defect within thirty days of removal.[80] Prior to the amendment, there was no specific time limit for motions to remand based on procedural defects; the courts simply applied a "reasonable time" requirement.[81] Congress enacted the thirty-day requirement for remands based on procedural defects to avoid "shuttling a case between two courts that each have . . . jurisdiction."[82] The amendment moderates litigation over forum because plaintiffs who fail to promptly move for remand waive their right to remand based upon a procedural defect.[83]

---

[75] H.R. REP. NO. 100-889, at 72 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5982, 6032–33.

[76] *Id.*

[77] *See* Burns v. Windsor Ins. Co., 31 F.3d 1092, 1097 n.12 (11th Cir. 1994) ("Congress has recognized and accepted that, in some circumstances, plaintiff[s] can and will intentionally avoid federal jurisdiction."); David D. Siegel, Commentary on 1988 Revision of Section 1446, *noted following* 28 U.S.C.A. § 1446, at 193 (West 1996) (commenting that the prohibition "can invite tactical chicanery").

[78] *See* H.R. REP. NO. 100-889, at 45.

[79] Judicial Improvements and Access to Justice Act § 201; H.R. REP. NO. 100-889, at 44–45. It was estimated that the amendment would result in a forty percent decrease in the federal court caseload. H.R. REP. NO. 100-889, at 45. The increase in the amount in controversy was actually a compromise. *See id.* at 44–45. Many legislators wanted to completely abolish diversity jurisdiction. *See id.* at 44.

[80] Judicial Improvements and Access to Justice Act § 1016(c)(1). In 1996, Congress amended Section 1447(c) again by deleting the reference to motions to remand based upon procedural defects and substituting a reference to motions to remand based on "any defect other than lack of subject-matter jurisdiction." Pub. L. No. 104-219, § 1, 110 Stat. 3022, 3022 (1996).

[81] *See* Siegel, *supra* note 10, at 399. The amendment did not alter prior law authorizing motions to remand for lack of subject-matter jurisdiction at any time. *See id.* at 402.

[82] H.R. REP. NO. 100-889, at 72.

[83] *See id.*

Additionally, the 1988 Act amended Section 1447(c) so as to authorize a remanding district court to award costs, including attorneys' fees, incurred as a result of the improper removal.[84] Prior to the amendment, attorneys' fees were not included in costs, although there was a requirement that the removing defendant post a bond.[85] This amendment reflects congressional intent to more effectively deter erroneous removals.[86] Thus, the 1988 Act indicates that Congress intended to decrease the federal court caseload and curtail wasteful litigation over forum.[87] Arguably, nothing in the 1988 Act or its legislative history indicates that Congress intended the one-year bar to be subject to equitable tolling.[88]

## IV. JUDICIAL INTERPRETATION OF THE ONE-YEAR BAR IN SECTION 1446(b)

Federal courts have not uniformly interpreted the one-year bar in Section 1446(b).[89] Most federal courts find the bar to be absolute based upon the language of the statute. These courts express the view that only Congress can alter the clear meaning of the statutory limitation.[90] A minority of courts has recognized an equitable exception to prevent plaintiffs from wrongfully manipulating federal removal jurisdiction. These courts view the one-year limitation as procedural, and therefore subject to waiver and equitable considerations.[91]

### *A. Jurisdictional and Absolute*

#### 1. Fourth Circuit

In *Lovern v. General Motors Corp.*, the Fourth Circuit held that the defendant's removal within thirty days of receiving a copy of a police report and the plaintiff's responses to interrogatories, both of which indicated that the plaintiff was diverse, was timely pursuant to the second paragraph of

[84] Judicial Improvements and Access to Justice Act § 1016(c)(1).

[85] *See* Siegel, *supra* note 10, at 401.

[86] *See id.* (noting that threat posed by the money sanction is arguably as great as or greater than the threat posed by the bond requirement).

[87] *See* H.R. REP. NO. 100-889, at 45, 72.

[88] *See* Lewis, *supra* note 3, at 233; McNew, *supra* note 14, at 1361–62.

[89] See *supra* notes 14–19 and accompanying text.

[90] *See supra* notes 14–19 and accompanying text.

[91] *See supra* notes 14–19 and accompanying text.

Section 1446(b) authorizing removal of cases that are not removable based upon the initial pleading but become removable later.[92] In responding to the concern that extending the thirty-day removal period in cases that are not initially removable may give defendants the opportunity to determine whether the state court is receptive to the defendant's position, the court observed that Section 1446(b) "erect[s] an absolute bar to removal of cases in which jurisdiction is premised on [diversity] 'more than 1 year after commencement of the action.'"[93] The court suggested that the bar gives defendants an incentive to investigate promptly the grounds for removal jurisdiction, thereby making it difficult to strategically test the waters in state court before removing to federal court.[94] Although the court was not deciding whether to recognize an equitable exception to Section 1446(b), its characterization of the one-year limitation as an absolute bar appears to foreclose recognition of an equitable exception.[95]

### 2. Sixth Circuit

In *Brock v. Syntex Laboratories, Inc.*, the Sixth Circuit found that the one-year limitation is jurisdictional.[96] There, the defendant had removed the case to federal court based on diversity jurisdiction more than one year

[92] 121 F.3d 160, 163 (4th Cir. 1997).

[93] *Id.* (citing 28 U.S.C. § 1446(b) (2000)).

[94] *Id.*

[95] Numerous district courts within the Fourth Circuit have interpreted the court's *Lovern* opinion as foreclosing recognition of an equitable exception. *See, e.g.*, Culkin v. CNH Am., LLC, 598 F. Supp. 2d 758, 761 (E.D. Va. 2009) (finding that "equitable tolling is likely not available"); Lexington Market, Inc. v. Desman Associates, 598 F. Supp. 2d 707, 711–13 (D. Md. 2009) (finding the one-year bar jurisdictional and absolute based on the Fourth Circuit's "unequivocal position in *Lovern*" and the unambiguous language of the statute); Wider v. Isuzu, Inc., No. 3:06-1103-CMC, 2006 WL 1488836, at *2 (D.S.C. May 24, 2006) ("interpret[ing] *Lovern* as precluding equitable tolling of the one year limit"); U.S. Airways, Inc. v. PMA Capital Ins. Co., 340 F. Supp. 2d 699, 708 n.13 (E.D. Va. 2004) (citing *Lovern* and determining that it was "unlikely that the Fourth Circuit would adopt such an exception to § 1446(b)'s 'absolute bar' to removal"); Santee Print Works v. GE Lighting, No. C/A 3:03-2517-22, 2003 WL 24309801, at *3 (D.S.C. Sept. 16, 2003) (predicting that the Fourth Circuit would not recognize equitable tolling); Mantz v. St. Paul Fire & Marine Ins. Co., No. 2:03-0506, 2003 WL 21383830, at *2 (S.D.W. Va. June 13, 2003) (observing that the Fourth Circuit viewed the one-year bar as absolute). *But see* Rauch v. Rauch, 446 F. Supp. 2d 432, 435–36 (D.S.C. 2006) (acknowledging *Lovern* but finding an equitable exception).

[96] *See* Nos. 92-5740, 92-5766, 1993 WL 389946, at *1 (6th Cir. Oct. 1, 1993).

after commencement.[97] Almost three months after removal, the plaintiffs moved to remand, arguing removal was barred by the one-year limitation.[98] In affirming the district court's remand, the Sixth Circuit acknowledged that the plaintiffs had probably manipulated the pleadings, but found that the one-year limitation is jurisdictional based on the "unmistakably clear" language of Section 1446(b).[99]

### *B. Procedural and Subject to Equitable Considerations*

#### 1. Fifth Circuit

In *Tedford v. Warner-Lambert Co.*, the Fifth Circuit held that, despite the clear language of Section 1446(b), an equitable exception to the one-year bar arises in cases where the plaintiff has manipulated removal jurisdiction.[100] There, plaintiffs Jaretta Tedford and Maria Castro filed suit in Johnson County, Texas for injuries they allegedly sustained as a result of taking the prescription drug Rezulin.[101] The plaintiffs named Dr. Johnson, a non-diverse physician who had treated Castro, and Warner-Lambert, the diverse drug manufacturer of Rezulin, as defendants.[102] Warner-Lambert moved to sever Tedford's claims from Castro's and to transfer Tedford's claims to Eastland County, Texas, Tedford's county of residence.[103] Tedford then amended her complaint to add Dr. DeLuca, a non-diverse

[97] *Id.*

[98] *Id.* Section 1447(c) requires motions to remand based on procedural defects to be filed within thirty days of removal, while it authorizes motions to remand based on lack of subject-matter jurisdiction to be filed at any time. 28 U.S.C. § 1447(c) (2000). Section 1447(c) has since been amended to delete the reference to remand motions based on procedural defects. *See supra* note 80.

[99] *Brock*, 1993 WL 389946, at *1 (stating that it was "powerless to question the fairness of any [statutory] limits imposed on [diversity] jurisdiction" by Congress). The court did not address Section 1447(d), which generally bars appellate review of remand orders. *See* 28 U.S.C. § 1447(d). District courts within the Sixth Circuit have similarly recognized their inability to ignore the clear language of Section 1446(b). *See, e.g.*, Fortner v. K-V-A-T Food Stores, Inc., No. 3:09-CV-244, 2009 WL 4573761, at *3 (E.D. Tenn. Dec. 2, 2009) ("The statute clearly provides for a one-year limit on removal actions"); Jones Mgmt. Serv., LLC v. KES, Inc., 296 F. Supp. 2d 892, 894 (E.D. Tenn. 2003) ("Any attempt to read into the statute an 'equitable' exception amounts to judicial legerdemain.").

[100] Tedford v. Warner-Lambert Co., 327 F.3d 423, 424–25 (5th Cir. 2003).

[101] *Id.*

[102] *Id.*

[103] *Id.*

physician who had treated Tedford and prescribed Rezulin.[104] After Tedford's claims were severed and transferred to Eastland County, Texas, Warner-Lambert removed, arguing that Tedford had fraudulently joined DeLuca.[105] The district court remanded the case, presumably finding that Tedford had a reasonable possibility of recovering from DeLuca in state court.[106]

After remand, Tedford and Warner-Lambert agreed to a preferential trial date in state court.[107] DeLuca then filed a motion to abate the proceedings for sixty days based on Tedford's failure to give him proper notice as required by Texas law.[108] Immediately after expiration of the one-year period, Tedford filed a Notice of Nonsuit of DeLuca, which notice had been executed by Tedford prior to the expiration of the one-year period.[109] Warner-Lambert then removed the case a second time, alleging that Tedford had wrongfully manipulated removal jurisdiction.[110] Tedford filed a timely motion to remand, arguing that she had determined to dismiss her claims against DeLuca in order to preserve the preferential trial date agreed to by Warner-Lambert and because her lawyer, after consultation with DeLuca and his counsel, had determined that DeLuca was not morally culpable.[111] Tedford also claimed that she immediately filed the Notice of Nonsuit after DeLuca agreed to its filing.[112] The district court denied Tedford's motion to remand, finding an equitable exception to the one-year bar.[113]

---

[104] *Id.* at 425.

[105] *Id.* In order to determine whether a plaintiff has fraudulently joined a non-diverse defendant, courts within the Fifth Circuit must determine whether the plaintiff has a reasonable possibility of recovering from the non-diverse defendant. Smallwood v. Ill. Cent. R.R. Co., 385 F.3d 568, 573 (5th Cir. 2004), *cert. denied*, 544 U.S. 992 (2005) (citing Travis v. Irby, 326 F.3d 644, 646–47 (5th Cir. 2003)).

[106] *Tedford*, 327 F.3d at 425.

[107] *Id.*

[108] *Id.*

[109] *Id.* at 427–28.

[110] *Id.* at 425.

[111] *See* Appellant's Brief at 4–5, Tedford v. Warner-Lambert Co., 327 F.3d 423 (5th Cir. 2003) (No. 02-10582).

[112] *Id.* at 22 n.6. Although Tedford executed the nonsuit a few days before expiration of the one-year period, she claimed that DeLuca did not immediately agree to sign it and only did so after negotiations. *Id.*

[113] *Tedford*, 327 F.3d at 424. The district court certified its order for interlocutory appeal. *Id.*

On appeal, the Fifth Circuit concluded that "strict application of the one-year limit would encourage plaintiffs to join non-diverse defendants for 366 days simply to avoid federal court, thereby undermining the very purpose of diversity jurisdiction."[114] The Fifth Circuit approvingly cited the American Law Institute's draft proposal attempting to solve this problem by amending the removal statutes so as to entirely eliminate the one-year limitation, while granting district courts discretion to remand cases that are removed more than one year after commencement to serve "the interest of justice."[115] Noting that it had previously determined that the one-year bar is procedural rather than jurisdictional, the Court recognized an equitable exception to the one-year limitation in cases where the "plaintiff has attempted to manipulate the statutory rules for determining federal removal jurisdiction."[116]

### 2. Third Circuit

In *Ariel Land Owners, Inc. v. Dring*, the defendant removed the case based upon diversity jurisdiction almost two years after commencement.[117] More than twenty months after removal, the plaintiff moved to remand based on the one-year bar.[118] The district court granted the remand motion and the defendants then appealed, arguing that the plaintiff's remand motion was based upon a procedural, rather than jurisdictional, defect and was therefore untimely.[119] The plaintiff argued that the one-year bar is

[114] *Id.* at 427.

[115] *Id.* at 427 n.10 (citing A.L.I., FEDERAL JUDICIAL CODE PROJECT 157–58 (Tentative Draft No. 3 1999)). The draft cited by the Fifth Circuit contains the same language as the final proposal. *See infra* note 133. A.L.I., JUDICIAL CODE PROJECT 463 (Tentative Draft No. 3 1999).

[116] *Tedford*, 327 F.3d at 426, 428–29 (referring to its earlier decision in Barnes v. Westinghouse Elec. Corp., 962 F.2d 513 (5th Cir. 1992)). Commentators have argued that in recognizing an exception, the Fifth Circuit inappropriately ignored the clear statutory language of Section 1446(b). *See, e.g.*, Lewis, *supra* note 3, at 233 ("While arguably a laudable attempt at preventing plaintiffs from benefiting from clear forum manipulation, the *Tedford* approach suffers from the fact that the plain language of § 1446(b) does not allow for equitable exceptions and the legislative history does not contemplate their creation."); McNew, *supra* note 14, at 1362 (concluding that the Fifth Circuit "overstepped its role" when it recognized the equitable exception). *But see* Haiber, *supra* note 6, at 664 (urging courts to follow *Tedford* and arguing that there is "no statutory prohibition . . . against the application of traditional equitable exceptions to the one-year bar when a plaintiff has engaged in gamesmanship to defeat removal").

[117] *See* 351 F.3d 611, 612 (3d Cir. 2003).

[118] *See id.*

[119] *See id.* at 612–13. Section 1447(c) authorizes motions to remand based on lack of subject-

jurisdictional, and that, pursuant to Section 1447(d), remand orders based upon lack of subject-matter jurisdiction are not reviewable on appeal.[120] Citing *Thermtron Products, Inc. v. Hermansdorfer*,[121] the Third Circuit held that it could hear the appeal only if the district court had exceeded its statutory authority to remand by entertaining an untimely motion to remand based on a procedural defect.[122] The court reasoned that the jurisdictional requirements for removal are no greater than those applicable to cases originally filed in federal court and that the one-year limitation and the thirty-day requirement should be treated consistently.[123] The court therefore held that the one-year limitation is procedural and subject to waiver.[124]

As demonstrated by these divergent judicial interpretations of the one-year bar, it is not easy to discern whether the one-year bar is jurisdictional or procedural.[125] Neither the statutory language nor its legislative history offers determinative insight.[126] Even if one assumes that the one-year bar is procedural, it does not necessarily follow that it should be subject to extension or tolling based upon equitable considerations.[127]

For purposes of this Article, the important inquiry is to determine whether extending the one-year period based upon equitable considerations is good policy. If the costs of recognizing an equitable exception to the

matter jurisdiction to be filed at any time but requires motions to remand based on other defects to be filed within thirty days of removal. 28 U.S.C. § 1447(c) (2000).

[120] *See Ariel Land Owners*, 351 F.3d at 613.

[121] 423 U.S. 335, 344–51 (1976) (holding that Section 1447(d) does not bar appellate review of remand orders based on grounds other than a lack of subject-matter jurisdiction or a timely raised defect in removal procedure). *See also supra* note 72 and accompanying text.

[122] *See Ariel Land Owners*, 351 F.3d at 613.

[123] *See id.* at 614–15.

[124] *See id.*

[125] For a thoughtful proposal about how to resolve the jurisdictional versus procedural dilemma, see Dodson, *supra* note 41. There is also a circuit court split over whether the forum defendant rule is jurisdictional or procedural. *See id.* at 82–85.

[126] *See* Yosef Rothstein, *Ask Not For Whom the Bell Tolls: How Federal Courts Have Ignored the Knock on the Forum Selection Door Since Congress Amended Section 1446(b)*, 33 COLUM. J.L. & SOC. PROBS. 181, 190–98 (2000) (concluding that the plain meaning of the statute arguably supports both interpretations and further concluding that the legislative history of the 1988 amendment is ambiguous).

[127] *See* Scott Dodson, *Mandatory Rules*, 61 STAN L. REV. 1, 1–10 (2008) (discussing the false dichotomy over whether statutory provisions are jurisdictional and absolute or procedural and subject to equitable considerations and arguing that there are often excellent reasons to have a mandatory procedural rule).

one-year bar are too great, it would be best for Congress to simply clarify that the one-year bar is jurisdictional and absolute, or that it is procedural but nevertheless mandatory.[128] A procedural but mandatory one-year bar that is not subject to equitable considerations would serve the interests of finality, "conserve[] judicial resources by avoiding the need to litigate a host of potential equitable issues," and "constrain[] judicial discretion and thus promote[] fairness and equity across cases."[129] The obvious problem with a mandatory one-year bar is that it is likely to produce seemingly unfair results in cases where plaintiffs successfully manipulate jurisdiction and prevent removal.[130] In order to determine whether the costs of recognizing an equitable exception to the one-year bar are greater than the benefits, this Article will carefully consider current legislative proposals to codify the equitable exception, examine and analyze the numerous cases applying the judicially recognized equitable exception, consider the federalism concerns previously discussed, and forecast the incentives that will likely be created by recognition of an equitable exception.

## V. LEGISLATIVE PROPOSALS

### *A. The A.L.I. Project*

In 2004, the American Law Institute published its recommended revisions to the Federal Judicial Code.[131] It concluded that the one-year bar made it too easy for plaintiffs to prevent removal by adding a non-diverse defendant with the intention of dismissing such defendant after the expiration of the one-year period.[132] Therefore, it recommended that the one-year bar be completely removed from Section 1446(b) and that Section 1447(b) be amended so as to grant district courts discretion to remand cases that have been removed based on diversity more than one year after commencement if remand is in the interest of justice.[133] The A.L.I.

[128] *See id.* at 10 (arguing that certain areas of the law might call for the "inflexibility" of a mandatory rule "over equity").

[129] *See id.* (discussing the virtues of procedural but mandatory rules).

[130] *See id.* (stating that the "primary detraction" of any mandatory procedural rule is that it is likely to produce "harsh and unfair [results] in specific cases").

[131] *See* A.L.I., JUDICIAL CODE PROJECT, *supra* note 13.

[132] *See id.* at 466.

[133] *Id.* at 466–67. Revised Section 1447(b) would provide in pertinent part:

(b) *Remand in interest of justice*. If a civil action has been removed under section[]

proposal requires a plaintiff to file a motion to remand "in the interest of justice" within thirty days of removal.[134]

Although similar to the *Tedford* equitable exception, the proposal actually operates very differently.[135] By completely removing the one-year bar and requiring the plaintiff to move for remand within thirty days, the A.L.I. proposal contemplates that all cases removed more than one year after commencement are within the district court's jurisdiction; otherwise, the plaintiff could move to remand based on "the interest of justice" at any time, given that motions to remand based on lack of subject-matter jurisdiction may be made at any time.[136] The A.L.I. proposal does not indicate who bears the burden of proving that remand is or is not "in the interest of justice."[137] Under the *Tedford* equitable exception, the removing defendant bears the burden of proving subject-matter jurisdiction and therefore bears the burden of proving equitable considerations warranting removal after the one-year bar.[138] Under the A.L.I. proposal, however, a case that is removed more than one year after commencement is within the court's jurisdiction.[139] Thus absent any provision to the contrary, the plaintiff seeking to remand "in the interest of justice" apparently bears the burden of proving that remand serves justice.[140] A requirement that the plaintiff prove that remand is "in the interest of justice" creates tension with the longstanding obligation of federal courts to construe removal statutes narrowly and to remand cases when there is some doubt about federal court jurisdiction.[141]

> 1441(a) . . . of this chapter more than one year after the commencement of the action, and if the sole basis for removal is the jurisdiction conferred by section[] 1332 . . . of this title, the district court may in the interest of justice remand the action to the State court from which it was removed. No such remand shall be ordered except upon motion of a party filed within [thirty days after the removal].

*Id.* at 463.

[134] *Id.* at 463–64.

[135] *See* McNew, *supra* note 14, at 1347–49.

[136] *See id.* at 1349–50.

[137] A.L.I., JUDICIAL CODE PROJECT, *supra* note 13, at 466–67.

[138] *See* Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994) (holding that the removing defendant must overcome the presumption against jurisdiction that arises because federal courts are courts of limited jurisdiction).

[139] A.L.I., JUDICIAL CODE PROJECT, *supra* note 13, at 340–41.

[140] *See* McNew, *supra* note 14, at 1347–48.

[141] *See id.* (observing that this aspect of the A.L.I. proposal renders presumptive remands a

Another, and more obvious, drawback of the A.L.I. proposal is the difficulty in defining and quantifying when remand serves the interest of justice.[142] The A.L.I. acknowledged that the proposed revision grants district courts "broad equitable discretion"[143] but suggested that cases construing the "in the interest of justice" standards in Sections 1404 and 1406 of the venue transfer statutes would provide courts with guidance as to how to construe the proposed revision.[144] Contrary to the A.L.I.'s suggestion, the construction of the same language in the venue statutes is not likely to be of much assistance.[145] Many courts give deference to the plaintiff's choice of forum when weighing the "in the interest of justice" standard under Section 1404(a).[146] The proposal fails to indicate whether deference should be given to the plaintiff's choice of forum.[147] Although giving deference to the plaintiff's choice of forum might be consistent with the current obligation to construe removal statutes narrowly,[148] the proposal offers no guidance on this issue.[149]

Another factor relevant to the venue transfer decision in cases based on diversity jurisdiction is the controlling state law.[150] Courts are more likely to transfer a case to another federal court in a foreign state if the law of that foreign state will control, based on the assumption that the transferee federal court is much more familiar with the state law of the state in which it sits.[151] Consideration of this factor will not give district courts much help

nullity).

[142] *See id.* at 1351.

[143] *See* A.L.I., JUDICIAL CODE PROJECT, *supra* note 13, at 471.

[144] *See id.* at 467. Section 1404(a) authorizes a district court to transfer venue to any other district where the case could have been brought "[f]or the convenience of parties and witnesses" and "in the interest of justice." 28 U.S.C. § 1404(a) (2000).

[145] *See* McNew, *supra* note 14, 1351–53.

[146] *See* David E. Steinberg, *The Motion to Transfer and the Interests of Justice*, 66 NOTRE DAME L. REV. 443, 488 n.236 (1990) (citing Howell v. Tanner, 650 F.2d 610, 616 (5th Cir. 1981) ("The plaintiff's choice of forum should not be disturbed unless it is clearly outweighed by other considerations.")).

[147] *See* A.L.I., JUDICIAL CODE PROJECT, *supra* note 13, at 341.

[148] For a discussion of the judicial obligation to construe removal statutes narrowly, see *supra* notes 49–51 and accompanying text.

[149] *See* McNew, *supra* note 14, at 1353–54.

[150] *See* 15 CHARLES ALAN WRIGHT & ARTHUR MILLER, FEDERAL PRACTICE AND PROCEDURE § 3854 (3d ed. 1998); Steinberg, *supra* note 146, at 494.

[151] *See* Kafack v. Primerica Life Ins. Co., 934 F. Supp. 3, 8 (D.D.C. 1996) (the "interests of justice are best served by having a case decided by the federal court in the state whose laws

when determining whether to remand diversity cases because the state court where the case originated would typically be viewed as the court having the most expertise with respect to state law.[152]

When determining whether to transfer venue, district courts also consider the relative backlog of the courts and the speed with which a trial may occur.[153] Although docket congestion may be a relevant factor when determining which federal court should hear a case, it is arguably an inappropriate factor when determining whether a state or federal court should hear a case, given the important federalism concerns at stake.[154] Moreover, in many states, this factor might systemically weigh in favor of federal court due solely to the fact that federal courts in some areas have greater resources than state courts and are therefore able to resolve cases more quickly.[155] Thus, as demonstrated, many of the factors relevant to determining whether a transfer of venue is "in the interest of justice" are not relevant to, and should not control, whether remand is "in the interest of justice."[156]

Furthermore, many commentators have suggested that the "in the interest of justice" standards in the venue statutes have completely failed to produce uniformity and predictability and have invited unwarranted transfer motions that unnecessarily delay resolution of the merits of the case and add to the federal court burden.[157] Given the difficulties associated with construing the "in the interest of justice" standard in the venue statutes, it is overoptimistic to expect their construction to enlighten and assist judges attempting to construe the "in the interest of justice" standard in the A.L.I. proposal.[158]

govern the interests at stake").

[152] *See* 15 WRIGHT & MILLER, *supra* note 150, at § 3854.

[153] *See, e.g.*, P & S Bus. Mach., Inc. v. Canon USA, Inc., 331 F.3d 804, 808 (11th Cir. 2003) (finding "docket congestion, if proven, may be an appropriate consideration in a § 1404 motion to transfer"); *see also* Steinberg, *supra* note 146, at 500–01.

[154] For a discussion of these federalism concerns, see *supra* notes 41–51 and accompanying text.

[155] *See* Steinberg, *supra* note 146, at 500–01.

[156] *See* McNew, *supra* note 14, at 1352–53.

[157] *See* 15 WRIGHT & MILLER, *supra* note 150 (characterizing the "in the interest of justice" standard in Section 1404(a) as "extremely amorphous and somewhat subjective"); Steinberg, *supra* note 146, at 446 (concluding that the law governing Section 1404(a) transfers "is in chaos" and observing that the "ad hoc balancing" by district courts has failed to yield uniform, predictable results).

[158] *See* McNew, *supra* note 14, at 1351 (remarking that "courts struggle to find a uniform

One of the A.L.I.'s illustrations attempts to further elaborate on the "in the interest of justice" standard by stating that the district court should consider "all the circumstances pertaining to the case," including "federalism concerns and efficient judicial administration as well as the conduct and convenience interests of the parties."[159] This statement really raises more questions than it answers. The A.L.I. in no way describes how to weigh these factors and essentially seems to put them on equal footing, even though federalism concerns and efficient judicial administration are arguably much more important considerations than the "convenience interests of the parties."[160] Although the A.L.I. directs courts to consider the conduct of the parties, it does not specify what conduct is relevant or how it is to be weighed.[161] Does a court have to find that the plaintiff purposefully engaged in forum manipulation or acted in bad faith? How egregious must the forum manipulation be in order for it to tilt the scales in favor of denying a motion to remand? What conduct on the part of the defendant is relevant? Case law indicates that the defendant's vigilance in protecting the right to remove is relevant to the *Tedford* equitable exception,[162] but the A.L.I. proposal does not specify any particular relevant conduct on the part of the plaintiff or defendant.[163] Despite the A.L.I.'s attempt to elucidate the "remand in the interest of justice" standard, there is every reason to believe that such standard will be as amorphous, subjective, and problematic as the "in the interest of justice" standard in the venue statutes.

### *B. The Federal Courts Jurisdiction and Venue Clarification Act of 2009*

In an attempt to foreclose plaintiffs' gamesmanship of the one-year bar, the Federal Courts Jurisdiction and Venue Clarification Act of 2009 would amend Section 1446 so that amended Section 1446(b)(3) would retain the

interpretation and application of the interest of justice language").

[159] A.L.I. JUDICIAL CODE PROJECT, *supra* note 13, at 471.

[160] Although not entirely clear, "efficient judicial administration" presumably turns on the degree of progress in state court before removal. The further a case has progressed in state court, the less efficient it is to remove it to federal court.

[161] *See* A.L.I., JUDICIAL CODE PROJECT, *supra* note 13, at 471.

[162] *See* Baby Oil, Inc. v. Cedyco Corp., 654 F. Supp. 2d 508, 515 (E.D. La. 2009); Daniel Mineral Dev., Inc. v. Petroleum Dev. Co., No. H-07-1558, 2007 WL 2315218, at *3–4 (S.D. Tex. Aug. 10, 2007).

[163] *See* A.L.I., JUDICIAL CODE PROJECT, *supra* note 13, at 471.

one-year bar "unless equitable considerations warrant removal."[164] Amended Section 1446(b)(3) would specify that "[s]uch equitable considerations include whether the plaintiff has acted in bad faith, whether the defendant has acted diligently in seeking to remove the action, and whether the case has progressed in State court to a point where removal would be disruptive."[165] The bill further provides that in diversity cases removed more than one year after commencement, "a finding that the plaintiff deliberately failed to disclose the actual amount in controversy in order to prevent removal . . . shall be deemed an equitable consideration . . . that warrants removal."[166]

[164] Federal Courts Jurisdiction and Venue Clarification Act of 2009, H.R. 4113, 111th Cong. § 105 (2009). Amended Section 1446(b)(3) would provide:

> If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action, unless equitable considerations warrant removal. Such equitable considerations include whether the plaintiff has acted in bad faith, whether the defendant has acted diligently in seeking to remove the action, and whether the case has progressed in State court to a point where removal would be disruptive.

*See id.*

[165] *Id.*

[166] *Id.* § 105(b). With respect to cases that are not initially removable because the amount in controversy requirement is not met but later become removable, the bill would disallow removal during the one-year period if the case is being tried or is set for trial within thirty days unless "the plaintiff deliberately failed to disclose the actual amount in controversy in order to prevent removal." *Id.* The bill also attempts to reduce some of the difficulty associated with determining the amount in controversy. *See id.* § 104. For example, it authorizes the use of declarations. *See id.* If a plaintiff files a binding declaration in state court within the complaint or in addition to the complaint stipulating that the plaintiff will not seek or accept an award greater than $75,000.00, the case may not be removed as long as the plaintiff abides by the declaration. *See id.* If the plaintiff fails to abide by such declaration, the defendant may remove the case. *See id.* The bill also authorizes a plaintiff to file such a declaration in the federal district court within thirty days of removal. *See id.* Upon such filing, the district court must remand the case "unless equitable circumstances warrant retaining the case." *Id.* The use of declarations in this manner is consistent with the current practice of many district courts to remand a case if the plaintiff has filed an affidavit stating that the plaintiff will not seek or accept an amount greater than the jurisdictional minimum. *See, e.g.*, Guy Jones, Jr. Constr. Co. v. Zurich-Am. Ins. Group, No. 4:05CV61, 2006 WL 1983404, at *1–2 (N.D. Miss. July 13, 2006). The bill further provides that in cases where the plaintiff demands a specific sum below the amount in controversy requirement and state law

While the bill lists specific equitable factors for courts to consider—the plaintiff's bad faith, the defendant's diligence in preserving the right to remove, and progress in state court—the language of the bill suggests that this is not an exhaustive list of factors and that other factors may also be relevant.[167] Thus, the amendment invites removing defendants to be as imaginative as possible in articulating equitable considerations in support of removal after one year. Given the broad range of relevant equitable considerations that are likely to be urged by removing defendants and the absence of any direction as to how to weigh the various equities involved in a given case, it is almost certain that courts will consider and weigh equities in unique and dissimilar methods, thereby yielding a standard that is amorphous and unpredictable.[168]

Another difficulty created by the proposed amendment is that it would require courts to make findings about plaintiffs' subjective motives.[169] By listing the plaintiff's bad faith as a relevant equitable consideration, the bill suggests that conduct that falls short of bad faith is irrelevant.[170] Requiring a finding of bad faith is totally consistent with the goal of preventing wrongful forum manipulation by plaintiffs. In order to find bad faith, however, courts will have to make factual determinations about the plaintiff's subjective motive.[171] In order to make such determinations, courts will often have to engage in lengthy and fact-intensive reviews.[172]

forbids recovery of an amount greater than the amount demanded, the amount demanded "shall be deemed to be the amount in controversy." H.R. 4113, § 105. In cases in which the plaintiff does not demand a specific sum or demands a specific sum but state law permits recovery of damages in excess of the amount demanded, the defendant may remove but will be required to prove the amount in controversy by a preponderance of the evidence. *See id.* at 9. While these provisions may achieve some beneficial results, this Article does not attempt to carefully analyze these provisions and will instead focus upon the bill's proposed codification of the equitable exception.

[167] *See* H.R. 4113, § 105.

[168] *See id.*

[169] *See* Chambers v. NASCO, Inc., 501 U.S. 32, 47 n.11 (1991) (observing that courts have difficulty applying subjective bad faith standards).

[170] *See* H.R. 4113, § 105.

[171] *See* Smallwood v. Ill. Cent. R.R. Co., 385 F. 3d 568, 578 n.4 (5th Cir. 2004) (Jolly, J., dissenting) (observing that subjective tests require the court "to penetrate the mind of the plaintiff").

[172] *See* Chambers, 501 U.S. at 47 n.11 (observing that courts have difficulty applying subjective bad faith standards); Smallwood, 385 F. 3d at 578 n.4 (Jolly, J., dissenting) (observing that courts generally eschew subjective tests because they often require the court "to penetrate the mind of the plaintiff and turn removal hearings into lengthy proceedings").

In cases where the plaintiff dismisses a non-diverse defendant after the one-year period, the court will have to determine whether the plaintiff engaged in bad faith by joining the non-diverse defendant solely for the purpose of defeating removal and without any intention of ever actually pursuing the claim against the non-diverse defendant.[173] This will require the court to evaluate the degree to which the plaintiff prosecuted the claim against the non-diverse defendant.[174] For example, district courts applying *Tedford* consider whether the plaintiff pursued written discovery from the non-diverse defendant, whether the plaintiff deposed the non-diverse defendant, and whether the plaintiff designated an expert in support of the claim against the non-diverse defendant.[175] In other cases, the court will have to determine whether the plaintiff's proffered reason for dismissal is true.[176] For example, Tedford argued that she determined to dismiss the non-diverse physician to preserve a preferential trial date in state court that had been agreed to by the diverse defendant.[177] She also contended that by the time of dismissal, her counsel had determined, based upon investigation, that the physician had followed the drug manufacturer's instructions and was therefore not morally to blame.[178] The Fifth Circuit apparently found this explanation lacking, given the suspicious timing of the dismissal.[179] In addition to the difficulty posed by any test requiring courts to make findings about subjective intent, inquiry into the plaintiff's motive in this context will, more often than not, really involve the plaintiff's counsel's motive and strategy, thereby raising the possibility that plaintiff's counsel will have to

[173] *See* H.R. 4113, § 105.

[174] *See, e.g.*, *In re* Propulsid Prods. Liab. Litig., MDL No. 1355, 2007 WL 1668752, at *1 (E.D. La. June 6, 2007) (the court considered the fact that the plaintiff had not served discovery requests on the non-diverse defendants, had not offered any expert opinion against them, and had not deposed them).

[175] *See, e.g.*, Kemp v. CTL Distrib., Inc., No. 09-1109-JJB-SCR, 2010 WL 2560447, at *6–7 (M.D. La. May 6, 2010) (the court considered the fact that the plaintiffs did not serve any discovery on the non-diverse defendants); *In re* Propulsid Prods. Liab. Litig., MDL No. 1355, at *1 (the court considered the fact that the plaintiff had not served discovery requests on the non-diverse defendants, had not offered any expert opinion against them, and had not deposed them); *In re* Vioxx Prods. Liab. Litig., No. MDL 1657, 2005 WL 3542885, at *4 (E.D. La. Nov. 23, 2005) (the court considered the fact that the plaintiffs had designated an expert against the non-diverse defendant).

[176] *See, e.g.*, *Tedford v. Warner-Lambert Co.*, 327 F.3d 423, 427–29 (5th Cir. 2003).

[177] *See* Appellant's Brief, *supra* note 111, at 4–5.

[178] *See id.*

[179] *See Tedford*, 327 F.3d at 427–29.

testify live or by affidavit.[180] Inquiries into counsel's motive and strategy should not be made without careful consideration, given the negative impact such intrusive questioning is likely to have.[181]

Another problematic provision related to the plaintiff's conduct is the provision equating a plaintiff's deliberate failure to disclose the actual amount in controversy with bad faith.[182] Arguably, a plaintiff who fails to disclose the true amount in controversy is not engaging in bad faith unless the plaintiff has a duty to disclose such information.[183] In states that allow a plaintiff to file a complaint seeking a money judgment for an unspecified sum, the plaintiff has no obligation to reveal the amount in controversy.[184] Obviously, if asked during a deposition, in an interrogatory, or in a request for admission to state the amount in controversy, the plaintiff has an obligation to truthfully respond, but in the absence of such a request, the plaintiff has no obligation to voluntarily disclose the amount in controversy and is not engaging in any inappropriate conduct by merely remaining silent.[185] It is up to the removing defendant to prove the amount in controversy,[186] and therefore, the onus should be on the defendant to propound some discovery request in state court in order to trigger a duty to disclose. To the extent the bill equates a failure to disclose with bad faith, the bill wrongfully assumes that the plaintiff automatically has a duty to disclose the amount in controversy while the action is pending in state court.[187]

---

[180] Hickman v. Taylor, 329 U.S. 495, 510–11 (1947) (cautioning against "unwarranted inquiries into the files and the mental impressions of an attorney" and expressing concern that forcing counsel to testify about trial strategy would be demoralizing).

[181] *See id.*

[182] The bill suggests that conduct short of bad faith is irrelevant but then provides that if the court finds that the "plaintiff deliberately failed to disclose the actual amount in controversy to prevent removal," such finding is "an equitable consideration . . . that warrants removal." *See* Federal Courts Jurisdiction and Venue Clarification Act of 2009, H.R. 4113, 111th Cong. § 105(b)(5)(B) (2009).

[183] *See, e.g.*, Morgan Bldgs. & Spas, Inc. v. Advantage Mfg., Inc., No. 3:06-CV-0149-D, 2006 WL 1140657, at *1 (N.D. Tex. May 1, 2006) ("reject[ing] the premise that the mere failure to plead the amount of damages in the original and amended petition is evidence of active concealment").

[184] *See id.*

[185] *See id.*

[186] *See* Univ. of S. Ala. v. Am. Tobacco Co., 168 F.3d 405, 411–12 (11th Cir. 1999); Boyer v. Snap-on Tools Corp., 913 F.2d 108, 111 (3d Cir. 1990), *cert denied*, 498 U.S. 1085 (1991).

[187] *See supra* notes 182–85.

A final problem with the proposed amendment is that although it purports to limit removal after one year to cases involving the requisite equitable considerations, it fails to contemplate that removal is effected upon the defendant's filing of the notice of removal.[188] Thus, a defendant is able to remove more than one year after commencement merely by alleging equitable considerations in support of removal.[189] The removal is effected before there is any finding by the court concerning the relative equities.[190] Even if a case is eventually remanded because the court determines that the equities do not warrant removal, the plaintiff suffers harm because the case has been delayed and the plaintiff has been forced to file and litigate a remand motion.[191] The absence of any "ex ante constraint" arguably "invite[s] erroneous, and perhaps even knowingly erroneous, removal."[192]

Thus, although the proposed amendment would thwart some instances of forum manipulation by plaintiffs, it is far from clear that the benefits that are likely to be achieved by the amendment outweigh the problems and difficulty it is likely to create. Given that the proposed amendment essentially codifies the *Tedford* equitable exception, a review of the manner in which district courts have applied the *Tedford* exception over the past several years should assist in predicting how effective the proposed amendment would be. Such analysis will also illuminate the degree to which the equitable exception is good policy.

## VI. ANALYSIS OF POST-*TEDFORD* CASES

### *A. Fifth Circuit Case Applying* Tedford

Since *Tedford*, the Fifth Circuit has reviewed a district court's recognition of the equitable exception in only one case.[193] In *Brower v.*

[188] *See* Federal Courts Jurisdiction and Venue Clarification Act of 2009, H.R. 4113, 111th Cong. § 105 (2009).

[189] *See id.*

[190] *See* Theodore Eisenberg & Trevor W. Morrison, *Overlooked in the Tort Reform Debate: The Growth of Erroneous Removal*, 2 J. EMPIRICAL LEGAL STUD. 551, 560–61 (2005).

[191] Circle Indus. USA, Inc. v. Parke Constr. Grp., Inc., 183 F.3d 105, 109 (2d Cir. 1999) ("While the simplicity of this procedure facilitates removal, it also exposes a plaintiff to the possibility of abuse, unnecessary expense and harassment if a defendant removes improperly, thereby requiring plaintiff to appear in federal court, prepare motion papers and litigate, merely to get the action returned to the court where the plaintiff initiated it.").

[192] Eisenberg & Morrison, *supra* note 190, at 561.

[193] In a different case, the defendant attempted to appeal the district court's remand, arguing

*Staley, Inc.*,[194] the court affirmed the district court's recognition of the equitable exception even though the district court made no finding that the plaintiff engaged in forum manipulation.[195] There, Brower filed a complaint in state court against Staley, Inc. seeking damages in an amount less than $75,000.00 for injuries allegedly sustained in an automobile collision.[196] At the time he filed the original complaint, Brower's outstanding medical bills totaled about $5,500.00.[197] In response to requests for admissions, Brower denied that he was seeking more than $75,000.00 and refused to admit that he would not amend his complaint more than one year after commencement so as to seek more than $75,000.00.[198] The defendant removed the case and the district court remanded, finding that the defendant had not demonstrated the requisite amount in controversy.[199]

Brower continued to receive treatment, and a few weeks before the expiration of the one-year period, he had a surgical diskectomy.[200] Brower's counsel first received medical records and bills related to the surgery two days after the one-year period expired.[201] Shortly thereafter, Brower's counsel notified Staley, Inc. that Brower intended to seek additional damages for the surgery and moved to amend the complaint.[202] After Brower filed the amended complaint, the defendant removed the case a second time.[203]

The district court found that although Brower's counsel may not have been aware of the exact surgery or cost until after the expiration of the one-

that the district court erred in failing to recognize the equitable exception. *See* Certa v. Cain, 308 F. App'x 845, 846 (5th Cir. 2009). The Fifth Circuit held that it had no jurisdiction to hear the appeal, citing 28 U.S.C. § 1447(d), which prohibits appeal of remand orders based on grounds within 28 U.S.C. § 1447(c). *See id.* at 847.

[194] Brower v. Staley, Inc., 306 F. App'x 36 (5th Cir. 2008).

[195] *See id.* at 38.

[196] *See* Brower v. Staley, Inc., No. 2:05CV212PA, 2006 WL 839469, at *1 (N.D. Miss. March 27, 2006), *aff'd*, 306 F. App'x 36 (5th Cir. 2008).

[197] *See id.*

[198] *See id.*

[199] *See id.*

[200] *See id.*

[201] *See id.* at *2.

[202] *See id.*

[203] *See id.*

year period, Brower had agreed to the surgery within the one-year period and failed to update the defendant.[204] The court further determined:

> [G]iven that the very nature of the term "equitable" in the equitable exception doctrine means fairness, malfeasance is not necessarily required to utilize the exception. Giving the benefit of the doubt to both parties, it appears equitable to allow removal since there is now no dispute that there is diversity of citizenship and an amount in controversy in excess of $75,000.00. The court has no reason to doubt that had the defendant known about the extra medical bills for the November 2004 surgery, [it] would have removed on or before December 8, 2004.[205]

The district court did not make a finding that Brower had purposefully engaged in forum manipulation and did not comment on the degree of progress in state court.[206] Nor did the court suggest that the defendant had been vigilant in protecting its right to remove.[207] Instead, the court was apparently willing to overlook the fact that the defendant received notice of the increased damages months before it removed.[208] The only justification offered by the district court for its finding that removal was proper is the court's suggestion that removal was fair.[209]

On appeal, the Fifth Circuit affirmed, noting that Brower knew about the surgery but did not tell the defendant about it until after expiration of the one-year period.[210] The court agreed that the defendant would have timely removed if it had known about the surgery and further held that "Brower's actions regarding the amount of damages . . . sought in his pleadings justify an equitable exception."[211] The court offered no further

[204] *See id.*

[205] *Id.* at *3.

[206] *See id.* at *1–3.

[207] *See id.*

[208] *See id.* at *2. Although the defendant admitted receiving correspondence from the plaintiff's counsel giving notice of the increase in damages on January 19, 2005, the defendant did not remove until October 14, 2005. *See id.*

[209] *See id.* at *3.

[210] *See* Brower v. Staley, 306 F. App'x 36, 38–39 (5th Cir. 2008).

[211] *Id.* at 38.

elaboration on the specific equitable considerations justifying removal after more than one year.[212]

The court's opinion in *Brower* is troubling because the district court made no specific findings justifying application of the equitable exception.[213] The district court and the Fifth Circuit both suggested that removal was proper because the defendant would have removed if it had known the true amount in controversy.[214] Rather than clarifying the equitable exception recognized in *Tedford*, the Fifth Circuit's opinion in *Brower* only serves to blur the boundaries of the equitable exception and invites defendants to remove based upon any conceivable allegation that removal after the one-year period is somehow fair. Given that the Federal Courts Jurisdiction and Venue Clarification Act directs courts to consider all equitable considerations warranting removal, it would create an equally vague removal standard.[215]

## *B. District Court Cases Applying* Tedford

### 1. High Remand Rate

Since the Fifth Circuit decided *Tedford*, district courts within the Fifth Circuit have cited *Tedford* in sixty-one cases involving removal more than one year after commencement.[216] The district courts found removal proper based upon the equitable exception in only thirteen cases.[217] In forty-eight cases, they found that there was an insufficient factual basis for an equitable exception.[218] Thus, the district courts within the Fifth Circuit recognized an equitable exception in only twenty-one percent of cases and remanded the remaining seventy-nine percent of cases after finding that the facts did not justify removal.[219]

[212] *See id.* at 36–39.

[213] *See id.*

[214] *See id.* at 38.

[215] *See* Federal Courts Jurisdiction and Venue Clarification Act of 2009, H.R. 4113, 111th Cong. § 105(b)(3)(D) (2009).

[216] *See infra* Table A.

[217] *See infra* Table C, attached hereto.

[218] *See infra* Table D, attached hereto.

[219] *See infra* Table A.

*Table A.*[220]
Remand Rates for Removals Based upon
Alleged Equitable Exceptions

| | Number of Cases Properly Removed Based upon an Equitable Exception | Number of Cases Remanded After the Court Found No Factual Basis for an Equitable Exception | Remand Rate |
|---|---|---|---|
| District Court Cases Within the Fifth Circuit | 13 | 48 | 78.6% |
| District Court Cases Outside the Fifth Circuit | 3 | 32 | 91.4% |
| All District Court Cases | 16 | 80 | 83.3% |

Since *Tedford*, district courts outside the Fifth Circuit have cited *Tedford* in forty-six cases involving removal more than one year after commencement.[221] The district courts found removal proper based upon the equitable exception in only three cases.[222] In thirty-two cases, they found that there was an insufficient factual basis for an equitable exception.[223] In sixteen cases, the district courts rejected *Tedford*.[224] Excluding the sixteen cases in which the district courts rejected *Tedford* entirely, the courts recognized an equitable exception in only nine percent of cases and remanded the remaining ninety-one percent of cases after finding that the facts did not warrant removal.[225]

[220] This Table summarizes information in Tables C, D, E, and F, attached hereto.

[221] *See infra* Tables F and G, attached hereto.

[222] *See infra* Table E, attached hereto.

[223] *See infra* Table F, attached hereto.

[224] *See infra* Table G, attached hereto.

[225] *See supra* Table A.

Combining the relevant cases within and outside the Fifth Circuit, the district courts recognized an equitable exception in only sixteen of ninety-six cases—less than seventeen percent.[226] They remanded the overwhelming majority of cases, more than eighty-three percent, because the facts of the case did not warrant recognition of an equitable exception.[227] Thus, for every case that was properly removed, more than four were erroneously removed and eventually remanded.[228]

A recent study indicates that the remand rate for all cases removed based upon diversity jurisdiction is almost twenty percent.[229] Although a remand rate of twenty percent is significant and may suggest a need for removal reform,[230] it pales in comparison to the remand rate of eighty-three percent for diversity cases removed based upon an alleged equitable exception.[231] A remand rate of eighty-three percent is extremely troubling, especially when one considers the costs and time delays imposed upon the judicial system and the litigants, particularly plaintiffs.[232]

This high remand rate is not surprising given the very broad nature of the equitable exception. Moreover, removing defendants have every incentive to remove, even when they are aware the grounds for removal are extremely weak or nonexistent.[233] Removal is worth attempting even when there is no legitimate basis for removal because, at worst, the removing defendant will end up back in state court after having successfully delayed final resolution.[234] Although most examined cases were remanded within six months of removal, a substantial number remained in federal court for longer periods of time while the plaintiffs' remand motions were

[226] *See supra* Table A.

[227] *See supra* Table A.

[228] *See supra* Table A.

[229] *See* Eisenberg & Morrison, *supra* note 190, at 564.

[230] *See id.* at 576 (concluding that erroneous removal, especially erroneous removal based upon diversity jurisdiction, is a growing problem necessitating consideration of removal reform).

[231] *See supra* Table A.

[232] *See* Eisenberg & Morrison, *supra* note 190, at 553.

[233] *See* Lewis, *supra* note 3, at 236. In eighteen of the forty-eight cases remanded to district courts within the Fifth Circuit, the district court found that the defendant had not vigilantly protected the right to remove, either because the defendant had the opportunity to remove within one year but failed to do so or because the defendant failed to remove within thirty days of receiving notice that the case had become removable. *See infra* Table D, attached hereto.

[234] *See* Christopher R. McFadden, *Removal, Remand, and Reimbursement Under 28 U.S.C. § 1447(c)*, 87 MARQ. L. REV. 123, 133 (2003).

pending.[235] Discovery on the merits is often stayed while the plaintiff's motion to remand is pending in federal court, thereby exacerbating the delay.[236] Even when a case is remanded shortly after removal, the actual delay in final resolution is likely to be much longer than the duration of the removal, because, upon remand back to state court, the case will probably be assigned a new trial date that is much later than the original trial date in state court.[237]

This time delay harms plaintiffs because they typically want to resolve cases as quickly as possible so that they may receive compensation.[238] The delay also economically harms plaintiffs and benefits defendants in those cases where the defendant is not required to pay prejudgment interest.[239] Not only does the delay decrease the true value of any settlement or judgment the plaintiff recovers, but it also places an additional financial strain on plaintiffs by forcing them to expend resources litigating removal/remand issues.[240] A recent study revealed that defendants are much more likely to erroneously remove cases involving individual plaintiffs rather than corporate plaintiffs, "perhaps because such plaintiffs suffer more from delay and added cost."[241]

There is very little to deter defendants from removing even when the basis for removal is extremely weak, given that courts rarely award attorneys' fees to the plaintiff based upon the defendant's erroneous removal.[242] In this context, the risk of a fee award is minimized even more

[235] Of the forty-eight cases remanded to district courts within the Fifth Circuit, one was remanded more than one year after removal, one was remanded more than ten months after removal, eight were remanded six to nine months after removal, and the remainder were remanded within six months of removal. *See infra* Table D, attached hereto. Of the thirty-two cases remanded by district courts outside the Fifth Circuit, one case was remanded more than a year after removal, five cases were remanded six to nine months after removal, and the remainder were remanded within six months of removal. *See infra* Table F, attached hereto.

[236] *See* McFadden, *supra* note 234, at 133.

[237] *See* Eisenberg & Morrison, *supra* note 190, at 553, 561–62.

[238] *See* Lewis, *supra* note 3, at 236.

[239] *See* McFadden, *supra* note 234, at 133.

[240] *See* Eisenberg & Morrison, *supra* note 190, at 553 (observing that defendants may remove cases to force their less well-financed opponents to incur additional litigation expense).

[241] Christopher Terranova, *Erroneous Removal as a Tool for Silent Tort Reform: An Empirical Analysis of Fee Awards and Fraudulent Joinder*, 44 WILLAMETTE L. REV. 799, 799–800 (2008).

[242] *See* McFadden, *supra* note 234, at 125 (suggesting that the threat of fee awards "suboptimally deter[s] erroneous removals" because fee awards are too infrequent).

because the broad nature of the equitable exception makes it relatively easy for the defendant to suggest some arguably reasonable factor, no matter how weak, supporting removal. With respect to the eighty cases that were remanded because the district court found no factual basis for an equitable exception, the district court awarded costs and attorneys' fees in only one case.[243] The lack of deterrence is evidenced not only by the overwhelming remand rate but also by the fact that many of the examined cases had been removed multiple times.[244] More than twenty-five percent of the eighty relevant remanded cases had been removed twice and one had been removed three times.[245]

The extremely high remand rate might be explained in small part by the fact that the equitable exception is a new rule requiring court interpretation to establish the boundaries of the exception. Given the broad nature of the equitable exception, however, it is unlikely that continued ad hoc balancing by district courts will further define the boundaries of the exception. Thus, it is unrealistic to expect the remand rate to decrease significantly in the future as the result of further clarification of the rule. Defendants are likely to continue to have every incentive to remove, especially given that they risk only a very minimal chance of being sanctioned for erroneous removal and will always gain an advantageous delay in the state court

[243] *See infra* Tables D and F, attached hereto. In the sole case in which the court awarded fees, the defendants had removed more than one year after commencement, arguing that complete diversity was created by a defendant's change in state citizenship after commencement. *See In re* Estate of Luis v. Gonzales, No. H-06-3686, 2006 WL 3716665, at *1 (S.D. Tex. Dec. 14, 2006). Finding that the law clearly provides that citizenship is to be determined at the time of commencement, the court found that the defendant had no objectively reasonable basis for removal. *See id.*

[244] Of the eighty relevant remanded cases, fifteen cases within the Fifth Circuit had been removed twice, eight cases outside the Fifth Circuit had been removed twice, and one case within the Fifth Circuit had been removed three times. *See infra* Tables D and F, attached hereto.

[245] *See supra* note 244. Defendants have also filed improper appeals of the district court's remand order and improper motions to reconsider the district court's remand order, further evidencing that there is little to deter the defendant from improperly asserting removal jurisdiction. *See, e.g.*, Certa v. Cain, 308 F. App'x 845, 846–47 (5th Cir. 2009) (finding no authority to hear the removing defendant's appeal of the district court's remand order where the removing defendant argued that the district court erred in failing to find an equitable exception to the one-year bar); Omi's Custard Co. v. Relish This, LLC, No. 04CV861 DRH, 2006 WL 2460573, at *5–6 (S.D. Ill. Aug. 24, 2006) (rejecting the defendant's argument that the one-year bar was not at issue in a case where the defendant moved for reconsideration of the district court's remand order more than one year after commencement based upon the plaintiff's revised calculation of damages).

proceedings.[246] Based upon the district courts' record in applying the *Tedford* equitable exception, demonstrating a staggering rate of erroneous removals at great cost to the court system and the parties, it is difficult to argue that the equitable exception is good public policy.[247] Moreover, the excessively high remand rate suggests that defendants are abusing removal based upon alleged equitable exceptions for strategic gain.[248]

### 2. Inconsistent Application

Application of the *Tedford* equitable exception has also proven problematic because district courts have not consistently or uniformly decided similar cases. District courts are inconsistent in their treatment of plaintiffs who simply fail to disclose the true amount in controversy.[249] Some courts have held that, in states where plaintiffs are not required to request a specific sum in the complaint, plaintiffs do not have a duty to voluntarily disclose the amount in controversy.[250] Other courts have treated the plaintiff's failure to disclose as evidence supporting removal based upon forum manipulation.[251] This tension would also likely arise under the legislation pending before Congress given that it equates a plaintiff's failure to disclose with bad faith.[252]

---

[246] *See* Eisenberg & Morrison, *supra* note 190, at 553; *supra* note 243 and accompanying text.

[247] *See* Eisenberg & Morrison, *supra* note 190, at 553 (discussing how the time and resources expended in remanding an erroneous removal is a great toll on the judicial system).

[248] *See id.* at 561–62, 576 (discussing examples of removal abuse and concluding that the remand rate of almost twenty percent for cases removed based upon diversity suggests purposeful and abusive erroneous removal by defendants).

[249] While some plaintiffs purposefully and actively conceal the true amount in controversy, others simply remain silent and fail to voluntarily disclose the true amount in controversy. *See, e.g.*, Brower v. Staley, No. 2:05CV212PA, 2006 WL 839469, at *1–3 (N.D. Miss. Mar. 27, 2006), *aff'd*, 306 F. App'x 36 (5th Cir. 2008).

[250] *See, e.g.*, Space Maker Designs, Inc. v. Steel King Indus., Inc., No. 3:09-CV-2386-B, 2010 WL 2680098, at *3 (N.D. Tex. July 6, 2010) (requiring the removing defendant to prove that the plaintiff purposefully concealed the amount of damages); Morgan Bldgs. & Spas, Inc. v. Advantage Mfg., Inc., No. 3:06-CV-0149-D, 2006 WL 1140657, at *1 (N.D. Tex. May 1, 2006) ("reject[ing] the premise that the mere failure to plead the amount of damages in the original and amended petition is evidence of active concealment").

[251] *See, e.g.*, *Brower*, 2006 WL 839469, at *2 (N.D. Miss. Mar. 27, 2006) (noting that the plaintiff knew the damages would be greater than $75,000.00 and failed to disclose).

[252] *See supra* notes 182–85 and accompanying text.

District courts also disagree over whether the equitable exception is applicable in the absence of bad faith forum manipulation.[253] Some courts have found removal proper in the absence of bad faith while others have not.[254] In the former category of cases, the district courts found that removal was appropriate, despite the absence of evidence of bad faith on the part of the plaintiff.[255] In the latter category, the district courts held that proof of manipulation by the plaintiff was required in order to invoke the equitable exception.[256]

In light of the Fifth Circuit's recent opinion in *Brower* suggesting that a finding of forum manipulation by the plaintiff is unnecessary, courts applying the *Tedford* equitable exception will now be forced to determine when removal is equitable in cases where there is no evidence of forum manipulation.[257] Thus, rather than narrowing the range of removable cases, the court's *Brower* opinion greatly increases the likelihood that district courts will resolve similar cases in dissimilar fashion because *Brower* directs district courts to weigh all equitable factors supporting removal

[253] *See infra* notes 255–56 and accompanying text.

[254] *See infra* notes 255–56 and accompanying text.

[255] *See, e.g.*, Villaje Del Rio, Ltd. v. Colina Del Rio, LP, No. SA-07-CV-947-XR, 2008 WL 2229469, at *1–2 (W.D. Tex. May 28, 2008) (finding the equitable exception applicable while assuming the plaintiff acted in good faith); Lafazia v. Ecolab, Inc., No. 06-491ML, 2006 WL 3613771, at *3 (D.R.I. Dec. 11, 2006) (recognizing an equitable exception despite finding that the diverse defendant's removal was delayed by the plaintiff's sloppy pleading rather than an attempt at deception); *Brower*, 2006 WL 839469, at *3 (recognizing an equitable exception absent a finding of forum manipulation by the plaintiff).

[256] *See, e.g.*, Space Maker Designs, Inc., v. Steel King Indus., Inc., No. 3:09-CV-2386-B, 2010 WL 2680098, at *3 (N.D. Tex. July 6, 2010) (remanding the case after finding that the defendant failed to prove that the plaintiff purposefully concealed the amount of damages); Daniel Mineral Dev., Inc. v. Petroleum Dev. Co., No. H-07-1558, 2007 WL 2315218, at *3–4 (S.D. Tex. Aug. 10, 2007) (remanding the case after finding that the plaintiff had not engaged in forum manipulation). Many courts have required the removing defendant to show clear and egregious forum manipulation by the plaintiff. *See, e.g.*, Baby Oil, Inc. v. Cedyco Corp., 654 F. Supp. 2d 508, 515–16 (E.D. La. 2009) (remanding the case because the removing defendant had not shown egregious forum manipulation by the plaintiff); Joiner v. McLane Co., No. 08CV130, 2008 WL 1733655, at *3 (W.D. La. Apr. 14, 2008) (remanding the case because the removing defendant had not shown egregious forum manipulation by the plaintiff). To the extent that the *Tedford* equitable exception requires courts to calculate the degree of egregiousness of the plaintiff's conduct, such requirement is likely to cause dissimilar outcomes in similar cases because courts will not identically differentiate between levels of egregiousness. *See* McNew, *supra* note 14, at 1359–60.

[257] *See Brower*, 2006 WL 839469, at *3 (recognizing an equitable exception absent a finding of forum manipulation by the plaintiff).

rather than find forum manipulation by the plaintiff.[258] By enlarging the criteria upon which an equitable exception can be based, the Fifth Circuit all but ensured that dissimilar treatment of similar cases by district courts will continue.[259] This lack of uniformity will only cause the equitable exception standard to be more ambiguous and unpredictable. The proposed legislation pending before Congress, which lists the plaintiff's bad faith as only one relevant factor to consider and directs district courts to weigh all equitable considerations, will almost certainly yield a similarly amorphous standard.[260]

## VII. BRIGHT LINE ONE-YEAR BAR VERSUS CASE-BY-CASE ANALYSIS OF THE EQUITABLE EXCEPTION

Whether to recognize an equitable exception to the one-year bar poses the classic dilemma between choosing a bright-line rule, and reaping the efficiency and predictability benefits associated therewith, or choosing a rule that gives district courts great discretion to weigh the equities involved on a case-by-case basis to better serve fairness concerns while sacrificing efficiency and predictability. When determining whether the benefits of an equitable exception outweigh the costs, it is important to consider the incentives the equitable exception is likely to create and to predict its effectiveness in light of those incentives.

Neither a judicially recognized nor a legislatively established equitable exception is likely to effectively deter plaintiffs from manipulating the forum by joining non-diverse defendants to defeat removal. In response to the exception, plaintiffs will simply continue to prosecute their claims against the non-diverse defendants beyond the one-year period. Moreover, the equitable exception is likely to cause plaintiffs to refuse to settle with non-diverse defendants in order to prevent removal. If a plaintiff is willing to settle with a non-diverse defendant even though such settlement will almost certainly lead to removal by the diverse defendant, the plaintiff is likely to require the non-diverse defendant to pay a settlement premium that not only reflects the settlement value of the claim against the non-diverse defendant but that also reflects the reduced value of the remaining claim against the diverse defendant that will be resolved in federal court after

[258] *See id.*

[259] *See id.*

[260] *See* Federal Courts Jurisdiction and Venue Clarification Act of 2009, H.R. 4113, 111th Cong. § 105(b)(5)(B) (2009).

removal. In so doing, application of the equitable exception may unintentionally increase litigation costs because non-diverse defendants who would be dismissed or released pursuant to a settlement agreement in the absence of such an exception will now be forced to defend the claim to a final resolution or pay a settlement premium over and above the actual value of the claim.

The A.L.I. proposal to completely abolish the one-year bar and grant district courts discretion to remand "in the interest of justice" would also incentivize plaintiffs to sue non-diverse defendants and continue to prosecute the claims against the non-diverse defendants until final resolution.[261] The A.L.I. concluded that removing the one-year bar is unlikely to significantly disrupt state court proceedings because there is no evidence that late removals had a significant effect before the 1988 legislation creating the one-year bar.[262] There is no indication, however, that the A.L.I. considered that the lack of evidence of disruption could be due in part to the fact that plaintiffs simply continued to prosecute the claims against the non-diverse defendants.[263] Nor is there any indication that the A.L.I. considered the possibility that removal of the one-year bar would be ineffective in deterring manipulation of the complete diversity requirement because plaintiffs are likely to respond by discontinuing settlements with, or dismissals of, non-diverse defendants.[264]

The equitable exception may be somewhat more effective in deterring plaintiffs' manipulation of the amount in controversy requirement, but plaintiffs are likely to continue engaging in gamesmanship of the amount in controversy simply because they have nothing to lose by doing so.[265] At worst, they will be forced to litigate in federal court.[266] At best, they may successfully evade removal jurisdiction.[267]

---

[261] A.L.I., JUDICIAL CODE PROJECT, *supra* note 13, at 463, 468.

[262] *See id.* at 468.

[263] *See id.* at 463–97.

[264] *See id.*

[265] *See* McNew, *supra* note 14, at 1362–64 (predicting that the *Tedford* equitable exception and the A.L.I. proposal will not effectively deter forum manipulation by plaintiffs because plaintiffs risk nothing by engaging in such gamesmanship and further suggesting that the equitable exception will also be problematic because it will be implemented in an inconsistent manner by district courts thereby giving plaintiffs an additional incentive to forum shop for state courts in a federal district that conservatively applies the equitable exception).

[266] *See id.* at 1363.

[267] *See id.* at 1364 (concluding that "whether forum manipulation is allowed will depend on

It has not been demonstrated that an equitable exception is necessary to police manipulation of the amount in controversy in a sufficient number of cases so as to warrant its recognition. In most cases, defendants should have sufficient time in which to determine the amount in controversy before expiration of the one-year period.[268] Defendants have a wide assortment of discovery tools available to them to help them discern the amount in controversy. They can propound interrogatories to plaintiffs regarding damages. They can request plaintiffs to produce documents, electronic evidence, or other tangible things related to the calculation of damages. They can depose plaintiffs and question them under oath regarding damages. Thus, in the large majority of cases, it is reasonable to presume that defendants should be able to determine the amount in controversy before expiration of the one-year period.

Undoubtedly, and as history demonstrates, there will be some cases in which the plaintiff is able to successfully conceal the true amount in controversy until after expiration of the one-year period. Of the sixteen post-*Tedford* cases recognizing an equitable exception, only three involve manipulation of the amount in controversy by the plaintiff.[269] A plaintiff's ability to conceal the true amount in controversy during the one-year period is presumably much greater in those cases where the damages are not substantially more than $75,000.00. The greater the true amount in controversy, the easier it should be for a defendant to discover and demonstrate, within the one-year period, that more than $75,000.00 is in controversy. Assuming that the equitable exception is unlikely to effectively deter manipulation of the complete diversity requirement because plaintiffs will simply name non-diverse defendants and continue to prosecute their claims against them in such a manner as to avoid removal, and further assuming that defendants should be able to overcome manipulation of the amount in controversy requirement in the vast majority of cases by attentively using all available discovery tools, it is difficult to justify the equitable exception because it may only be necessary and effective in a very small range of cases involving manipulation of the

the individual forum" under both the *Tedford* equitable exception and the A.L.I. proposal).

[268] Filing of the complaint usually commences the civil action in state court. Although the plaintiff may delay serving the defendant until after filing the complaint, many states require the plaintiff to serve a defendant within so many days, usually 120, of filing the complaint. *See, e.g.*, ARIZ. R. CIV. P. 4(i); MISS. R. CIV. P. 4(h); N.Y. C.P.L.R. § 306-b (Consol. 2010); UTAH R. CIV. P. 4(b).

[269] *See infra* Tables C and E, attached hereto.

amount in controversy where the amount in controversy is not substantially greater than $75,000.00.

The excessively high remand rate of more than eighty-three percent also weighs heavily against recognition of the equitable exception because it demonstrates that the equitable exception standard is so broad, inconsistent, and amorphous that it encourages defendants to erroneously remove cases and arguably enables them to purposefully abuse the removal process for strategic delay.[270] The extremely high remand rate imposes tremendous costs on the state court system by disrupting proceedings in those courts for non-meritorious reasons.[271] The large number of erroneous removals also imposes significant time delays and financial costs upon plaintiffs and increases the overall cost of litigation to both parties.[272] In addition, erroneous removals waste federal judicial resources at a time when many federal district courts are experiencing substantial backlogs.[273] Legislative or additional judicial recognition of the equitable exception will only add to the federal court burden because defendants will be encouraged to remove any case in which there is the slightest reason to suggest that removal after the one-year period is equitable.

In prohibiting appellate review of most remand orders, including those where the district court erred in finding a lack of removal jurisdiction, Congress clearly determined that there are circumstances where judicial economy and efficiency are more important than protecting a defendant's right to remove.[274] Congress and courts should make the same determination when considering whether to recognize an equitable exception to the one-year bar because the exception will likely yield only marginal benefits while exacting substantial costs from the parties and the judicial system.

[270] *See supra* Table A.

[271] *See* Eisenberg & Morrison, *supra* note 190, at 553 (discussing the burden erroneous removals cause the judicial system).

[272] *See id.*

[273] *See* Martin v. Franklin Capital Corp., 546 U.S. 132, 140 (2005) (observing that erroneous removals waste judicial resources); Eisenberg & Morrison, *supra* note 190, at 553, 564 (observing that the number of erroneous removals based upon diversity jurisdiction has significantly increased in recent years); *see also supra* note 35 and accompanying text.

[274] *See* 28 U.S.C. § 1447(d) (2000); *see also supra* note 72 and accompanying text.

## VIII. CONCLUSION

In light of the significant federalism concerns discussed above, the near certainty that the resulting standard for equitable removal will be amorphous and unpredictable, the excessively high remand rate for cases removed based upon an alleged equitable exception, the probability that the equitable exception will be ineffective in deterring manipulation of the complete diversity requirement and may very well create unwanted and costly side effects, the likelihood that the equitable exception will only be necessary and effective in a small range of cases involving manipulation of the amount in controversy requirement, the substantial costs that will be imposed upon state and federal courts as well as litigants by recognition of the equitable exception, and the considerable potential for removal abuse that will be created by recognition of the equitable exception, one can only conclude that legislative or judicial recognition of the equitable exception is like opening Pandora's box—such recognition will almost certainly create more evils than it prevents.

*Table B.*[275]
Analysis of District Court Cases
Citing *Tedford*

| Table | Category of District Court Cases | Total District Court Cases |
|---|---|---|
| Table C | Post-*Tedford* District Court Cases Within the Fifth Circuit Where the Court Found an Equitable Exception to the One-Year Period | 13 |
| Table D | Post-*Tedford* District Court Cases Within the Fifth Circuit Where the Court Found an Insufficient Factual Basis for an Equitable Exception to the One-Year Period | 48 |
| Table E | Post-*Tedford* District Court Cases Outside the Fifth Circuit Where the Court Found an Equitable Exception to the One-Year Period | 3 |
| Table F | Post-*Tedford* District Court Cases Outside the Fifth Circuit Where the Court Found an Insufficient Factual Basis for an Equitable Exception to the One-Year Period | 32 |
| Table G | Post-*Tedford* District Court Cases Outside the Fifth Circuit in Which the Court Rejected the *Tedford* Equitable Exception | 16 |
| Table H | Post-*Tedford* District Court Cases Within the Fifth Circuit That Do Not Involve Removal After the One-Year Period | 41 |
| Table I | Post-*Tedford* District Court Cases Outside the Fifth Circuit That Do Not Involve Removal After the One-Year Period | 11 |

[275] As of August 13, 2010, district courts within the Fifth Circuit had cited *Tedford v. Warner-Lambert Co.*, 327 F.3d 423 (5th Cir. 2003), in 102 cases. The author analyzed each of these cases and divided them into three categories: (1) cases in which the district court found an equitable exception to the one-year period based on *Tedford* (listed in Table C); (2) cases in which the district court found an insufficient factual basis for an equitable exception to the one-year period (listed in Table D); and (3) cases that did not involve removal more than one year after commencement (listed in Table H). As of August 13, 2010, district courts outside the Fifth Circuit had cited *Tedford* in 62 cases. The author analyzed each of these cases and divided them into four categories: (1) cases in which the district court found an equitable exception to the one-year period based on *Tedford* (listed in Table E); (2) cases in which the district court found an insufficient factual basis for an equitable exception to the one-year period (listed in Table F); (3) cases in which the district court refused to follow *Tedford* (listed in Table G); and (4) cases that did not involve removal more than one year after commencement (listed in Table I).

*Table C.*
Post-*Tedford* District Court Cases Within the Fifth Circuit
Where the Court Found an Equitable Exception
to the One-Year Period (13 Total)

| | |
|---|---|
| 1. | **Kemp v. CTL Distribution, Inc., No. 09-1109-JJB-SCR, 2010 WL 2560447 (M.D. La. May 6, 2010).**<br>The plaintiffs filed a wrongful death complaint against a diverse truck terminal operator and its non-diverse individual manager. *Kemp*, 2010 WL 2560447, at *1. The defendant removed, arguing that the non-diverse individual manager had been fraudulently joined. *Id.* at *4. The plaintiffs moved to amend the complaint to add an additional non-diverse defendant. *Id.* at *1. The federal district court found that the plaintiffs had a non-frivolous claim against the new non-diverse defendant, granted the motion to amend, and remanded the case to state court. *Id.* The plaintiffs then added claims against several non-diverse defendants. *Id.* More than two years later, the plaintiffs filed another amended complaint in which they sued only the diverse truck terminal operator and its non-diverse individual manager. *Id.* at *2. The diverse defendant removed a second time. *Id.* The court found that the non-diverse defendant was improperly joined and further found that the equitable exception applied. *Id.* at *5. The court was persuaded by the fact that, after the case was remanded the first time, the plaintiffs did not serve or seek discovery from the newly added non-diverse defendants and offered vague explanations for their dismissal of the non-diverse defendants. *Id.* at *7.<br>Filed Nov. 3, 2006; removed Dec. 30, 2009; motion to remand denied May 6, 2010. [second removal] |
| 2. | **Brown v. Descheeny, No. 03:09-CV-21-HTW-LRA, 2010 WL 1141156 (S.D. Miss. Mar. 22, 2010).**<br>The plaintiff sued the diverse driver and the diverse owner of the vehicle for injuries sustained in an automobile accident and sought $74,000.00 in damages. *Brown*, 2010 WL 1141156, at *1. Less than eleven months after commencement, the plaintiff reserved the right to amend the complaint to seek more damages. *Id.* at *2. More than two years after commencement, the plaintiff designated experts and claimed she had suffered permanent injuries. *Id.* On December 12, 2008, the plaintiff sent a demand letter seeking $100,000.00. *Id.* The district court denied the motion to remand, finding that the plaintiff's waffling on the amount of damages warranted application of the equitable exception. *Id.*<br>Filed May 3, 2006; removed Jan. 12, 2008; motion to remand denied May 22, 2010. |

| | |
|---|---|
| 3. | **Villaje Del Rio, Ltd., v. Colina Del Rio, LP, No. SA-07-CV-947-XR, 2008 WL 2229469 (W.D. Tex. May 28, 2008).**<br>The plaintiff filed suit against the defendants and then shortly thereafter filed for bankruptcy. *See Villaje*, 2008 WL 2229469, at *1. One of the defendants removed to bankruptcy court. *Id.* The principal of the plaintiff then purchased the pending claim from the bankruptcy estate and moved for remand. *Id.* The bankruptcy court remanded the case and the defendants then removed to federal district court. *See id.* The federal district court found the equitable exception applicable, even assuming the plaintiff had acted in good faith. *Id.* at *2. The court concluded that the balance of interests weighed in favor of removal given that very little progress had been made in state court. *Id.*<br>Filed Apr. 27, 2006; removed Nov. 20, 2007; motion to remand denied May 28, 2008. |
| 4. | **Cousins v. Wyeth Pharm., Inc., No. 3:08-CV-310-N, 2008 WL 1883932 (N.D. Tex. Apr. 18, 2008).**<br>The plaintiff sued a diverse medical center, a diverse drug manufacturer, and several non-diverse physicians, seeking damages for injuries allegedly caused by medication. *See Cousins*, 2008 WL 1883932, at *1. When the plaintiff failed to serve the non-diverse physicians with an expert affidavit within 120 days of filing as required by state law, the non-diverse defendants filed a motion to dismiss. *Id.* Before the state court could rule on the motion, the diverse defendants removed, arguing that the plaintiff had improperly joined the non-diverse defendants. *Id.* In support of her motion to remand, the plaintiff represented that she would vigorously oppose the motion to dismiss in state court. *Id.* at *2. The court granted the motion to remand. *Id.* After the case had been remanded to state court, the plaintiff nonsuited the non-diverse defendants and the diverse defendants removed a second time. *Id.* at *1. The plaintiff's only explanation for her conduct was that it was in her best interest. *Id.* at *2. The court found that the equitable exception applied and denied the motion to remand. *Id.*<br>Filed Jan. 2, 2007; removed after Jan. 2, 2008; motion to remand denied Apr. 18, 2008. [second removal] |

| | |
|---|---|
| 5. | ***In re* Propulsid Prods. Liab. Litig., MDL No. 1355, 2007 WL 1668752 (E.D. La. June 6, 2007).**<br>The plaintiff sued diverse and non-diverse defendants in state court and, as the litigation progressed, she dismissed several of the non-diverse defendants. *In re Propulsid*, 2007 WL 1668752, at *1. On November 4, 2005, she dismissed the sole remaining non-diverse defendant and the diverse defendants removed the case to federal court shortly thereafter. *Id.* The court denied the plaintiff's motion to remand, finding that she had not served discovery on any of the non-diverse defendants, had not deposed them, had not offered any expert opinions against them, and had not provided any justifiable reason for their dismissal three years after commencement. *Id.*<br>Filed Sept. 6, 2002; removed Nov. 18, 2005; motion to remand denied June 6, 2007. |
| 6. | **Vidaurri v. H.M.R. Props., No. SA-06-CA-1124-FB, 2007 WL 1512029 (W.D. Tex. Mar. 8, 2007).**<br>The plaintiff sued the defendants for property damage and emotional distress allegedly caused by their negligent maintenance and repair of a water heater. *Vidaurri*, 2007 WL 1512029, at *1. The plaintiff sought $60,000.00 in damages. *Id.* More than one year after commencement, the plaintiff responded to a discovery request by producing a document showing that more than $89,000.00 in damages had been incurred by that date. *Id.* at *2. Shortly thereafter, the defendants removed. *Id.* The court refused to remand the case, in large part because the plaintiff had filed an earlier complaint in a separate state court action for the same damages seeking $100,000.00. *Id.* That claim was dismissed for the plaintiff's failure to prosecute. *Id.* at *7.<br>Filed June 28, 2005; removed Dec. 21, 2006; motion to remand denied Mar. 8, 2007. |
| 7. | **Taylor v. Money Sore, Inc., No. 2:05CV90-P-B, 2006 WL 1666714 (N.D. Miss. May 9, 2006).**<br>The plaintiffs filed a complaint naming diverse and non-diverse defendants. *Taylor*, 2006 WL 1666714, at *1. The diverse defendants removed, arguing that the plaintiff had improperly joined the non-diverse defendants and pointing to the fact that the plaintiffs had not served the non-diverse defendants. *Id.* The district court remanded the case, presuming that the plaintiffs would serve the non-diverse defendants. *Id.* Eight months after remand, the diverse defendants removed again because the plaintiffs had not yet served the non-diverse defendants. *Id.* The court refused to remand the case, finding the equitable exception applicable. *Id.*<br>Filed May 29, 2003; removed Nov. 12, 2004; motion to remand denied Feb. 24, 2005. |

| | |
|---|---|
| 8. | **Brower v. Staley, Inc., No. 2:05CV212PA, 2006 WL 839469 (N.D. Miss. Mar. 27, 2006), *aff'd*, 306 F. App'x 36 (5th Cir. 2008).**<br>Brower filed a complaint in state court against Staley, Inc. seeking damages in an amount less than $75,000.00 for injuries allegedly sustained in an automobile collision with a vehicle driven by one of Staley, Inc.'s employees. *Brower*, 2006 WL 839469, at *1. At that time, Brower's outstanding medical bills totaled about $5,500.00. *Id.* In response to requests for admissions, Brower denied that he was seeking more $75,000.00 but refused to admit that he would not amend his complaint more than one year after commencement so as to seek more than $75,000.00. *Id.* The defendant removed the case based on Brower's denials and the district court remanded the case back to state court, finding that the defendant had not demonstrated that more than $75,000.00 was in controversy. *Id.* As the litigation went forward, Brower continued to receive treatment from his treating physician, and on November 16, 2004, he had a surgical diskectomy. *Id.* Brower's counsel did not receive medical records or bills related to the surgery until December 10, 2004, two days after the one-year period expired. *Id.* On January 19, 2005, Brower's counsel notified the defendant of Brower's intention to seek damages for the November surgery and moved to amend the complaint to seek additional damages. *Id.* After Brower filed the amended complaint, the defendant removed the case a second time on October 14, 2005. *Id.* at *2. The district court found that although Brower's counsel may not have been aware of the exact surgery or cost until after the expiration of the one-year period, Brower had agreed to the surgery on November 3, 2004 and failed to update the defendant. *Id.* The court found the equitable exception applicable even though it made no finding that Brower had purposefully engaged in forum manipulation. *Id.* at *3.<br>Filed Dec. 8, 2003; removed Oct. 14, 2005; motion to remand denied Mar. 27, 2006. |
| 9. | **Elsholtz v. Taser Int'l, Inc., 410 F. Supp. 2d 505 (N.D. Tex. 2006).**<br>The plaintiff filed a wrongful death claim against the city, alleging that the city's negligent maintenance of a taser gun caused her son's death. *Elsholtz*, 410 Supp. 2d at 506. Four months later, the plaintiff amended the complaint to add the diverse manufacturer of the taser gun. *Id.* The city contested the claim, arguing that it had not waived sovereign immunity. *Id.* The plaintiff repeatedly requested the hearing on this issue be continued, arguing that discovery was necessary. *Id.* The hearing was finally set for August 2005. *Id.* The plaintiff dismissed the city on July 29, 2005, after which the taser gun manufacturer removed. *Id.* The court refused to remand, finding that the facts warranted application of the equitable exception. *Id.* at 506–07.<br>Filed June 22, 2004; removed Aug. 1, 2005; motion to remand denied Jan. 5, 2006. |

| | |
|---|---|
| 10. | **Morrow v. Wyeth, No. B-05-209, 2005 WL 2621555 (S.D. Tex. Oct. 13, 2005).**<br>The plaintiff filed a complaint against diverse and non-diverse defendants, seeking damages allegedly caused by the ingestion of a prescription drug. *Morrow*, 2005 WL 262155, at *1. The plaintiff did not serve any defendants at that time. *Id.* at *7. The plaintiff later amended the complaint to add additional non-diverse defendants. *Id.* The plaintiff first served the diverse defendant more than two years after commencement, at which point no other defendants had been served. *Id.* The diverse defendant removed. *Id.* The court refused to remand, finding that the non-diverse defendants had been fraudulently joined and further finding that the plaintiff's explanation that service was delayed twenty-six months because of continuing investigation did not demonstrate good faith. *Id.*<br>Filed May 29, 2003; removed July 22, 2005; motion to remand denied Oct. 13, 2005. |
| 11. | **Davis v. Merck & Co., 357 F. Supp. 2d 974 (E.D. Tex. 2005).**<br>The plaintiff sued a diverse drug manufacturer and a non-diverse doctor for injuries allegedly caused by Vioxx. *See Davis*, 357 F. Supp. 2d at 976. The diverse drug manufacturer removed, arguing fraudulent joinder. *Id.* The district court remanded. *Id.* After remand, the plaintiff failed to file an expert report against the doctor as required by state law. *Id.* The doctor moved to dismiss, which motion was granted. *Id.* at 976–77. The drug manufacturer removed. *Id.* at 977. The court refused to remand, finding that the plaintiff's failure to comply with state law indicated she never intended to pursue a claim against the doctor. *Id.* at 979.<br>Filed May 29, 2003; removed Nov. 12, 2004; motion to remand denied Feb. 24, 2005. |
| 12. | **Ardoin v. Stine Lumber Co., 298 F. Supp. 2d 422 (W.D. La. 2003).**<br>The plaintiffs filed a putative class action case against diverse and non-diverse defendants, seeking damages caused by chemically treated wood. *Ardoin*, 298 F. Supp. 2d at 426. By December 5, 2002, the plaintiffs had voluntarily dismissed all non-diverse wood treaters and retailers. *Id.* at 427. The plaintiffs argued that they made the strategic decision to dismiss the non-diverse defendants in order to make the case more manageable after determining a full recovery could be had from the other defendants. *Id.* The district court was not persuaded by this explanation and refused to remand, finding that the plaintiffs attempted forum manipulation. *Id.* at 428.<br>Filed Oct. 2001; removed Dec. 5, 2002; motion to remand denied Aug. 28. 2003. |

| | |
|---|---|
| 13. | **Brooks v. Am. Bankers Ins. Co., No. 401CV00008-PB, 2003 WL 22037730 (N.D. Miss. Aug. 20, 2003).**<br>The plaintiffs sued a diverse insurer and a non-diverse insurance agent. *See Brooks*, 2003 WL 22037730, at *1. Almost three years after commencement, the only plaintiffs who had a claim against the non-diverse defendant voluntarily dismissed all of their claims, and the diverse defendant removed. *Id.* The court refused to remand, finding that the plaintiffs engaged in forum manipulation because they had never propounded discovery to the non-diverse defendant and had not taken a default judgment against her. *Id.* at *1–2.<br>Filed Oct. 20, 2000; removed July 16, 2003; motion to remand denied Aug. 20, 2003. |

*Table D.* [276]

Post-*Tedford* District Court Cases Within the Fifth Circuit Where the Court Found an Insufficient Factual Basis for an Equitable Exception to the One-Year Period (48 Total)

| | |
|---|---|
| 1. | **Space Maker Designs, Inc. v. Steel King Indus., Inc., No. 3:09-CV-2386-B, 2010 WL 2680098 (N.D. Tex. July 6, 2010).**<br>The defendant removed after learning more than $75,000.00 was in controversy. *Space Maker*, 2010 WL 2680098, at *2. The district court remanded, finding that the removing defendant failed to demonstrate that the plaintiff knew the damages were greater than $75,000.00 at the time of pleading, much less purposefully concealed such fact. *Id.* at *5–6.<br>Filed Aug. 1, 2008; removed Dec. 15, 2009; remanded July 6, 2010. |
| 2. | **De Vida v. Nautilus Ins. Co., No. H-10-1078, 2010 WL 2541806 (S.D. Tex. June 23, 2010).**<br>A Texas plaintiff brought a state law claim against an insurance company and an adjuster, alleging that the adjuster was a Texas citizen. *De Vida*, 2010 WL 2541806, at *1–2. The insurance company removed after learning that the adjuster was not a Texas citizen and was in fact diverse from the plaintiff. *Id.* at *2. The district court remanded, holding that the insurance company failed to show that the plaintiff knew the adjuster was not a Texas citizen. *Id.* at *5. The adjuster was licensed in Texas, had performed adjustments in Texas and had listed a Texas address with the Texas Department of Insurance. *Id.* at *4.<br>Filed Feb. 27, 2009; removed Apr. 1, 2010; remanded June 23, 2010. |

[276] Triple asterisks (***) indicate that the court found that the defendant(s) did not act vigilantly to protect the right to remove, either because the defendant(s) could have removed within the one-year period or because they failed to remove within thirty days of receiving notice that the case had become removable.

| | |
|---|---|
| 3. | **Dougherty v. Petco Sw., Inc., No. 4-10-CV0133, 2010 WL 2231996 (S.D. Tex. May 28, 2010).**<br>The plaintiff sued Petco and its employee in a premises liability case. *Dougherty*, 2010 WL 2231996, at *1. Within a few months of filing the complaint, the plaintiff dismissed the non-diverse employee. *Id.* Upon being notified by Petco that it planned to remove, the plaintiff filed an amended complaint, again naming the non-diverse employee. *Id.* The state court granted the employee summary judgment because a store manager is not liable for premises liability under Texas law. *Id.* Petco then removed more than one year after commencement. *Id.* The district court remanded the case finding that Petco could have removed the case within the one-year period based on the improper joinder of the employee. *Id.* at *7–8.<br>Filed June 26, 2008; removed Jan. 14, 2010; remanded May 28, 2010.*** |
| 4. | **Davis v. Great W. Cas. Co., No. 1:09CV484HSO-JMR, 2010 WL 537075 (S.D. Miss. Feb. 9, 2010).**<br>The plaintiff sued a diverse insurance company and a non-diverse individual for wrongfully denying his insurance claim for damage to his 1987 tractor trailer. *Davis*, 2010 WL 537075, at *1. The plaintiff sought less than $75,000.00. *Id.* Almost seven years later, the plaintiff filed an amended complaint that named only the diverse insurance company and that did not specifically limit his damages to less than $75,000.00. *Id.* The insurer removed, seeking application of the equitable exception. *Id.* at *1–2. The court remanded the case because the defendant had not demonstrated that more than $75,000.00 was in controversy. *Id.* at *3.<br>Filed Oct. 16, 2002; removed July 17, 2009; remanded Feb. 9, 2010. |
| 5. | **La. State Bar Ass'n v. Weitz & Luxenberg, P.C., No. 09-6366, 2009 WL 4547686 (E.D. La. Nov. 30, 2009).**<br>The Louisiana State Bar filed suit against a law firm, asserting that it was engaged in the unauthorized practice of law. *La. State Bar Ass'n*, 2009 WL 4547686, at *1. The Bar Association then added a claim for injunctive relief against the state court clerk, seeking to have him ordered to refuse any pleadings filed by the law firm in Louisiana. *Id.* The law firm removed, arguing that federal question jurisdiction and/or diversity jurisdiction was present. *Id.* The federal district court disagreed and remanded the case. *Id.* On August 20, 2009, the state court dismissed the clerk without prejudice. *Id.* The law firm removed on September 17, 2009 and sought application of the equitable exception. *Id.* at *1–2. The court remanded again, finding no evidence of forum manipulation. *Id.* at *3.<br>Filed Jan. 16, 2008; removed Sept. 17, 2009; remanded Nov. 30, 2009. [second removal] |

| | |
|---|---|
| 6. | **Jackson v. ADM/Growmark River Sys., Inc., No. 09-3864, 2009 WL 3081448 (E.D. La. Sept. 22, 2009).**<br>The plaintiff sued her former employer for an alleged violation of the Family Medical Leave Act. *Jackson*, 2009 WL 3081448, at *1. Nine months after filing, the plaintiff sent the defendant a demand letter for $260,000.00. *Id.* In May of 2009, the plaintiff amended the petition to add a state law claim for retaliatory discharge. *Id.* The defendant then removed, arguing application of the equitable exception. *Id.* at *2. The court remanded because it was unconvinced that the plaintiff engaged in forum manipulation and also because the defendant failed to timely remove in response to the $260,000.00 demand letter. *Id.* at *3. There was no discussion of removal based on the assertion of a federal question. *Id.* at *1–3.<br>Filed Mar. 6, 2006; removed June 15, 2009, remanded Sept. 22, 2009.*** |
| 7. | **Snipes v. CSX Transp., No. 1:08CV1512HSO-JMR, 2009 WL 2872798 (S.D. Miss. Aug. 31, 2009).**<br>The plaintiff sued a diverse defendant in state court, alleging it had caused the destruction of the plaintiff's forty-four-foot boat during Hurricane Katrina. *Snipes*, 2009 WL 2872798, at *1. On January 29, 2008, the plaintiff replied to the defendant's interrogatories and made it clear that the plaintiff was seeking more than $75,000.00. *Id.* In December 2008, the plaintiff admitted he was seeking more than $75,000.00 and produced documents supporting his damage calculation. *Id.* The defendant then removed. *Id.* The district court remanded, finding that the equitable exception did not apply because there was no evidence of forum manipulation. *Id.* at *3. Moreover, the court found that the defendant had failed to remove within thirty days of learning that the amount in controversy requirement had been met. *Id.*<br>Filed Aug. 28, 2007; removed Dec. 24, 2008; remanded Aug. 31, 2009.*** |
| 8. | **Baby Oil, Inc. v. Cedyco Corp., 654 F. Supp. 2d 508 (E.D. La. 2009).**<br>The plaintiff sued diverse and non-diverse defendants regarding ownership in an oil well. *Baby Oil*, 654 F. Supp. 2d at 509. The diverse defendant removed arguing fraudulent joinder. *Id.* at 510. The district court remanded the case. *Id.* The diverse defendant removed a second time more than one year after commencement, again arguing fraudulent joinder and seeking application of the equitable exception. *Id.* The court remanded a second time, finding that the removing defendant had not shown egregious forum manipulation by the plaintiff and further finding that the removing defendant had not acted vigilantly to protect its rights since the defendant took more than four years to develop the alleged basis for removal. *Id.* at 517.<br>Filed May 13, 2004; removed July 2, 2008; remanded July 31, 2009. [second removal]*** |

| | |
|---|---|
| 9. | **Quest Acquisition, L.L.C. v. Hartford Cas. Ins. Co., No. 08-665-JJB-DLD, 2009 WL 1423435 (M.D. La. May 20, 2009).**<br>The plaintiff sued a diverse insurer and a non-diverse agent for compensation for property damage allegedly owed pursuant to an insurance policy. *Quest Acquisition*, 2009 WL 1423435, at *1. More than one year after commencement, the plaintiff sent the defendants a demand letter for $900,000.00. *Id.* at *2. The insurer then removed, arguing fraudulent joinder and seeking the application of the equitable exception. *Id.* The court remanded, finding no improper joinder and further finding that the defendant failed to prove the plaintiff engaged in forum manipulation. *Id.* at *5.<br>Filed Apr. 19, 2007; removed Oct. 17, 2008; remanded May 20, 2009. |
| 10. | **Allianz Global Risk U.S. Ins. Co. v. Gen. Elec. Co., No. 08-699JJB-DLD, 2009 WL 1181467 (M.D. La. May 1, 2009).**<br>The plaintiffs filed various state law claims against GE arising from the failure of their generator. *Alianz Global Risk U.S. Ins. Co.*, 2009 WL 1181467, at *1. Pursuant to an insurance policy, Allianz made payment to the plaintiffs and then sought to intervene and replace the original plaintiffs, in light of its subrogation interest. *Id.* Before the actual substitution, GE removed, arguing complete diversity. *Id.* The court remanded, finding that actual substitution had not taken place and further finding that GE had failed to prove complete diversity. *Id.* at *2. After Allianz was formally substituted as the plaintiff, GE removed a second time. *Id.* Allianz moved to remand based on the one-year time period. *Id.* The court remanded again, finding that GE had not introduced any evidence that the plaintiffs were engaged in forum manipulation. *Id.* at *3–4.<br>Filed Sept. 28, 2005; removed Oct. 29, 2008; remanded May 1, 2009. [second removal] |
| 11. | **Moffett Realty, Inc. v. Md. Cas. Co., No. 08-1589, 2009 WL 909270 (W.D. La. Mar. 27, 2009).**<br>The plaintiff sued a diverse and a non-diverse defendant in state court. *Moffett Realty*, 2009 WL 909270, at *1. More than a year later, the state court dismissed the non-diverse defendant, finding that the claims against it were prescribed. *Id.* The diverse defendant then removed, seeking application of the equitable exception. *Id.* The court remanded the case, finding no forum manipulation similar to that in *Tedford* and further finding that the defendant should have timely removed based on fraudulent joinder because the claims against the non-diverse defendant were clearly prescribed. *Id.*<br>Filed June 22, 2007; removed Oct. 23, 2008; remanded Mar. 27, 2009.*** |

| | |
|---|---|
| 12. | **Case v. Phillips 66 Co., No. 1:08cv95WJG, 2008 WL 5101333 (S.D. Miss. Nov. 26, 2008).**<br>The plaintiffs sued diverse and non-diverse defendants in a case alleging injuries caused by exposure to asbestos. *Case*, 2008 WL 5101333, at *1. The diverse defendants removed more than one year later, arguing that the only non-diverse defendant who had been served was fraudulently joined, as evidenced by its motion for summary judgment in state court. *Id.* The defendants also argued that the plaintiffs had not actively pursued their claims against the non-diverse defendant. *Id.* The district court remanded the case, observing that the outcome of the summary judgment motion was pending and finding no inequitable conduct on the part of the plaintiffs. *Id.* at *3–4.<br>Filed Mar. 6, 2006; removed Sept. 26, 2008; remanded Nov. 26, 2008. |
| 13. | **Ebeling v. Scottsdale Ins. Co., No. 08-4619, 2008 WL 4974804 (E.D. La. Nov. 19, 2008).**<br>The plaintiff suffered property damage as a result of Hurricane Katrina and filed suit against a diverse insurer, a non-diverse insurance broker, and a non-diverse retail insurance producer. *Ebeling*, 2008 WL 4974804, at *1. The insurer timely removed, arguing the plaintiff had fraudulently joined the non-diverse defendants. *Id.* The court remanded, because the removing defendant had not demonstrated that the plaintiff had fraudulently joined the retail insurance producer. *Id.* After eighteen months of litigation, the insurer propounded discovery upon the non-diverse retail insurance producer, and upon receipt of the responses, again removed to federal court arguing fraudulent joinder. *Id.* at *2. The district court remanded the case a second time, finding no forum manipulation on the part of the plaintiff and further finding that the case was removable from the outset based on fraudulent joinder even though the defendant failed to so demonstrate during the first removal. *Id.* at *4.<br>Filed Sept. 26, 2006; removed Oct. 8, 2008; remanded Nov. 19. 2008. [second removal]*** |

| | |
|---|---|
| 14. | **Janeau v. Pleasant Grove Indep. Sch. Dist., No. 5:07CV163, 2008 WL 4951727 (E.D. Tex. Nov. 17, 2008).**<br>The plaintiff sued a non-diverse school district for injuries she sustained when a Polaris Ranger driven by a student crushed her leg. *Janeau*, 2008 WL 4951727, at *1. The school responded, claiming it was immune. *Id.* More than one year after commencement, the plaintiff amended her suit to add the diverse manufacturer of the Polaris. *Id.* The manufacturer then removed, arguing that the school had been improperly joined and seeking application of the equitable exception. *Id.* The plaintiff then dismissed the claims against Polaris. *Id.* at *2. The school district then urged the federal court to retain jurisdiction, arguing that the case had been properly removed. *Id.* The court remanded the case, stating that it was not convinced that the plaintiff had improperly joined the school district and further finding that all that remained was a state law claim between non-diverse parties. *Id.* at *7.<br>Filed Aug. 24, 2006; removed Oct. 26, 2007; remanded Nov. 17, 2008. |
| 15. | **Lofton v. Phillips 66 Co., No. 1:08cv1008WJG-JMR, 2008 WL 4829913 (S.D. Miss. Nov. 4, 2008).**<br>The plaintiffs sued diverse and non-diverse defendants in a case alleging injuries caused by exposure to asbestos. *Lofton*, 2008 WL 4829913, at *1. The diverse defendants removed more than one year later, arguing that the only in-state defendant who had been served was fraudulently joined, as evidenced by its motion for summary judgment in state court. *Id.* The defendants also argued that the plaintiffs had not actively pursued their claims against the in-state defendant. *Id.* The district court remanded the case, observing that the outcome of the summary judgment motion was pending and finding no inequitable conduct on the part of the plaintiffs given that they had "engaged in discovery and attempted to prosecute their case against the resident defendant." *Id.* at *4.<br>Filed Mar. 6, 2006; removed Sept. 25, 2008; remanded Nov. 4, 2008. |
| 16. | **Isch v. Poole, No. 2:08-cv-742, 2008 WL 4377132 (W.D. La. Sept. 24, 2008).**<br>More than one year after commencement of the case and after receiving the plaintiff's amended pleading seeking more than $75,000.00, the diverse defendants removed. *Isch*, 2008 WL 4377132, at *1. The plaintiff informed the defendants of his intent to file a motion to remand and the defendants agreed to file a joint motion to remand, rather than litigate whether removal was proper pursuant to the *Tedford* exception. *Id.*<br>Filed Sept. 18, 2006; removed May 28, 2008; remanded Sept. 24, 2008. |

| | |
|---|---|
| 17. | **Certa v. Cain, No. H-07-1003, 2008 WL 2626818 (S.D. Tex. June 27, 2008), *aff'd*, 308 F. App'x 845 (5th Cir. 2009).**<br>The plaintiff sued diverse and non-diverse defendants for fraud. *Certa*, 2008 WL 2626818, at *1. The diverse defendants removed, arguing that the plaintiff improperly joined the non-diverse defendant. *Id.* The district court remanded the case. *Id.* In early June 2008, the plaintiff settled with and dismissed the non-diverse defendant. *Id.* The diverse defendants again removed to federal court more than one year after commencement. *Id.* The district court remanded a second time, finding no evidence of forum manipulation. *Id.* at *1–2. There was no proof the plaintiff had actually settled with the non-diverse defendant prior to the expiration of the one year period. *Id.* at *1.<br>Filed Oct. 6, 2006; removed June 11, 2008; remanded June 27, 2008. [second removal] |
| 18. | **Edwards v. Standard Fire Ins. Co., No. 07-6714, 2008 WL 1832366 (E.D. La. Apr. 23, 2008).**<br>After Hurricane Katrina, the plaintiffs sued a diverse insurance company and a non-diverse insurance company and agent, alleging that the defendants breached duties owed to the insureds by failing to properly advise them regarding the proper type and amount of coverage. *Edwards*, 2008 WL 1832366, at *1. The diverse defendant removed arguing fraudulent joinder. *Id.* The district court remanded the case back to state court. *Id.* More than one year after commencement, the defendant removed a second time based on improper joinder and argued that the plaintiffs' deposition testimony contradicted the plaintiffs' affidavit in support of their first motion to remand, making the case appropriate for application of the equitable exception. *Id.* at *1–2. The court found that the plaintiffs' behavior did not rise to the level of manipulation in *Tedford* and further found that the defendant could have removed within one year, given that the deposition at issue was held three weeks before the one-year deadline. *Id.* at *2–3.<br>Filed Oct. 2, 2006; removed Oct. 11, 2007; remanded Apr. 23, 2008. [second removal]*** |

| | |
|---|---|
| 19. | **Joiner v. McLane Co. Inc., No. 08 CV 130, 2008 WL 1733655 (W.D. La. Apr. 14, 2008).**<br>The plaintiff sued diverse defendants seeking damages for injuries sustained in an automobile accident. *Joiner*, 2008 WL 1733655, at *1. The complaint alleged damages less than the jurisdictional amount for removal. *Id.* More than one year later, the plaintiff amended his complaint to seek damages in excess of the jurisdictional amount and the defendants removed. *Id.* The court remanded, finding that the defendants had "not presented evidence of clear, egregious forum manipulation." *Id.* at *3.<br>Filed Feb. 9, 2006; removed Jan. 30, 2008; remanded Apr. 14, 2008. |
| 20. | **Roberson Adver. Serv., LLC v. Lafayette Ins. Co., No. 08-844, 2008 WL 1732969 (E.D. La. Apr. 9, 2008).**<br>A Louisiana plaintiff sued a non-diverse insurer for damages arising from Hurricane Katrina. *Roberson Adver. Serv., LLC*, 2008 WL 1732969, at *1. The insurer removed, arguing removal was proper pursuant to the Multiparty, Multiforum Trial Jurisdiction Act. *Id.* The district court disagreed and remanded the case. *Id.* After remand, the insurer filed a third-party claim for indemnity against an insurer organized under the laws of New Hampshire with its principal place of business in Massachusetts. *Id.* The third-party defendant then removed, arguing that realignment of the parties would result in complete diversity. *Id.* The court remanded again, finding that realignment was not appropriate and further finding that removal was not appropriate more than one year after commencement because there were no grounds upon which to find an equitable exception. *Id.* at *1–2.<br>Filed Aug. 7, 2006; removed Feb. 6, 2008; remanded Apr. 9, 2008. [second removal] |
| 21. | **Gallegos Perez v. Lasko Prods., Inc., No. L-08-3, 2008 WL 608313 (S.D. Tex. Mar. 3, 2008).**<br>The plaintiff filed suit against a diverse product manufacturer and a non-diverse retail seller. *Gallegos Perez*, 2008 WL 608313, at *1. The diverse manufacturer removed more than one year after commencement, arguing that the retail seller had been improperly joined because there was no evidence that the plaintiff bought the product from the retail seller. *Id.* The court remanded the case, finding that the plaintiff's lack of evidence regarding the retail seller was evident from the plaintiff's deposition, which had been taken more than three months before the expiration of the one-year period. *Id.* at *1–2.<br>Filed Dec. 21, 2006; removed Jan. 8, 2008; remanded Mar. 3, 2008.*** |

| | |
|---|---|
| 22. | **Estate of Edwards v. Mariner Health Care, Inc., No. 4:07CV174-P-B, 2008 WL 144691 (N.D. Miss. Jan. 15, 2008).**<br>The plaintiff sued a diverse nursing home and non-diverse nursing home administrators. *Estate of Edwards*, 2008 WL 144691, at *1. At the time of the complaint, state law supported the claim against the administrators. *Id.* In 2006, the Mississippi Supreme Court decided a case in which it held that nursing home administrators owed no duty, thereby prompting the court in this case to dismiss the administrators. *Id.* The nursing home then removed the case more than six years after commencement. *Id.* The federal district court remanded, finding no evidence of forum manipulation, given that the plaintiff's claims were supported by state law applicable at the time of filing. *Id.*<br>Filed Dec. 7, 2001; removed Oct. 12, 2007; remanded Jan. 15, 2008. |
| 23. | **Santee v. Encore Receivable Mgmt., Inc., 527 F. Supp. 2d 591 (W.D. Tex. 2007).**<br>The plaintiff, who had been the target of collection efforts, sued diverse defendants for invasion of privacy and violations of various state statutes. *Santee*, 527 F. Supp. 2d at 593. The defendants removed more than one year after commencement, arguing that they had just learned that more than $75,000.00 was in controversy. *Id.* at 595. The court remanded, finding that the defendants had failed to timely remove given that they received notice of the amount in controversy almost four months before removing. *Id.* at 597.<br>Filed May 5, 2006; removed Oct. 9, 2007; remanded Dec. 21, 2007.*** |

| | |
|---|---|
| 24. | **Lajaunie v. CSR Ltd., No. 07-3626, 2007 WL 2407312 (E.D. La. Aug. 20, 2007).** The plaintiffs filed a wrongful death action against Conagra and several of its executive officers, alleging that they failed to provide the deceased a safe place to work and exposed him to asbestos. *Lajaunie*, 2007 WL 2407312, at *1. Plaintiffs did not know the citizenship of the executive officers and therefore did not serve them immediately. *Id.* When the plaintiffs served Conagra, they simultaneously served interrogatories requesting citizenship information about the corporate employees. *Id.* Conagra did not respond to the discovery requests until April 26, 2006. *Id.* On April 27, 2007, the plaintiffs amended the complaint to specify the citizenship of the corporate executives and then served the executives. *Id.* Some of the executives then removed, seeking application of the equitable exception. *Id.* The court remanded the case, finding that the plaintiffs were merely ignorant of the executives' citizenship and had not manipulated the pleadings. *Id.* at *2. The court found that although the plaintiffs received Conagra's discovery responses and then waited a year to amend the pleadings, Conagra was responsible for the expiration of most of the one-year period because it took so long to respond to discovery. *Id.* Filed June 22, 2005; removed July 5, 2007; remanded Aug. 20, 2007. |
| 25. | **Daniel Mineral Dev., Inc. v. Petroleum Dev. Co., No. H-07-1558, 2007 WL 2315218 (S.D. Tex. Aug. 10, 2007).** The plaintiff filed suit against a diverse defendant seeking a declaratory judgment that it was the proper operator of an oil well. *Daniel Mineral Dev., Inc.*, 2007 WL 2315218, at *1. The plaintiff did not serve the defendant until more than four months later because it was awaiting the outcome of a related pending administrative matter. *Id.* The plaintiff served the defendant on June 7, 2006. *Id.* The defendant removed on May 9, 2007. *Id.* The court remanded the case, finding that the equitable exception did not apply because the plaintiff had not engaged in forum manipulation. *Id.* at *3–4. The court observed that the defendant had more than six months to remove after being served and before expiration of the one-year period. *Id.* at *3. Moreover, the court also noted that the defendant did not act diligently because it failed to remove within thirty days of service. *Id.* Filed Jan. 17, 2006; removed May 9, 2007, remanded Aug. 10, 2007.*** |

| | |
|---|---|
| 26. | **Bellon v. Conoco Phillips Co., No. 07-0037, 2007 WL 1791223 (W.D. La. June 19, 2007).**<br>The plaintiffs sued a diverse oil company and a diverse oil monitoring corporation as well as several non-diverse individuals for damages to their property resulting from an oil leak. *Bellon*, 2007 WL 1791223, at *1–2. The plaintiffs did not serve the non-diverse defendants and requested a trial date on May 23, 2006. *Id.* at *3. The diverse defendants removed the case almost two years after commencement, on January 8, 2007. *Id.* at *2. The court remanded, finding that the plaintiffs did not improperly or fraudulently join the non-diverse defendants, that the plaintiffs did not engage in forum manipulation, and that the defendants failed to remove in a timely manner. *Id.* at *6.<br>Filed Feb. 10, 2005; removed Jan. 8, 2007; remanded June 19, 2007.*** |
| 27. | **Peres v. JPMorgan Chase Bank, No. 3:07-CV-0569-B, 2007 WL 1944376 (N.D. Tex. June 19, 2007).**<br>The plaintiff sued the diverse bank alleging it improperly closed his accounts, thereby damaging him and his business. *Peres*, 2007 WL 1944376, at *1. More than two months after commencement, the plaintiff notified the state court that he had filed a bankruptcy petition. *Id.* About five months later, the state court closed the case. *Id.* Ten months later, pursuant to an agreed order signed by both parties, the state court reinstated the case. *Id.* About seven weeks later, the bank removed. *Id.* at *2. The district court remanded the case, finding no bad faith or forum manipulation on the part of the plaintiff. *Id.* at *6.<br>Filed Sept. 6, 2005; removed Mar. 30, 2007; remanded June 19, 2007. |
| 28. | **Williams v. Nat'l Heritage Realty, Inc., 489 F. Supp. 2d 595 (N.D. Miss. 2007).**<br>The plaintiff sued a diverse rehabilitation center and a non-diverse center administrator. *Williams*, 489 F. Supp. 2d at 596. At the time of the complaint, state law supported the claim against the administrator. *Id.* In 2006, the Mississippi Supreme Court decided a case in which it held that such administrators owed no duty. *Id.* More than three years after commencement, and in response to the Mississippi Supreme Court's decision, the diverse defendant removed, arguing the plaintiff fraudulently joined the administrator. *Id.* The federal district court remanded, finding no evidence of forum manipulation. *Id.* at 596–97.<br>Filed June 13, 2002; removed Nov. 14, 2006; remanded June 13, 2007.[second removal] |

| | |
|---|---|
| 29. | **Smith v. Wal-Mart Stores, Inc., 489 F. Supp. 2d 600 (N.D. Miss. 2007).**<br>The plaintiff sued Wal-Mart for injuries she allegedly received while on the premises of one of its stores. *Smith*, 489 F. Supp. 2d at 601. Years after commencement, the plaintiff amended her complaint to seek additional damages and Wal-Mart removed, asserting the equitable exception. *Id.* The district court remanded finding that the plaintiff's stipulation to damages of less than $75,000.00 more than two years after commencement had no effect on removal and further finding that the defendant failed to use available methods to determine the amount in controversy during the one-year period. *Id.* at 603, 605. The court also concluded that the plaintiff's explanation that she amended her complaint after realizing that her continuing medical treatment was going to be more costly was reasonable. *Id.* at 604. Finally, the court observed the defendant failed to remove within thirty days of a November 2006 mediation during which it became clear that more than $75,000.00 was in controversy. *Id.* at 604.<br>Filed May 2, 2004; removed Jan. 16, 2007; remanded June 13, 2007. *** |
| 30. | **Rhodes *ex rel.* Rhodes v. Mariner Health Care, Inc., 516 F. Supp. 2d 611 (S.D. Miss. 2007).**<br>The plaintiff brought a personal injury action against a diverse nursing home and a non-diverse nursing home administrator and licensee. *Rhodes*, 516 F. Supp. 2d at 612. More than thirty days after the Mississippi Supreme Court held that such administrators and licensees owed no duty, the diverse nursing home removed. *Id.* The district court remanded, finding no forum manipulation on the part of the plaintiff. *Id.* at 615.<br>Filed Aug. 25, 2004; removed Nov. 28, 2006; remanded May 2, 2007. |
| 31. | **Bartholomew v. Great Atl. & Pac. Tea Co., No. 06-11139, 2007 WL 1063257 (E.D. La. Apr. 3, 2007).**<br>The plaintiff sued a diverse storeowner and a non-diverse store manager for injuries she allegedly sustained when she slipped and fell at the owner's store. *Bartholomew*, 2007 WL 1063257, at *1. More than one year after commencement, the defendant deposed the plaintiff and learned that she was considering arthroscopic surgery. *Id.* A week after the deposition, the diverse store owner removed, arguing that it had just learned that more than $75,000.00 was in controversy and also arguing that the non-diverse store manager was improperly joined. *Id.* The court remanded, finding that the plaintiff's conduct may not have even been manipulative and certainly did not rise to the level warranting the equitable exception. *Id.*<br>Filed Aug. 25, 2005; removed Dec. 18, 2006; remanded Apr. 3, 2007. |

| | |
|---|---|
| 32. | **Hernandez v. Wyeth Pharm., Inc., No. SA:06-CV-1025-WRF, 2007 WL 1113039 (W.D. Tex. Mar. 9, 2007).**<br>The plaintiffs sued diverse manufacturers of hormone replacement therapy drugs as well as their non-diverse physicians for injuries allegedly sustained as a result of ingestion of the drugs. *Hernandez*, 2007 WL 1113039, at *1. In mid-October 2006, the remaining plaintiff deposed the non-diverse physicians. *Id.* at *2. Two weeks after the depositions, and more than three years after commencement of the case, the remaining plaintiff dismissed the non-diverse physicians. *Id.* The diverse defendants removed a second time, seeking application of the equitable exception. *Id.* The district court remanded the case, finding no evidence of forum manipulation. *Id.* at *5–6.<br>Filed Aug. 29, 2003; removed Nov. 22, 2006; remanded Mar. 9, 2007. [second removal] |
| 33. | **Estate of Luis v. Gonzales, No. H-06-3686, 2006 WL 3716665 (S.D. Tex. Dec. 14, 2006).**<br>The plaintiff sued non-diverse defendants in state court. *Estate of Luis*, 2006 WL 3716665, at *1. More than a year after commencement, the defendants moved to Mexico. *Id.* Defendants then removed to federal court. *Id.* The district court remanded, finding that the parties' citizenship at the time of filing controls. *Id.* In addition, the district court ordered the removing defendant to pay the plaintiff's attorney's fees and expenses, finding that he could not have reasonably believed removal was proper. *Id.*<br>Filed May 24, 2004; removed Nov. 2006; remanded Dec. 14, 2006. [fee award] |
| 34. | **Thibodeaux Family Ltd. P'ship v. Holland, No. 06-1626, 2006 WL 3899908 (W.D. La. Nov. 29, 2006).**<br>The plaintiffs sued the defendants and then later settled with them. *Thibodeaux Family Ltd. P'ship*, 2006 WL 3899908, at *1. At the time of settlement, the defendants reserved their rights against each other. *Id.* Shortly thereafter, one co-defendant cross-claimed against another, who then removed more than one year after commencement. *Id.* Finding no evidence of forum manipulation by the plaintiff, the district court remanded. *Id.* at *2.<br>Filed June 9, 2003; removed Sept. 21, 2006; remanded Nov. 29, 2006. |

| | |
|---|---|
| 35. | **Monk v. Werhane Enter., Ltd., No. 06-4230, 2006 WL 3918395 (E.D. La. Nov. 27, 2006).**<br>The plaintiff filed suit in state court for injuries she sustained in an automobile accident and named the driver, his employer, and his insurer as defendants. *Monk*, 2006 WL 3918395, at *1. She stated that her damages were less than $75,000.00. *Id.* More than two years later, she amended her complaint to seek additional damages and shortly thereafter the defendants removed. *Id.* The court remanded, finding insufficient evidence of forum manipulation. *Id.* at *4–5. The court noted that although the plaintiff knew she was a possible candidate for surgery before she filed suit, she was hoping to avoid it and only scheduled surgery once it became apparent that her other treatment had been ineffective. *Id.* at *4. The court further found that the defendants had not been vigilant in protecting their right to remove because they did not remove within thirty days of learning about the potential surgery during the plaintiff's April 22, 2005 deposition. *Id.* at *5.<br>Filed approx. July 16, 2004; removed Aug. 10, 2006; remanded Nov. 27, 2006. [second removal]*** |
| 36. | **Perez v. Lancer Ins. Co., No. C-06-388, 2006 WL 2850065 (S.D. Tex. Oct. 4, 2006).**<br>The plaintiff sued a diverse insurance company and other non-diverse defendants. *Perez*, 2006 WL 2850065, at *1. After the state court severed the claims more than one year after commencement, the diverse insurance company removed. *Id.* The district court remanded, finding that the action commenced at the time the original complaint was filed, and therefore, the removal was more than one year after commencement. *Id.* at *3–4.<br>Filed Mar. 4, 2005; removed Sept. 6, 2006; remanded Oct. 4, 2006. |
| 37. | **Morgan v. Powe Timber Co., No. 4:06CV9LN, 2006 WL 1272950 (S.D. Miss. May 9, 2006).**<br>The plaintiff sued defendants for injuries allegedly caused by his exposure to chemically treated wood chips. *Morgan*, 2006 WL 1272950, at *1. During a December 2005 deposition of the plaintiff, the diverse defendant learned that the plaintiff might have only been exposed to the wood chips by the diverse defendants and not by the non-diverse defendants. *Id.* The diverse defendants thereafter removed. *Id.* The district court remanded, finding that the equitable exception did not excuse the defendants' untimely removal. *Id.* at *1–2.<br>Filed Dec. 6, 2001; removed Feb. 3, 2006; remanded May 9, 2006. [second removal] |

| | |
|---|---|
| 38. | **Buxton v. Powe Timber, No. 4:06CV28LN, 2006 WL 1303136 (S.D. Miss. May 9, 2006).**<br>The plaintiff sued defendants for injuries allegedly caused by his exposure to chemically treated wood chips. *Buxton*, 2006 WL 1303136, at *1. The defendants removed after learning in a 2006 deposition that the plaintiff had not been exposed to the wood chips by the non-diverse defendants. *Id.* at *2. The district court remanded, finding that the equitable exception did not excuse the defendants' untimely removal because the defendants were put on notice that the non-diverse defendants may not have exposed the plaintiff to wood chips in the plaintiff's April 11, 2005 deposition. *Id.*<br>Filed Apr. 28, 2004; removed Mar. 7, 2006; remanded May 9, 2006.*** |
| 39. | **Morgan Bldgs. & Spas, Inc. v. Advantage Mfg., Inc., No. 3:06-CV-0149-D, 2006 WL 1140657 (N.D. Tex. May 1, 2006).**<br>The plaintiff sued diverse defendants in state court and did not plead a specific amount of damages. *Morgan Bldgs. & Spas, Inc.*, 2006 WL 1140657, at *1–2. The defendants removed almost three years later, after the plaintiff responded to the defendants' request for a settlement demand by demanding more than $75,000.00. *Id.* The court remanded, finding that the plaintiff's failure to plead a specific amount of damages was not evidence of active concealment. *Id.* at *3.<br>Filed Oct. 25, 2004; removed Jan. 20, 2006; remanded May 1, 2006. |
| 40. | **ConocoPhillips Co. v. Turner Indus. Grp, LLC., No. G-05-516, 2006 WL 213956 (S.D. Tex. Jan. 24, 2006).**<br>The plaintiff sued ConocoPhillips for injuries allegedly caused by his exposure to benzene. *ConocoPhillips Co.*, 2006 WL 213956, at *1. ConocoPhillips settled the lawsuit with the plaintiff and filed a third-party claim for indemnity against its liability insurer. *Id.* Almost three years after commencement, the insurer removed the case. *Id.* The district court remanded, finding that third-party defendants cannot remove and further finding no evidence of forum manipulation warranting removal beyond the one-year period. *Id.* at *1–2.<br>Filed Oct. 22, 2002; removed Sept. 27, 2005; remanded Jan. 24, 2006. |

| | |
|---|---|
| 41. | **In re Vioxx Prods. Liab. Litig., No. MDL 1657, 2005 WL 3542885 (E.D. La. Nov. 23, 2005).**<br>The plaintiffs sued diverse drug manufacturers and non-diverse physicians for injuries allegedly caused by prescription drugs. *In re Vioxx Prods. Liab. Litig.*, 2005 WL 3542885, at *1. The diverse drug manufacturers removed on January 18, 2005 based on the December 9, 2004 deposition testimony of the plaintiffs' expert physician in which the expert refused to opine that the non-diverse defendant doctors were negligent. *Id.* at *2. Although the plaintiffs voluntarily dismissed two of three claims against the doctors, they actively pursued the remaining claim and did have an additional expert supporting such claim. *Id.* The district court remanded, finding no forum manipulation by the plaintiffs and further finding that the defendant was not vigilant in removing, given that it waited more than thirty days after the December, 9, 2004 deposition to remove. *Id.* at *4–5.<br>Filed Mar. 10, 2003; removed Jan. 18, 2005; remanded Nov. 23, 2005. [second removal]*** |
| 42. | **Lowry v. Dresser, Inc., No. 1:05CV0275, 2005 WL 2237637 (W.D. La. Sept. 14, 2005).**<br>The plaintiff sued his diverse employer and the non-diverse CEO of his employer for violation of state employment discrimination laws. *Lowry*, 2005 WL 2237637, at *1. The employer removed the first time, arguing that the plaintiff had fraudulently joined the individual officers. *Id.* The federal district court remanded, finding that Louisiana law was ambiguous with respect to such claims against individuals associated with the plaintiff's employer. *Id.* On remand, the employer moved to dismiss the claims against the individual officers and the trial court refused the motion. *Id.* The state appellate court, however, found that such claims could only be brought against the employer and therefore dismissed the individual officers. *Id.* The diverse employer then filed a second notice of removal more than one year after commencement. *Id.* The district court remanded, finding that the plaintiff had not engaged in forum manipulation, given that Louisiana law was inconclusive at the time of filing. *Id.* at *3.<br>Filed Oct. 2, 2003; removed Feb. 9, 2005; remanded Sept. 14, 2005. [second removal] |

| | |
|---|---|
| 43. | **Herschberger v. ACandS, No. 1:05CV168WJG-JMR, 2005 WL 1221203 (S.D. Miss. May 23, 2005).**<br>The plaintiff was one of seven plaintiffs who sued diverse and non-diverse defendants in this asbestos case. *Herschberger*, 2005 WL 1221203, at *1. At the time of filing, the plaintiffs were properly joined pursuant to Mississippi joinder law. *Id.* After state joinder law changed in 2004, the state court severed the claims of each plaintiff in July of 2004. *Id.* Plaintiff Hershberger had not sued any non-diverse defendants. *Id.* The diverse defendant removed in late April or early May of 2005. *Id.* at *4. The court found no evidence of forum manipulation, given that the plaintiffs were properly joined at the time of filing and further found that the defendant did not remove within thirty days of the severance. *Id.* at *4–5.<br>Filed early 2000; removed late Apr. 2005; remanded May 23, 2005. [third removal]*** |
| 44. | **Foster v. Landon, No. 04-2645, 2004 WL 2496216 (E.D. La. Nov. 4, 2004).**<br>The plaintiff sued a non-diverse driver and Hertz for injuries sustained in an automobile accident, stating in the complaint that the damages were less than $75,000.00. *Foster*, 2004 WL 2496216, at *1–2. The plaintiff voluntarily dismissed the non-diverse driver. *Id.* at *1. In April of 2004, the plaintiff was diagnosed with a herniated disc and was admitted to the hospital for additional testing in late June of 2004. *Id.* at *2. In August of 2004, the plaintiff sent a demand letter indicating that the amount in controversy was more than $75,000.00. *Id.* Hertz removed. *Id.* The district court remanded, finding that the plaintiff's delay of a few months in sending the demand letter was not a transparent attempt to circumvent removal jurisdiction. *Id.* at *2–3.<br>Filed July 3, 2003; removed Sept. 23, 2004; remanded Nov. 4, 2004. |
| 45. | **Clark v. Nestle USA, Inc., No. 04-1537, 2004 WL 1661202 (E.D. La. July 22, 2004).**<br>The plaintiff sued a diverse defendant in state court and stated in the petition that the damages were less than $75,000.00. *Clark*, 2004 WL 1661202, at *1. More than four years later, the plaintiff moved to amend the pleadings to seek additional damages and the defendant removed. *Id.* The district court remanded, finding no evidence of forum manipulation, given that the plaintiff explained that the amended pleading was necessary in light of medical treatment she had received during the intervening four years. *Id.* at *2–3. In addition, the court found that the defendant was not vigilant in protecting its right to remove because it removed months after first learning that more than $75,000.00 was in controversy. *Id.* at *2.<br>Filed Apr. 13, 2000; removed June 2, 2004; remanded July 22, 2004.*** |

| | |
|---|---|
| 46. | **Sanders v. G.D. Searle & Co., No. 2:04CV73, 2004 WL 443886 (N.D. Miss. Mar. 4, 2004).**<br>The plaintiff sued a diverse drug manufacturer and a non-diverse physician. *Sanders*, 2004 WL 443886, at *1. The drug manufacturer removed, arguing fraudulent joinder. *Id.* The district court remanded. *Id.* The drug manufacturer removed a second time, again arguing fraudulent joinder based upon an April 2003 affidavit of the physician stating he had no records that he ever prescribed the drug in question to the plaintiff. *Id.* The court remanded, finding no evidence of forum manipulation and further finding that the defendant removed almost one year after the availability of the affidavit. *Id.* at *1–2.<br>Filed Dec. 23, 2002; removed Mar. 2, 2004; remanded Mar. 4, 2004. [second removal]*** |
| 47. | **Field v. State Farm Lloyds Ins. Co., No. CA-C-03-468-H, 2004 WL 612841 (S.D. Tex. Mar. 1, 2004).**<br>The plaintiffs sued a diverse insurance company and a non-diverse agent and appraiser. *Field*, 2004 WL 612841, at *1. The insurance company removed, arguing fraudulent joinder. *Id.* The district court remanded. *Id.* The defendant removed a second time, arguing that the plaintiffs' deposition testimony indicated they had no claim against the non-diverse defendants. *Id.* at *2. The district court remanded, finding that the plaintiffs' conduct did not warrant application of the equitable exception. *Id.* at *5.<br>Filed Oct. 28, 2002; removed Nov. 13, 2003; remanded Mar. 1, 2004. [second removal] |
| 48. | **Thomas v. Exxon Mobil Corp., No. 03-2269, 2003 WL 22533677 (E.D. La. Nov. 5, 2003).**<br>The plaintiffs filed a class action petition for damages against two diverse oil corporations and one non-diverse defendant. *Thomas*, 2003 WL 22533677, at *1. More than seven years later, plaintiffs dismissed the non-diverse defendant and the diverse defendants removed. *Id.* The case was remanded because of the prohibition on removal more than one year after commencement. *Id.* In 2003, more than twelve years after commencement, the plaintiff filed an amended petition against the diverse defendants, who then removed for the third time, arguing that the case should be considered to have been commenced when the 2003 amended petition was filed and alternatively arguing that the *Tedford* exception applied. *Id.* at *2. The district court remanded, finding that the action was commenced in 1990 and that the exception was inapplicable because the plaintiffs did not engage in forum manipulation. *Id.* at *3, *6–7.<br>Filed Dec. 5, 1990; removed Aug. 12, 2003; remanded Nov. 5, 2003.[third removal] |

*Table E.*
Post-*Tedford* District Court Cases Outside the Fifth Circuit
Where the Court Found an Equitable Exception
to the One-Year Period (3 Total)

| | |
|---|---|
| 1. | **Lafazia v. Ecolab, Inc., No. 06-491ML, 2006 WL 3613771 (D.R.I. Dec. 11, 2006).**<br>The court applied the equitable exception even though it found that the diverse defendant's removal might have been delayed by the plaintiff's sloppy pleading rather than an attempt at deception. *Lafazia*, 2006 WL 3613771, at *3.<br>Filed Feb. 16, 2005; removed Nov. 14, 2006; motion to remand denied Dec. 11, 2006. |
| 2. | **Rauch v. Rauch, 446 F. Supp. 2d 432 (D.S.C. 2006).**<br>After divorce proceedings concluded, the plaintiff sued his diverse ex-wife and other diverse defendants alleging fraud. *Rauch*, 446 F. Supp. 2d at 432–33. Prior to filing the complaint, the plaintiff had released his ex-wife, the sole non-diverse defendant, from some claims. *Id.* at 433. The diverse defendants removed, arguing fraudulent joinder, and the district court remanded because the settlement agreement was ambiguous. *Id.* The diverse defendants removed a second time, essentially arguing the same grounds, and the district court remanded a second time, finding that the removal was really an unauthorized attempt to appeal the court's original remand order. *Id.* Two years and five months after commencement, the defendants removed a third time after discovering a tape recording in which the plaintiff essentially admitted that he never intended to recover from the non-diverse defendant. *Id.* The district court denied the motion to remand, finding that the plaintiff had manipulated jurisdiction and that there had not been substantial progress in state court. *Id.* at 435–37. Recognizing that it was departing from other precedent within the Fourth Circuit, the court certified the case for interlocutory appeal. *Id.* at 436.<br>Filed Aug. 15, 2002; removed Jan. or Feb. 2005; motion to remand denied Mar. 23, 2006. [third removal] |
| 3. | **In re Rezulin Prods. Liab. Litig., MDL No. 1348, 2003 WL 21355201 (S.D.N.Y. June 4, 2003).**<br>The court found forum manipulation by the plaintiff in a case where the plaintiff non-suited the non-diverse physician just five days after expiration of the one-year period without seeking any discovery from such defendant. *In re Rezulin Prods. Liab. Litig.*, 2003 WL 21355201, at *2.<br>Filed Feb. 9, 2001; removed Mar. 18, 2002; motion to remand denied June 4, 2003. |

*Table F.*
Post-*Tedford* District Court Cases Outside the Fifth Circuit
Where the Court Found an Insufficient Factual Basis for
an Equitable Exception to the One-Year Period (32 Total)

| | |
|---|---|
| 1. | **Allen v. Allstate Ins. Co., No. 08-0733 JB/RHS, 2010 WL 519862 (D.N.M. Jan. 26 2010).**<br>The court concluded that the statute did not appear to permit equitable tolling but also found that the defendant had not demonstrated the type of forum manipulation that would justify equitable tolling. *Allen*, 2010 WL 519862, at *6.<br>Filed July 2008; removed Aug. 7, 2009; remanded Jan. 26, 2010. [second removal] |
| 2. | **Bay Guardian Co. Inc., v. Village Voice Media LLC, No. 09-03833 JSW, 2010 WL 329962 (N.D. Cal. Jan. 20, 2010).**<br>The court expressed doubt that the Ninth Circuit would recognize an equitable exception but also found that the removing defendants failed to prove forum manipulation by the plaintiff. *Bay Guardian Co.*, 2010 WL 329962, at *3.<br>Filed 2004; removed Aug. 20, 2009; remanded Jan. 20, 1010. |
| 3. | **Custom Cupboards, Inc. v. Venjakob Maschinebau GMBH & Co. KG, No. 09-1226-EFM, 2010 WL 148361 (D. Kan. Jan. 12, 2010).**<br>The court found that even if it were to recognize the equitable exception, it was not clear that the plaintiff had engaged in forum manipulation. *Custom Cupboards, Inc.*, 2010 WL 148361, at *7.<br>Filed Dec. 20, 2007; removed July 20, 2009; remanded Jan. 12, 2010. |
| 4. | **Various Plaintiffs v. Various Defendants (Oil Field Cases), 673 F. Supp. 2d 358 (E.D. Pa. 2009).**<br>The court was generally willing to recognize the equitable exception but found that it was not warranted in the case at hand because the defendants failed to show the equities tilted in their favor, given that the defendants shared responsibility for the delay of proceedings in state court. *Oil Field Cases*, 673 F. Supp. 2d at 365.<br>Filed 2004; removed Sept. 26, 2008; remanded Dec. 10, 2009. |
| 5. | **Fortner v. K-V-A-T Food Stores, Inc., No. 3:09-CV-244, 2009 WL 4573761 (E.D. Tenn. Dec. 2, 2009).**<br>The court found that the statute clearly prohibited removal after more than one year but further found that it was not clear that the plaintiffs had engaged in forum selection games. *Fortner*, 2009 WL 4573761, at *3.<br>Filed Sept. 28, 2007; removed June 8, 2009; remanded Dec. 2, 2009. |

| | |
|---|---|
| 6. | **Elliot v. Wal-Mart Stores, Inc., No. 1:09-CV-1420-OWW-GSA, 2009 WL 4253973 (E.D. Cal. Nov. 24, 2009).**<br>The court held that even if it were to decide that the one-year period could be extended, the defendant failed to prove it was entitled to an equitable exception. *Elliot*, 2009 WL 4253973, at *4.<br>Filed Aug. 8, 2008; removed Aug. 12, 2009; remanded Nov. 24, 2009. |
| 7. | **Chidester v. Kaz, Inc., No. 08-CV-776-TCK-PJC, 2009 WL 2588866 (N.D. Okla. Aug. 19, 2009).**<br>The court found that even if the Tenth Circuit were to recognize the equitable exception, it would not be applicable in the case at hand because the plaintiff actively pursued the claim against the non-diverse defendant for more than a year after the expiration of the one-year period and because substantial progress had been made in state court. *Chidester*, 2009 WL 2588866, at *4.<br>Filed Feb. 9, 2006; removed Dec. 31, 2008; remanded Aug. 19, 2009. [second removal] |
| 8. | **Donato-Cook v. State Farm Fire & Cas. Co., No. 3:09-CV-0587, 2009 WL 2169168 (M.D. Pa. July 20, 2009).**<br>The court found that the plaintiff's conduct did not warrant equitable tolling of the one-year period. *Donato-Cook*, 2009 WL 2169168, at *3.<br>Action was commenced May 9, 2007; removed Mar. 31, 2009; remanded July 20, 2009. |
| 9. | **Cybernetics & Serv., Inc. v. Hitachi Data Sys. Corp., No. 3:09-CV-231-J-32HTS, 2009 WL 2151197 (M.D. Fla. July 16, 2009).**<br>The court held that even it were to recognize *Tedford*, equitable tolling was not appropriate based on the facts of the case at hand. *Cybernetics & Serv., Inc.*, 2009 WL 2151197, at *2.<br>Filed June 13, 2006; removed Mar. 11. 2009; remanded July 16, 2009. |
| 10. | **Boyke v. Celadon Trucking Servs., Inc., No. 4:08CV01857 FRB, 2009 WL 1393870 (E.D. Mo. May 15, 2009).**<br>The court remanded the case because the defendant did not even allege, much less prove, that the plaintiff had manipulated the forum. *Boyke*, 2009 WL 1393870, at *4. Nor did the defendant show any other facts to warrant equitable tolling. *Id.*<br>Filed Sept. 24, 2007; removed Dec. 2, 2008; remanded May 15, 2009. |
| 11. | **Culkin v. CNH Am., LLC, 598 F. Supp. 2d 758 (E.D. Va. 2009).**<br>The court found that equitable tolling was probably not available in the Fourth Circuit but further found that the facts of the case did not trigger equitable tolling. *Culkin*, 598 F. Supp. 2d at 761.<br>Filed Aug. 30, 2007; removed Nov. 3, 2008; remanded Jan. 23, 2009. |

| | |
|---|---|
| 12. | **Zendejas v. Shell Oil Co., No. CV-08-1720-PHX-DGC, 2008 WL 5214741 (D. Ariz. Dec. 11, 2008).**<br>The court did not determine whether to legally recognize the *Tedford* exception because it found the defendants had not shown the type of forum manipulation that was present in *Tedford*. *Zendejas*, 2008 WL 5214741, at *3.<br>Filed Mar. 30, 2007; removed Sept. 18, 2008; remanded Dec. 11, 2008. |
| 13. | **Lexington Mkt., Inc. v. Desman Assocs., 598 F. Supp. 2d 707 (D. Md. 2009).**<br>The court held that the one-year bar was jurisdictional, and the facts of the case did not show that the plaintiff had engaged in forum manipulation to prevent removal. *Lexington Mkt., Inc.*, 598 F. Supp. 2d at 713–14.<br>Filed June 29, 2007; removed Dec. 10, 2008; remanded Feb. 24, 2009. |
| 14. | **Meding v. Receptopharm, Inc., No. 08-CV-2367 SLT MDG, 2008 WL 4610303 (E.D.N.Y. Oct. 15, 2008).**<br>The court held that even if it were to recognize an equitable exception, the defendant failed to prove that the plaintiffs engaged in tactics to prevent removal. *Meding*, 2008 WL 4610303, at *8.<br>Filed Aug. 18, 2006; removed June 12, 2008; remanded Oct. 15, 2008. [second removal] |
| 15. | **Avington v. State Auto Prop. & Cas. Ins. Co., No. 07-CV-364-GKF-FHM, 2008 WL 545026 (N.D. Okla. Feb. 24, 2008).**<br>The court found that even if the Tenth Circuit were to recognize an equitable exception, it would not be applicable to the case at hand. *Avington*, 2008 WL 545026, at *2.<br>Filed July 25, 2005; removed June 28, 2007; remanded Feb. 24, 2008. |
| 16. | **Namey v. Malcolm, 534 F. Supp. 2d 494 (M.D. Pa. 2008).**<br>The court found that the defendants did not demonstrate sufficient culpability on the part of the plaintiffs to warrant application of the equitable exception. *Namey*, 534 F. Supp. 2d at 499.<br>Filed June 17, 2005; removed Nov. 14, 2007; remanded Jan. 15, 2008. |
| 17. | **Bouza v. Ford Motor Co., No. 07-22728CIV, 2007 WL 4232697 (S.D. Fla. Nov. 28, 2007).**<br>The court remanded, refusing to find statutory manipulation because Ford failed to "present sufficient facts showing that equitable tolling [was] merited." *Bouza*, 2007 WL 4232697, at *2.<br>Filed Nov.15, 2005; removed Oct. 16, 2007; remanded Nov. 28, 2007. |

| | |
|---|---|
| 18. | **Burkholder v. Asbestos Claim Mgmt. Corp., No. 07-CV-781-BR, 2007 WL 2463307 (D. Or. Aug. 28, 2007).**<br>The court held that even if it were to follow *Tedford*, there was no basis for an equitable exception in the case at hand because the defendants failed to prove that the plaintiff's conduct was improper. *Burkholder*, 2007 WL 2463307, at *4–5.<br>Filed Oct. 6, 2005; removed May 25, 2007; remanded Aug. 28, 2007. |
| 19. | **Blue v. Equifax Info. Servs. LLC, No. 2007 WL 602295 (N.D. Cal. Feb. 22, 2007).**<br>The court found that even it were to recognize the equitable exception, the defendants had not met their burden of proving that the plaintiff engaged in forum manipulation. *Blue*, 2007 WL 602295, at *3.<br>Filed June 30, 2005; removed Oct. 11, 2006; remanded Feb. 22, 2007. |
| 20. | **Marsh v. Yamaha Motor Corp., No. 2:06CV00144 GH, 2006 WL 3791722 (E.D. Ark. Dec. 21, 2006).**<br>The court indicated it would follow *Tedford* but found that the facts did not warrant equitable tolling. *Marsh*, 2006 WL 3791722, at *3.<br>Filed July 26, 2004; removed June 9, 2006; remanded Dec. 21, 2006. [second removal] |
| 21. | **Lee v. Carter-Reed Co., LLC, No. 06-CV-1173 DMC, 2006 WL 3511160 (D.N.J. Dec. 5, 2006).**<br>The court held that even if it were to recognize the equitable exception, the defendants offered no equitable reason to contravene the one-year limitation based on the facts of the case. *Lee*, 2006 WL 3511160, at *4.<br>Filed Nov. 10, 2004; removed Mar. 10, 2006; remanded Dec. 5, 2006. |

| | |
|---|---|
| 22. | **Omi's Custard Co. v. Relish This, LLC, No. 04CV861 DRH, 2006 WL 2460573 (S.D. Ill. Aug. 24, 2006).**<br>The case was initially removed and then remanded because the defendant did not prove that more than $75,000.00 was in controversy. *Omi's Custard Co.*, 2006 WL 2460573, at *1. After the plaintiff disclosed a revised calculation of damages after remand, the defendant moved the court to reconsider its order granting remand.[277] *Id.* at *2–3. The court found that it could not reconsider its earlier remand order but also found that the defendant did not clearly demonstrate that the plaintiff made a misrepresentation when it calculated its damages. *Id.* at *11–12.<br>Filed Oct. 13, 2004; motion to reconsider remand order filed Feb. 22, 2006; motion to reconsider denied Aug. 24, 2006. [motion to reconsider earlier remand order] |
| 23. | **Wider v. Isuzu, Inc., No. 3:06-1103-CMC, 2006 WL 1488836 (D.S.C. May 24, 2006).**<br>The court found that even if it were to recognize the equitable exception, there was no indication that the plaintiff had improperly manipulated any procedural rules. *Wider*, 2006 WL 1488836, at *3.<br>Filed Mar. 4, 2005; removed Apr. 7, 2006; remanded May 24, 2006. |
| 24. | **Davis v. Ocwen Fed. Bank, FSB, No. 305CV1229MHT, 2006 WL 155241 (M.D. Ala. Jan. 19, 2006).**<br>The court did not decide whether to adopt *Tedford* because it found that the equities favored remand. *Davis*, 2006 WL 155241, at *3.<br>Filed June 8, 2004; removed Dec. 27, 2005; remanded Jan. 19, 2006. [second removal] |

[277] Although this case does not technically involve a remand after the one-year period, it does involve a motion to reconsider a remand order, which motion was filed after the one-year period and which motion relied upon the *Tedford* equitable exception. *Omi's Custard Co.*, 2006 WL 2460573 at *3, *5.

| | |
|---|---|
| 25. | **Ophnet, Inc. v. Lamensdorf, No. 05-10970-DPW, 2005 WL 3560690 (D. Mass. Dec. 27, 2005).**<br>The defendant timely removed based on diversity. *Ophnet*, 2005 WL 3560690, at *3. The plaintiff then moved to amend the complaint to add a non-diverse defendant. *Id.* The defendant objected, arguing that the plaintiff was attempting to fraudulently join the non-diverse defendant. *Id.* The district court found the non-diverse party to be indispensable, granted the motion to amend and then remanded the case to state court. *Id.* More than three years after commencement, the defendant removed a second time, arguing that the plaintiff did not intend to recover from the non-diverse defendant. *Id.* at *3–4. The court declined to find an exception to the one-year period because of the substantial progress in state court and the indispensability of the non-diverse defendant. *Id.* at *7. Although the court denied the remand order, it did not award the plaintiff fees and costs. *Id.* at *8.<br>Filed Mar. 2002; removed May 10, 2005; remanded July 12, 2005; order denying the plaintiff's motion for costs and fees entered Dec. 27, 2005. |
| 26. | **City of Portsmouth, Va. v. Buro Happold Consulting Eng'rs, P.C., No. 2:05CV341, 2005 WL 2009281 (E.D. Va. Aug. 19, 2005).**<br>The court found no factors favoring application of the exception. *City of Portsmouth, Va.*, 2005 WL 2009281, at *4.<br>Filed Apr. 22, 2004; removed June 6, 2005; remanded Aug. 19, 2005. |
| 27. | **Stein v. Bayer Corp., No. 05-2476(AET), 2005 WL 2000143 (D.N.J. Aug. 18, 2005).**<br>The court found that even if it were to recognize equitable tolling, the facts of the case did not warrant an equitable exception. *Stein*, 2005 WL 2000143, at *2.<br>Filed Mar. 22, 2004; removed May 10, 2005; remanded Aug. 18, 2005. [second removal] |
| 28. | **Hill v. Delta Int'l Mach. Corp., 386 F. Supp. 2d 427 (S.D.N.Y. 2005).**<br>The court appeared willing to follow *Tedford*, but found it inapplicable to the case at hand because the defendants did not prove any strategic behavior on the part of the plaintiff and could have timely removed based on fraudulent joinder. *See Hill*, 386 F. Supp. 2d at 433.<br>Filed Jan. 29, 2004; removed Apr. 12, 2005; remanded July 19, 2005. |
| 29. | **US Airways, Inc. v. PMA Capital Ins. Co., 340 F. Supp. 2d 699 (E.D. Va. 2004).**<br>Assuming without deciding that the one-year bar is subject to equitable exception, the court found that the circumstances of the case did not warrant equitable tolling. *US Airways, Inc.*, 340 F. Supp. 2d at 707–09.<br>Filed Aug. 12, 2003; removed Aug. 23, 2004; remanded Oct. 1, 2004. |

| | |
|---|---|
| 30. | **Jones Mgmt. Servs., LLC v. KES, Inc., 296 F. Supp. 2d 892 (E.D. Tenn. 2003).**<br>The court refused to recognize the *Tedford* equitable exception but further held that the facts did not warrant recognition of the exception in the case at hand. *Jones Mgmt. Servs.*, 296 F. Supp. 2d at 894–95.<br>Filed June 13, 2002; removed Sept. 8, 2003; remanded Oct. 16, 2003. |
| 31. | **Santee Print Works v. GE Lighting, No. 3:03-2517-22, 2003 WL 24309801 (D.S.C. Sept. 16, 2003).**<br>The court did not decide whether to follow *Tedford* because the case at hand did not present grounds for an equitable extension of the one-year period. *Santee Print Works*, 2003 WL 24309801, at *3.<br>Filed Feb. 1, 2001; removed July 31, 2003; remanded Sept. 16, 2003. |
| 32. | **Longden v. Philip Morris, Inc., No. 03-353-M, 2003 WL 21975365 (D.N.H. Aug. 19, 2003).**<br>The court found that the facts of the case did not warrant recognizing an equitable exception. *Longden*, 2003 WL 21975365, at 9.<br>Filed June 21, 2000; removed more than one year later; remanded Aug. 19, 2003. |

*Table G.*
Post-*Tedford* District Court Cases Outside the Fifth Circuit in Which the Court Rejected the *Tedford* Equitable Exception (16 Total)

| | |
|---|---|
| 1. | **Schafer v. Bayer Cropscience LP, No. 4:10CV00167 BSM, 2010 WL 1038518 (E.D. Ark. Mar. 19, 2010).**<br>The court found the one-year bar absolute. *Schafer*, 2010 WL 1038518, at *2.<br>Filed Aug. 29, 2006; removed Mar. 16, 2010; remanded Mar. 19, 2010. |
| 2. | **Advanta Tech. Ltd. v. BP Nutrition, Inc., No. 4:08CV00612 ERW, 2008 WL 4619700 (E.D. Mo. Oct. 16, 2008).**<br>The court found the one-year bar jurisdictional. *Advanta Tech. Ltd.*, 2008 WL 4619700, at *4.<br>Filed Mar. 31, 2006; removed Apr. 30, 2008; remanded Oct. 16, 2008. [second removal] |
| 3. | **Jones v. H & S Homes, LLC, No. 3:08-CV-571-MEF, 2008 WL 4600999 (M.D. Ala. Oct. 15, 2008).**<br>The court declined to recognize the equitable exception. *Jones*, 2008 WL 4600999, at *2.<br>Filed Apr. 11, 2007; removed July 17, 2008; remanded Oct. 15, 2008. |
| 4. | **Skilstaf, Inc. v. Continental Cas. Co., No. 3:08-CV-253-WKW, 2008 WL 2852316 (M.D. Ala. July 22, 2008).**<br>The court found the one-year bar absolute. *Skilstaf*, 2008 WL 282316, at *1.<br>Filed Dec. 17, 2003; removed Apr. 4, 2008; remanded July 22, 2008. |
| 5. | **Bancservices Grp., Inc. v. Stockgrowers State Bank, No. 1:08:CV00011 RWS, 2008 WL 922306 (E.D. Mo. Mar. 31, 2008).**<br>The court found the one-year limit absolute. *Stockgrowers State Bank*, 2008 WL 922306, at *1.<br>Filed Oct. 10, 2003; removed late 2007 or early 2008; remanded Mar. 31, 2008. |
| 6. | **Bancservices Grp. Inc. v. W. Nat'l Bank, No. 1:08CV13 HEA, 2008 WL 922308 (E.D. Mo. Mar. 31, 2008).**<br>The court found the one-year bar absolute. *W. Nat'l Bank*, 2008 WL 922308, at *1–2.<br>Filed Oct. 10, 2003; removed Jan. 22, 2008; remanded Mar. 31, 2008. |
| 7. | **Bancservices Grp., Inc. v. Wyo. Bank & Trust, No. 1:08CV12HEA, 2008 WL 922310 (E.D. Mo. Mar. 31, 2008).**<br>The court found the one-year bar absolute. *Wyo. Bank & Trust*, 2008 WL 922310, at *1–2.<br>Filed Oct. 10, 2003; removed Jan. 22, 2008; remanded Mar. 31, 2008. |

| | |
|---|---|
| 8. | **Bancservices Grp., Inc. v Bank of Cherry Creek, NA, No. 1:08CV00035RWS, 2008 WL 880144 (E.D. Mo. Mar. 28, 2008).**<br>The court found the one-year bar absolute. *Bank of Cherry Creek, NA*, 2008 WL 880144, at *1.<br>Filed Oct. 10, 2003; removed late 2007 or early 2008; remanded Mar. 28, 2008. |
| 9. | **Bancservices Grp., Inc. v. Bank of Laramie, No. 1:08CV16HEA, 2008 WL 822120 (E.D. Mo. Mar. 26, 2008).**<br>The court found the one-year bar absolute. *Bank of Laramie*, 2008 WL 822120, at *1–2.<br>Filed Oct. 10, 2003; removed Jan. 22, 2008; remanded Mar. 26, 2008. |
| 10. | **Bancservices Grp., Inc. v. Premier Bank, No. 1:08CV00015RWS, 2008 WL 782867 (E.D. Mo. Mar. 20, 2008).**<br>The court found the one-year bar absolute. *Premier Bank*, 2008 WL 782867, at *1.<br>Filed Oct. 10, 2003; removed late 2007 or early 2008; remanded Mar. 20, 2008. |
| 11. | **Bancservices Grp., Inc. v. Am. Nat'l Bank, No. 1:08CV14, 2008 WL 585112 (E.D. Mo. Feb. 29, 2008).**<br>The court held that it could not contravene Congressional intent by recognizing an equitable exception. *Am. Nat'l Bank*, 2008 WL 585112, at *1.<br>Filed Oct. 10, 2003; removed late 2007 or early 2008; remanded Feb. 29, 2008. |
| 12. | **Harris v. Alamo Rent A Car, LLC, No. 4:07-CV-865 JCH, 2007 WL 1701868 (E.D. Mo. June 11, 2007).**<br>The court found the one-year bar was not subject to an equitable exception. *Harris*, 2007 WL 1701868, at *3.<br>Filed July 14, 2003; removed Apr. 30, 2007; remanded June 11, 2007. |
| 13. | **City and Cnty. of S.F. v. W. Transp., Inc., No. C-06-3930-VRW, 2006 WL 3259006 (N.D. Cal. Nov. 9, 2006).**<br>The court found it was without power to recognize an equitable exception given the clear language in the statute. *City and Cnty. of S.F.*, 2006 WL 3259006, at *2.<br>Filed Feb. 23, 2004; removed June 23, 2006; remanded Nov. 9, 2006. |
| 14. | **Medley v. Rag Am. Coal, No. 2:05-CV-353 TS, 2005 WL 2401867 (D. Utah Sept. 28, 2005).**<br>The court rejected the *Tedford* equitable exception. *Medley*, 2005 WL 2401867, at *2.<br>Filed July 29, 2002; removed Apr. 8, 2003; remanded Sept. 28, 2005. |

| | |
|---|---|
| 15. | **Caudill v. Ford Motor Co., 271 F. Supp. 2d 1324 (N.D. Okla. 2003).**<br>The court held that the statutory language was clear and rejected *Tedford*. *Caudill*, F. Supp. 2d at 1327–28.<br>Filed May 22, 2002; removed June 30, 2003; remanded July 8, 2003. |
| 16. | **Mantz v. St. Paul Fire & Marine Ins. Co., No. 2:03-0506, 2003 WL 21383830 (S.D.W. Va. June 13, 2003), *opinion withdrawn in part on reconsideration*, 2003 WL 23109773 (S.D.W. Va. July 18, 2003).**<br>The court rejected *Tedford* and awarded attorney's fees to the plaintiff. *Mantz*, 2003 WL 21383830, at *2.[278]<br>Filed March 22, 2002; removed June 4, 2003; remanded June 13, 2003. |

[278] The case reversing the fee award is case No. 10 in Table I.

*Table H.*
Post-*Tedford* District Court Cases Within
the Fifth Circuit That Do Not Involve
Removal After the One-Year Period (41 Total)

| | |
|---|---|
| 1. | **McCabe v. Ford Motor Co., No. 1:10-CV-98, 2010 WL 2545513 (E.D. Tex. June 21, 2010).**<br>The court remanded the case because the defendant did not remove within thirty days of service. *McCabe*, 2010 WL 2545513, at *7.<br>Filed June 22, 2009; removed Feb. 22, 2010; remanded June 21, 2010. |
| 2. | **Lewis v. Charley Carriers, Inc., No. 5:09-CV-170-DCB, 2010 WL 1409997 (S.D. Miss. Apr. 1, 2010).**<br>The court remanded the case based on the plaintiff's post-removal affidavit stating he would not seek to recover more than $75,000.00. *Lewis*, 2010 WL 1409997, at *3.<br>Filed June 12, 2009; removed Oct. 16, 2009; remanded Apr. 1, 2010. |
| 3. | **Gilbreath v. Averitt Express, Inc., No. 09-1922, 2010 WL 1643786 (W.D. La. Mar. 10, 2010).**<br>The court found that removal was within thirty days of the defendant's receipt of the plaintiff's discovery response indicating that more than $75,000.00 was in controversy. *Gilbreath*, 2010 WL 1643786, at *7.<br>Filed Aug. 27, 2009; removed Nov. 13, 2009; recommendation to deny motion to remand Mar. 10, 2010. |
| 4. | **Bassett v. Wal-Mart Louisiana, LLC, No. 09-1936, 2010 WL 502735 (W.D. La. Feb. 8, 2010).**<br>The court found removal was within thirty days of receipt of "other paper." *Bassett*, 2010 WL 502735, at *2–3.<br>Filed Dec. 19, 2008; removed Nov. 18, 2009; motion to remand denied Feb. 8, 2010. |
| 5. | **Xtria, LLC v. Int'l Ins. Alliance, Inc., No. 3:09-CV-2228-G, 2009 WL 4756365 (N.D. Tex. Dec. 11, 2009).**<br>The court cited *Tedford* when discussing whether the defendant had waived the right to remove. *Xtria, LLC*, 2009 WL 4756365, at *4.<br>Filed Nov. 16, 2009; removed Nov. 23, 2009; motion to remand denied Dec. 11, 2009. |

| | |
|---|---|
| 6. | **McMurphy v. State Farm Fire & Cas. Co., No. 1:09CV51-HSO-RHW, 2009 WL 2169867 (S.D. Miss. July 20, 2009).**<br>The court cited *Tedford* when discussing whether the defendant had waived the right to remove. *McMurphy*, 2009 WL 2169867, at *7.<br>Filed Aug. 26, 2008; removed Jan. 12, 2009; motion to remand denied July 20, 2009. |
| 7. | **Adams v. Williams, No. 2:09CV052-KS-MTP, 2009 WL 1585972 (S.D. Miss. June 4, 2009).**<br>The court remanded the case in light of the plaintiff's affidavit stating he would not seek to recover more than $75,000.00. *Adams*, 2009 WL 1585972, at *3. The court cited *Tedford* and indicated it would entertain a second removal if the plaintiff attempted to amend his complaint to seek more damages after remand. *Id.* at *3–4 n.2.<br>Filed Feb. 2009; removed Mar. 24, 2009; remanded June 4, 2009. |
| 8. | **Moreaux v. State Farm Mut. Auto Ins. Co., No. 09-396, 2009 WL 1559761 (W.D. La. June 3, 2009).**<br>The defendant removed within one year, arguing fraudulent joinder. *Moreaux*, 2009 WL 1559761, at *1–2.<br>Filed Jan. 29, 2009; removed Mar. 11, 2009; motion to remand denied June 3, 2009. |
| 9. | **Luxich v. Balboa Ins. Co., No. 3:08CV656TSL-JCS, 2009 WL 649727 (S.D. Miss. Mar. 10, 2009).**<br>The court remanded the case because the defendants did not prove that more than $75,000.00 was in controversy. *Luxich*, 2009 WL 649727, at *3. The court noted that it would entertain a second removal if the plaintiffs moved to amend their complaint to seek additional damages after remand. *Id.*<br>Filed Aug. 28, 2008; removed Oct. 22, 2008; remanded Mar. 10, 2009. |
| 10. | **F.M.B. v. Mega Life & Health Ins., No. 3:08CV530-DPJ-JCS, 2009 WL 426435 (S.D. Miss. Feb. 18, 2009).**<br>The court remanded the case because the defendant did not prove that more than $75,000.00 was in controversy. *F.M.B.*, 2009 WL 426435, at *2. The court noted that it would entertain a second removal if the plaintiffs moved to amend their complaint to seek additional damages after remand. *Id.*<br>[no dates provided] |
| 11. | **Dupree v. Torin Jacks, Inc., No. 08-CV-1648, 2009 WL 366332 (W.D. La. Feb. 12, 2009).**<br>The court cited *Tedford* when determining whether to make an exception to the rule of unanimity. *Dupree*, 2009 WL 366332, at *3.<br>Filed Oct. 1, 2008; removed Nov. 3, 2008; remanded Feb. 12, 2009. |

| | |
|---|---|
| 12. | **O'Keefe v. State Farm Fire & Cas. Co., No. 1:08CV600-HSO-LRA, 2009 WL 95039 (S.D. Miss. Jan., 13, 2009).**<br>The court cited *Tedford* when discussing whether the defendant had waived the right to remove based on federal question jurisdiction. *O'Keefe*, 2009 WL 95039, at *8.<br>Filed Aug. 28, 2006; removed Sept. 11, 2008; motion to remand denied Jan. 13, 2009. |
| 13. | **Campbell v. Royal Caribbean Cruises, Ltd., No. G-08-0117, 2008 WL 6025977 (S.D. Tex. Nov. 21, 2008).**<br>The court cited *Tedford* when discussing whether the defendant had waived the right to remove. *Campbell*, 2008 WL 6025977, at *2 n.1.<br>Filed (no date provided); removed 2008; motion to remand denied Nov. 21, 2008. |
| 14. | **Lofton v. Phillips 66 Co., No. 1:08CV1008WJG-JMR, 2008 WL 4829913 (S.D. Miss. Nov. 17, 2008).**<br>The court denied the defendants' motion to reconsider its order granting the plaintiff's motion to remand.[279] *Lofton*, 2008 WL 4939528, at *2.<br>Filed Mar. 6, 2006; removed Sept. 24, 2008; remanded Nov. 4, 2008; motion to reconsider remand denied Nov. 17, 2008. |
| 15. | **Williams v. EDCare Mgmt., Inc., No. 1:08-CV-278, 2008 WL 4755744 (E.D. Tex. Oct. 28, 2008).**<br>The defendant removed the case based on alleged federal question jurisdiction. *Williams*, 2008 WL 4755744, at *2.<br>Filed Jan. 4, 2007; removed May 16, 2008; remanded Oct. 28, 2008. |
| 16. | **Waxler Transp. Co. v. Valspar Corp., No. 08-1363, 2008 WL 4936510 (E.D. La. Aug. 6, 2008).**<br>The defendant removed the case pursuant to the Class Action Fairness Act and the court remanded after finding that the defendant had waived its right to remove. *Waxler Transp. Co.*, 2008 WL 4936510, at *1, *3.<br>Filed Feb. 22, 2008; removed Mar. 20, 2008; remanded Aug. 6, 2008. |
| 17. | **Davenport v. Hamilton, Brown, & Babst, L.L.C., 624 F. Supp. 2d 542 (M.D. La. 2008).**<br>The court found that the litigation between attorneys over fees was really a separate case that was removed within one year of commencement of the petition for intervention. *Davenport*, 624 F. Supp. 2d at 546–47.<br>Filed Oct. 17, 1995; petition for intervention filed Nov. 19, 2007; removed Jan. 25, 2008; motion to remand denied June 19, 2008. |

[279] *See* Case No. 15 in Table D.

| | |
|---|---|
| 18. | **Montgomery v. State Farm Fire and Cas. Co., No. 07-CV-2129, 2008 WL 1733594 (W.D. La. Apr. 14, 2008).**<br>The defendant removed more than thirty days after service and argued for application of the equitable exception because his counsel's runner inadvertently filed the removal notice in state court instead of federal district court, which error was not discovered by counsel until later because counsel became ill. *Montgomery*, 2008 WL 1733594, at *2. The court remanded the case, finding absolutely no forum manipulation and refusing to extend the equitable exception to cases of mistake or negligence by the removing defendant's counsel. *Id.* at *3.<br>Filed Aug. 20. 2007; removed Dec. 6, 2007; remanded Apr. 14, 2008. |
| 19. | **McMillin v. Breen, No. 08-1090, 2008 WL 782812 (E.D. La. Mar. 20, 2008).**<br>The court remanded the case after finding that it was a supplemental proceeding to a previously filed state court suit. *McMillin*, 2008 WL 782812, at *2.<br>Filed Nov. 27, 2007; removed Feb. 21, 2008; remanded Mar. 20, 2008. [fee award] |
| 20. | **Stampley v. Fred's Dollar Store of Miss., Inc., No. 5:07-CV-153-DCB-JMR, 2008 WL 480002 (S.D. Miss. Feb. 16, 2008).**<br>The court remanded after finding that the defendant had not demonstrated that more than $75,000.00 was in controversy. *Stampley*, 2008 WL 480002, at *3. The court noted that it would entertain a second removal based on *Tedford* if the plaintiff engaged in forum manipulation after remand. *Id.* at *4.<br>Filed May 10, 2007; removed Aug. 3, 2007; remanded Feb. 16, 2008. |
| 21. | **Myers v. Gregory, No. 07-2213, 2008 WL 239570 (W.D. La. Jan. 29, 2008).**<br>The court remanded after finding that the defendant had not demonstrated that more than $75,000.00 was in controversy. *Myers*, 2008 WL 239570, at *2–3. The court noted that it would entertain a second removal based on *Tedford* if the plaintiff engaged in forum manipulation after remand. *Id.* at *3.<br>Filed Nov. 29, 2007; removed Dec. 28, 2007; remanded Jan. 29, 2008. |
| 22. | **Citizens Nat'l Banc Corp. v. Directory Assistants, Inc., No. 4:07CV81DPJ-JCS, 2007 WL 4293304 (S.D. Miss. Dec. 4, 2007).**<br>The court remanded, after finding that the defendant had not demonstrated that more than $75,000.00 was in controversy. *Citizens Nat'l Banc Corp.*, 2007 WL 4293304, at *2.<br>Filed Mar. 22, 2007; removed June 26, 2007; remanded Dec. 4, 2007. |

| | |
|---|---|
| 23. | **Partners in Funding Inc. v. Quest Capital Res., LLC, No. H-05-0729, 2007 WL 471128 (S.D. Tex. Feb. 8, 2007).**<br>The court remanded after finding no equitable reason to make an exception to the requirement that defendants join in the notice of removal within the thirty-day removal period. *Partners in Funding*, 2007 WL 471128, at *3–4.<br>Filed Oct. 19, 2004; removed Mar. 4, 2005; remanded Feb. 8, 2007. |
| 24. | **KLN Steel Prods. Co. v. CNA Ins. Cos., No. SA-06-CA-0709-XR, 2006 WL 3228534 (W.D. Tex. Nov. 6, 2006).**<br>The court remanded after finding no equitable reason to make an exception to the requirement that defendants join in the notice of removal within the thirty-day removal period. *KLN Steel Prods. Co.*, 2006 WL 3228534, at *6.<br>Filed June 19, 2006; removed Aug. 18, 2006; remanded Nov. 6, 2006. |
| 25. | **Titan Aviation, LLC v. Key Equip. Fin., Inc., No. 3:06-CV-1121-D, 2006 WL 3040923 (N.D. Tex. Oct. 26, 2006).**<br>The court denied the motion to remand after finding that the plaintiff had fraudulently joined the non-diverse defendant and further finding that the defendant had not waived the right to remove. *Titan Aviation, LLC*, 2006 WL 3040923, at *6, 8, 10. The court cited *Tedford* in connection with its discussion of waiver of the right to remove. *Id.* at *8.<br>Filed (no date provided); removed in June or July 2006 (within one year); motion to remand denied Oct. 26, 2006. |
| 26. | **Yandell v. Standard Ins. Co., No. G-06-461, 2006 WL 2882807 (S.D. Tex. Oct. 5, 2006).**<br>The court denied the motion to remand after finding that the defendant did not waive the right to remove by asserting a compulsory counterclaim in state court. *Yandell*, 2006 WL 2882807, at *4.<br>Filed (no date provided); removed June 20, 2006; motion to remand denied Oct. 5, 2006. |
| 27. | **Nelson v. Rite Aid Corp., No. 5:05CV173-DCB-JCS, 2006 WL 2474005 (S.D. Miss. Aug. 25, 2006).**<br>The court remanded after finding that the defendants had not demonstrated that more than $75,000.00 was in controversy. *Nelson*, 2006 WL 2474005, at *3–4. The court noted that it would entertain a second removal based on *Tedford* if the plaintiffs engaged in forum manipulation after remand. *Id.*<br>Filed Mar. 17, 2005; removed Sept. 19, 2005; remanded Aug. 25, 2006. |

| | |
|---|---|
| 28. | **McMahon v. Allstate Ins., Co., No. 06-3022, 2006 WL 2402925 (E.D. La. Aug. 16, 2006).**<br>The court remanded after finding that the defendant had failed to establish that more than $75,000.00 was in controversy. *McMahon*, 2006 WL 2402925, at *2–3.<br>Filed (no date provided); removed 2006; remanded Aug. 16, 2006. |
| 29. | **Harrison v. Christus St. Patrick Hosp., 432 F. Supp. 2d 648 (W.D. La. 2006).**<br>The court granted the plaintiff's motion to remand, finding removal inappropriate based on lack of federal question jurisdiction.[280] *Harrison*, 432 F. Supp. 2d at 657.<br>Filed Feb. 11, 2005; removed Mar. 4, 2005; motion to remand denied May 4, 2006. |
| 30. | **Haley *ex rel.* Davis v. Ford Motor Co., 417 F. Supp. 2d 811 (S.D. Miss. 2006).**<br>The court remanded after finding that the defendant had not demonstrated that more than $75,000.00 was in controversy. *Haley*, 417 F. Supp. 2d at 816. The court noted that it would entertain a second removal based on *Tedford* if the plaintiff engaged in forum manipulation after remand. *Id.*<br>Filed Apr. 2005; removed 2006; remanded Mar. 2, 2006. |
| 31. | **Harrison v. Christus Health, No. 2:05-CV-00408-PM, 2005 WL 3989794 (W.D. La. Sept. 1, 2005).**<br>The court granted the plaintiff's motion to remand, finding removal inappropriate based on lack of federal question jurisdiction. *Harrison*, 2005 WL 3989794, at *7–8.<br>Filed Feb. 11, 2005; removed Mar. 4, 2005; motion to remand denied Sept. 1, 2005. |
| 32. | **In re Silica Prods. Liab. Litig., 398 F. Supp. 2d 563 (S.D. Tex. 2005).**<br>The court remanded some cases in this MDL action based on the defendants' failure to prove complete diversity based on improper joinder and the defendants' failure to prove timely joinder in the notice of removal. *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d at 658–59. The court did not discuss the equitable exception and cited *Tedford* as support for the rule of unanimity. *Id.* at 657.<br>[dates omitted because the decision involved the remand of numerous cases in the MDL action.] |
| 33. | **Dale v. First Am. Nat'l Bank, 370 F. Supp. 2d 546 (S.D. Miss. 2005).**<br>The court found that removal was proper because complete diversity was created after removal while the action was stayed. *Dale*, 370 F. Supp. 2d at 548, 551–52.<br>Filed July 31, 2002; removed Sept. 5, 2002; motion to remand denied May 12, 2005. |

[280] This appears to be a remand of the same case at issue in Case No. 31 below.

| | |
|---|---|
| 34. | **Paige *ex rel.* Paige v. Mariner Health Care, Inc., No. 506CV162-DCBJMR, 2007 WL 1296049 (S.D. Miss. May 2, 2007).**<br>The case was removed after more than one year but the plaintiff had previously waived the one-year limit. The opinion did not involve a motion to remand. *Paige*, 2007 WL 1296049, at *1.<br>Filed Aug. 30, 2004; removed Nov. 27, 2006. |
| 35. | **Nixon v. Wheatley, 368 F. Supp. 2d 635 (E.D. Tex. 2005).**<br>The court denied motion to remand after finding that the defendant had not waived the right to remove. *Nixon*, 368 F. Supp. 2d at 641.<br>Filed Dec. 30, 2004; removed Jan. 26, 2005; motion to remand denied Mar. 24, 2005. |
| 36. | **Lee v. State Farm Mut. Auto. Ins. Co., 360 F. Supp. 2d 825 (S.D. Miss. 2005).**<br>The court granted the plaintiff's motion to remand on October 23, 2003 and then stayed the defendant's motion to reconsider that order pending the outcome of *Smallwood v. Illinois Central R.R. Co.*, 385 F.3d 568 (5th Cir. 2004) (*en banc*). *Lee*, 360 F. Supp. at 827. After *Smallwood* was decided, the district court denied the defendant's motion to reconsider its order granting the plaintiff's motion to remand. *Id.* at 833.<br>[no dates provided] |
| 37. | **Texas First Nat'l Bank v. Wu, 347 F. Supp. 2d 389 (S.D. Tex. 2004).**<br>The court denied the plaintiffs' motion to remand a case that had been removed based on federal question jurisdiction and cited *Tedford* when discussing whether the defendant had waived the right to remove. *Texas First Nat'l Bank*, 347 F. Supp. 2d at 396–97.<br>[dates omitted because three cases were consolidated after removal] |
| 38. | **Chamberlain v. Amrep, Inc., No. 3:04-CV-1776-B, 2004 WL 2624676 (N.D. Tex. Nov. 18, 2004).**<br>The plaintiff filed an amended complaint adding a federal question claim on November 9, 2001. *Chamberlain*, 2004 WL 2624676, at *1. That same day, the court dismissed the case subject to the plaintiff's right to reinstate. *Id.* On April 4, 2002, the plaintiff filed a motion to reinstate, which motion was granted by order dated August 4, 2004. *Id.* The defendant removed on August 13, 2004, asserting federal question jurisdiction. *Id.* The court found that equity warranted tolling the thirty-day period while the state court case was dismissed. *Id.* at *2. The court denied the motion to remand after finding an equitable exception to the thirty-day period for removal. *Id.*<br>Filed Apr. 26, 2001; removed Aug. 13, 2004; motion to remand denied Nov. 18, 2004. |

| | |
|---|---|
| 39. | **Wilbanks v. N. Am. Coal Corp., 334 F. Supp. 2d 921 (S.D. Miss. 2004).**<br>The court remanded after finding that the defendants had not demonstrated that more than $75,000.00 was in controversy. *Wilbanks*, 334 F. Supp. 2d at 927–28. The court noted that it would entertain a second removal based on *Tedford* if the plaintiff engaged in forum manipulation after remand. *Id.* at 928.<br>Filed Mar. 25, 2004; removed May 26, 2004; remanded Sept. 8, 2004. |
| 40. | **Carr v. Mesquite Indep. Sch. Dist., No. 3:04-CV-0239, 2004 WL 1335827 (N.D. Tex. June 14, 2004).**<br>The court remanded a case that had been removed based upon federal question jurisdiction after finding no equitable exception to the requirement that the defendants unanimously join in the notice of removal within the thirty-day period. *Carr*, 2004 WL 1335827, at *3–4.<br>Filed May 28, 2003; removed Feb. 5, 2004; remanded June 14, 2004. [fee award] |
| 41. | **Miskovic v. Charter Commc'ns Holding Co., L.L.C., No. 3:03CV0796N, 2003 WL 21640575 (N.D. Tex. July 9, 2003).**<br>The court remanded the case because the settlement agreement between the plaintiff and the non-diverse defendant had not been recorded in the docket when the diverse defendant removed. *Miskovic*, 2003 WL 21640575, at *3. The court cited *Tedford* as a deterrence to gamesmanship by the plaintiff after remand. *Id.* at *2.<br>Filed May 3, 2002; removed Apr. 18, 2003; remanded July 9, 2003. |

*Table I.*
Post-*Tedford* District Court Cases Outside the
Fifth Circuit That Do Not Involve
Removal After the One-Year Period (11 Total)

| | |
|---|---|
| 1. | **Sloneker v. Smith, No. 10-CV-04096-NKL, 2010 WL 2772310 (W.D. Mo. July 12, 2010).**<br>The defendant urged the court to recognize an equitable exception to the thirty-day rule. *Sloneker*, 2010 WL 2772310, at *3. The court refused, finding that the defendant had an opportunity to timely remove. *Id.* at *4.<br>Filed Feb. 2, 2009; removed May 7, 2010; remanded July 12, 2010. |
| 2. | **City of Springfield, Mass. v. Comcast Cable Commc'n, Inc., 670 F. Supp. 2d 100 (D. Mass. 2009).**<br>The court cited *Tedford* in connection with the plaintiff's argument that the defendant had waived the right to remove. *City of Springfield, Mass.*, 670 F. Supp. 2d at 105–06.<br>Filed Mar. 31, 2009; removed May 13, 2009; motion to remand denied Nov. 17, 2009. |
| 3. | **McCormick v. Apache, Inc., No. 5:09CV49, 2009 WL 2985470 (N.D. W. Va. Sept. 15, 2009).**<br>The defendant urged the court to apply the *Tedford* equitable exception to the thirty-day requirement. *McCormick*, 2009 WL 2985470, at *4. The court refused and remanded. *Id.*<br>Filed Feb. 2009; served the defendant on Mar. 27, 2009; removed May 9, 2009; remanded Sept. 15, 2009. |
| 4. | **CMS Security, Inc. v. Burlington Ins. Co., No. 09-2217 MMC, 2009 WL 2252106 (N.D. Cal. July 28, 2009).**<br>The court cited *Tedford* in connection with the plaintiff's argument that the defendant had waived the right to remove. *CMS Security, Inc.*, 2009 WL 2252106, at *2.<br>Filed Nov. 24, 2008; removed May 20, 2009; motion to remand denied July 28, 2009. |
| 5. | **Cruz v. Lowe's Home Ctrs, Inc., No. 809-CV-1030-T-30MAP, 2009 WL 2180489 (M.D. Fla. July 21, 2009).**<br>The court cited *Tedford* in connection with the plaintiff's argument that the defendant had waived the right to remove. *Cruz*, 2009 WL 2180489, at *3 n.3.<br>Filed Jan. 16, 2009; removed June 3, 2009; motion to remand denied July 21, 2009. |

| | |
|---|---|
| 6. | **Berbig v. Sears Roebuck & Co., Inc., 568 F. Supp. 2d 1033 (D. Minn. 2008).**<br>The case was originally filed in Illinois and then dismissed. *Berbig*, 568 F. Supp. 2d at 1034–35. The case was then refiled in Minnesota and removed shortly thereafter. *Id.* The plaintiff argued that the second case commenced when the first case was filed. *Id.* at 1035. The court rejected the plaintiff's argument and denied the remand motion. *Id.* at 1035, 1040.<br>Filed Mar. 13, 2008; removed Apr. 30, 2008; motion to remand denied July 25, 2008. |
| 7. | **Walker v. Pac. Pride Servs., Inc., No. 07-2857-SC, 2007 WL 1888885 (N.D. Cal. June 29, 2007).**<br>The plaintiff argued for an equitable remand because the defendant had agreed to a trial date in state court. *Walker*, 2007 WL 1888885, at *3–4. The district court denied the motion for remand. *Id.* at *4.<br>Filed Sept. 14, 2006; removed June 1, 2007; motion to remand denied June 29, 2007. |
| 8. | **Espinosa v. Allstate Ins. Co., No. 07-0746, 2007 WL 1181020 (E.D. Pa. Apr. 16, 2007).**<br>The court remanded the case because the defendant did not demonstrate that more than $75,000.00 was in controversy. *Espinosa*, 2007 WL 1181020, at *14–16. The court cited *Tedford* and acknowledged that the defendant could remove again if the plaintiff manipulated the forum after remand. *Id.*<br>Filed Dec. 12, 2006; removed Feb. 23, 2007; remanded Apr. 16, 2007. |
| 9. | **Punzak v. Allstate Ins. Co., No. 07-1052, 2007 WL 1166087 (E.D. Pa. Apr. 16, 2007).**<br>The court remanded the case because the defendant did not demonstrate that more than $75,000.00 was in controversy. *Punzak*, 2007 WL 1166087, at *14–16. The court cited *Tedford* and acknowledged that the defendant could remove again if the plaintiff manipulated the forum after remand. *Id.*<br>Filed Dec. 20, 2006; removed Mar. 19, 2007; remanded Apr. 16, 2007. |

| | |
|---|---|
| 10. | **Mantz v. St. Paul Fire & Marine Ins. Co., No. 2:03-0506, 2003 WL 21383830 (S.D.W. Va. July 18, 2003).**<br>The court reconsidered its order imposing sanctions for the defendant's removal based on *Tedford* and withdrew the sanctions in light of an unpublished opinion recognizing *Tedford*. *Mantz*, 2003 WL 23109773, at *2.<br>Filed Mar. 22, 2002; removed June 4, 2003; remanded June 13, 2003; motion to reconsider sanctions granted July 18, 2003. |
| 11. | **In re Rezulin Prods. Liab. Litig., MDL No. 1348, 2003 WL 21285538 (S.D.N.Y. June 4, 2003),** ***corrected and superseded,*** **2003 WL 21355201 (S.D.N.Y. June 4, 2003).**[281]<br>This opinion was superseded by a later opinion of the court. *In re Rezulin Prods. Liab. Litig.*, 2003 WL 21355201, at *2.<br>Filed Feb. 9, 2001; removed Mar. 18, 2002; motion to remand denied June 4, 2003. |

[281] See Case No. 3 in Table E.