

ERRONEOUS REMOVAL AS A TOOL FOR SILENT TORT REFORM: AN EMPIRICAL ANALYSIS OF FEE AWARDS AND FRAUDULENT JOINDER

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By erroneously removing cases to federal court, defendants impose a cost (in time and money) on plaintiffs and the court system. If borderline cases are removed by defendants for precisely this purpose, defendants would be able to effect tort reform without needing new Congressional legislation. Using remand rates to measure erroneous removal, this Article finds that the remand rate for diversity cases has significantly changed over time: doubling by the year 2000, but sharply declining to the historical level thereafter.

Two hypotheses are studied to explain the fluctuation in the remand rate. First, were the changes to the removal statute in 1988—adding the authority to impose higher fee awards and eliminating the bond posting requirement—responsible for the uptick in the likelihood of remand during the 1990s and the sharp decline after 2000? Second, could doctrinal differences between circuit courts—in how they awarded fees and analyzed fraudulent joinder arguments—explain both the differences between the circuits and the fluctuation in the remand rate?

Two empirical findings stand out. First, diversity cases removed on the basis of fraudulent joinder arguments are much more likely to be remanded than other similar cases. If not constrained by courts, this provides an opportunity for defendants to abuse the doctrine. Second, the identity of the removing defendant—individual, corporation, or other—does not matter as much as the identity of the plaintiff. All types of defendants are more likely to erroneously remove a case against an individual plaintiff, perhaps because such

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plaintiffs suffer more from delay and added cost than would the average corporate plaintiff.

INTRODUCTION

A defendant's ability to remove cases from state to federal court is important to both litigants and the federal court system. Litigants tend to have greater success in the forum they choose, so removal can provide a forum-based advantage for defendants.¹ If wrongly invoked,² removal can be used by defendants to delay cases and increase the cost of litigation for plaintiffs, thus effecting silent tort reform. The federal court system would also suffer from such a state of affairs. In every case, the court must assess whether subject matter jurisdiction exists. The time judges spend on cases that should not have been removed to federal court, nor originally filed in federal court, is a deadweight loss that should be minimized.

The leading empirical study on erroneous removals, conducted by Theodore Eisenberg and Trevor W. Morrison, established that there had been a significant rise—nearly a doubling—in the remand rate of removed diversity cases in the two decades prior to the study.³ Although they did not inquire into why the remand rate had changed over time, they hypothesized that it might have risen because defendants believed that punitive damage awards in state courts had dramatically increased.⁴ Taking a closer look at one state, Alabama, Eisenberg and Morrison noted that erroneous removals had decreased since the late 1990s, and they suggested that this might have occurred because defendants no longer viewed Alabama federal courts as the

1. 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, 607 n.81 (1998) ([P]laintiffs' loss of forum advantage by removal . . . reduces their chance of winning by about one-fifth.").

2. Removed cases that are later remanded are described in this Article using terms such as "erroneously removed" or "wrongly removed." These cases are erroneous in the eyes of a federal court; I make no claims that the court was correct in every remand decision. The finality of the district court's remand decision provides a strong reason to view such cases as "erroneous." See 28 U.S.C. § 1447(d) (2006) ("An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, [unless it is a civil rights case removed pursuant to 28 U.S.C. § 1443]."). The "erroneous removal" terminology should not be confused with "abusive" removals: cases removed by defendants who know that removal is legally improper.

3. Theodore Eisenberg & Trevor W. Morrison, *Overlooked in the Tort Reform Debate: The Growth of Erroneous Removal*, 2 J.E.L.S. 551, 567 fig.5 (2005).

4. *Id.* at 568 ("[T]he AO data themselves do not show precisely why erroneous diversity removals have increased over the last two decades." (emphasis in original)).

“worst of the worst” in terms of pro-plaintiff bias.⁵ Thus, defendants were less likely to feel removal was absolutely necessary.⁶

Today, the reasons why remand rates in tort and contract cases have fluctuated so much over time are still unknown. Nor is it known whether there are certain case types or party pairings that lead to greater levels of remands. Furthermore, legal commentators disagree about whether the fraudulent joinder doctrine is a useful tool to counter questionable procedural tactics used by plaintiffs or whether it merely provides a plausible justification for defendants to remove when there is no diversity on the face of the complaint. Better understanding of these issues would (1) help Congress decide how best to tailor access to federal courts and (2) help judges determine how to optimally deter erroneous removals.

This Article focuses on two theories to explain changes in the remand rate. The first theory looks at the removal data through a historical lens, predicting that changes in the removal statute in 1988, which made removal easier by eliminating the bond posting requirement, led to an increased remand rate. Although the 1988 changes also allowed courts to impose higher fee awards to deter erroneous removals, I hypothesize that this tool was not used vigorously enough to offset the easier removal. The second theory focuses on doctrinal differences between circuits, predicting that circuits that readily grant fee awards, or are reluctant to entertain fraudulent joinder arguments by removing defendants, have a lower remand rate. To analyze these theories, I will use logistic regression, which is designed to estimate the *probability* of remand, instead of looking at the *percentage* of remands in a particular year.⁷ I am not aiming to predict which cases will be remanded;⁸ rather, I use logistic regression to measure the strength of the association between selected variables.

In Part I of this Article, I provide a brief overview of the process of removal and detail the legislative changes since 1980 in removal

5. *Id.* at 569 (citing American Tort Reform Association, *Judicial Hellholes* (2004)).

6. *Id.* (noting that “[o]ur data provide no way to confirm this [hypothesis]”).

7. This requires logistic regression, which is a special type of regression used for variables that have a binary outcome: something either does or does not happen. *See generally* ALAN C. ACOCK, *A GENTLE INTRODUCTION TO STATA* 248–67 (2006).

8. The baseline of comparison for this model is the naïve one: 85% of the tort cases can be explained by predicting that *none* of them will be removed. Models that do not beat this baseline are only marginally useful for prediction, but they may be used to measure association.

procedures and judicial tools to deter erroneous removals. In Part II, I analyze whether, after the major legislative changes in 1988, there was an increase in the number of fee awards, in the mean or maximum amount awarded in a year, or in the likelihood of remand for different groups of litigants. In Part III, I take a closer look at the circuit courts, which apply different standards for fee awards and fraudulent joinder inquiries. In Part IV, I combine the insights of the previous two sections to create a comprehensive model of factors that influence the remand rate. Lastly, the conclusion summarizes this Article's main findings and their implications.

I. HISTORICAL CHANGES IN REMOVAL REQUIREMENTS

The conditions a defendant must satisfy to permanently remove a case to federal court and the punishments meted out for erroneous removal go hand-in-hand. Adjusting these requirements can help satisfy, or can undermine, the goals underlying removal. Five actors have interests at stake: (1) the plaintiff, who wants to avoid undue costs and delay (and stay in state court); (2) the defendant, who prefers to litigate in federal court, perhaps because of concerns of state bias; (3) the federal court, which wants to avoid inefficient expenditure of its limited time and resources in reviewing wrongful removal requests; (4) the state court, which wants to avoid unneeded disruption to its ongoing proceedings; and (5) the general public, who as taxpayers funding the courts would like to save money, but who would also want to benefit from the deterrent effects of the tort system.

To satisfy these goals, Congress has amended the removal statute a number of times in the past few decades, including a major change in 1988. First, however, the current process for removal deserves to be highlighted. Within thirty days of receiving the plaintiff's complaint, the defendants must file a notice of removal in the proper federal court.⁹ Once the notice is filed, removal to the federal court is automatic: when the state court is notified of removal by the defendants, the state court "shall proceed no further."¹⁰

The automatic removal feature is what gives the process its bite. Removal can (and arguably has been)¹¹ abused by defendants wishing

9. 28 U.S.C. § 1446(b) (2006).

10. § 1446(d).

11. See Eisenberg & Morrison, *supra* note 3, at 561–62 (providing anecdotal evidence of removal abuse).

to delay the case and/or increase the plaintiff's litigation costs. If allowed to occur, this would effect silent tort reform—tort reform arguably more powerful than the limited procedural reforms that Congress has been able to pass, such as the Class Action Fairness Act (CAFA) of 2005, which applies only to a circumscribed set of cases.¹² There is a concern that such silent reform has occurred, as one empirical study recently concluded that “erroneous removal is a significant and growing phenomenon.”¹³

However, the view that the rising remand rate from 1988 to 2000 suggested a corresponding rise in purposefully wrongful removals neglects the role of the enforcer: the courts. Once the district court receives the notice of removal, it must “examine the notice promptly” and “make an order for summary remand” if removal appears impermissible on the face of the documents.¹⁴ If a summary remand is not warranted, the court does not proceed at its normal, measured pace. Rather, “an evidentiary hearing [must] be held promptly.”¹⁵ These provisions demonstrate a keen desire for a prompt determination of whether the case is properly in federal court. This is not designed to save the resources and time of federal courts, which may find a queue more efficient; rather, it is designed to provide such savings to plaintiffs. An important tool to achieve this goal is one of

12. First, only cases with over \$5 million in controversy are affected. 28 U.S.C. § 1332(d) (2006) (requiring that “matter in controversy exceed[] the sum or value of \$5,000,000,” and detailing certain circumstances in which district courts “shall decline to exercise jurisdiction”). Second, a recent study by the Federal Judicial Center indicates that CAFA has had little effect on tort cases. THOMAS E. WILLGING & EMERY G. LEE III, FED. JUDICIAL CTR., THE IMPACT OF THE CLASS ACTION FAIRNESS ACT OF 2005 ON THE FEDERAL COURTS: THIRD INTERIM REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 3, 21 (2007) (“Tort class actions in the federal courts have not greatly increased in the CAFA period. . . . [The] additional cases so far have primarily been contract and common-law fraud cases.”).

I did not study the effect of class actions in this Article because the AO data for this variable may be more likely than usual to be incomplete or erroneous. See THOMAS E. WILLGING, LAURAL L. HOOPER & ROBERT J. NIEMIC, FED. JUDICIAL CTR., EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES 199 (1996).

[The AO data] substantially undercounted class action activity during the study period [from 1992–1994]. . . . Data from the Federal Judicial Center time study sample . . . support the conclusion that in the recent past there were no reliable national data on the number of class action filings and terminations in the federal courts.

Id.

13. Eisenberg & Morrison, *supra* note 3, at 576.

14. § 1446(c)(4).

15. § 1446(c)(5).

deterrence: under 28 U.S.C. § 1447(c), the court “may require payment of just costs and any actual expenses, including attorney fees.” In addition, the statute explicitly, though unnecessarily, states that the defendant’s signed notice of removal is subject to Rule 11 of the Federal Rules of Civil Procedure.¹⁶

Although awards of costs, expenses, or attorney fees (or all three) are available to courts to deter wrongful removals, there are a few tools that Congress has explicitly said are *not* available. In 1988, after a long debate regarding whether diversity jurisdiction should be abolished,¹⁷ Congress passed an omnibus bill, “The Judicial Improvements and Access to Justice Act of 1988,”¹⁸ which contained a number of significant changes to the removal process. In the years before this Act was passed, defendants had to submit a “verified” petition for removal (notarized and sworn under oath) in addition to posting a removal bond.¹⁹ The Act jettisoned both of these requirements: the latter because it unduly burdened the ability of defendants to exercise their right of removal, and the former because its purposes could be achieved using Rule 11.²⁰ A third change in 1988 reworded § 1447(c). Instead of allowing “just payment of costs” for “improvidently” removed cases, Congress dropped the qualifier “improvidently” and expanded the available remedies to include “just costs,” “actual expenses,” and “attorney fees.” These changes do not appear to have been motivated by a desire to favor either plaintiffs or defendants in their procedural battles; rather, Congress likely believed that adding explicit authority to award expenses and attorney fees

16. § 1446(a).

17. H.R. REP. NO. 100-889, at 45 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 5982, 6005 (“[A subcommittee] adopted an amendment to generally abolish diversity of citizenship. The resolution of this debate . . . was to vote to increase the amount in controversy for diversity jurisdiction from \$10,000 to \$50,000.”).

18. Pub. L. No. 100-702, 102 Stat. 4642 (1988).

19. H.R. REP. NO. 100-889, at 71 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 5982, 6032.

20. H.R. REP. NO. 100-889, at 72 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 5982, 6033.

The bond requirement imposes a cost that may be substantial to some litigants, and constitutes an additional procedural complication. . . . [In addition to the option under section 1447(c) of] requiring payment of actual expenses incurred in resisting an improper removal[,] civil rule 11 can be used to impose a more severe sanction when appropriate.

Id.

would allow judges to limit wrongful removals.²¹ In the subsequent section, I explore whether this goal has been realized.

II. HISTORICAL CHANGES: AN EMPIRICAL ANALYSIS

As detailed above, the removal statute was amended in 1988 to expand the scope of fee awards and to eliminate the requirement that a removing defendant post bond. In this section, I will examine the effect of these changes on remand rates. First, I set out the historical data on remand rates, which show a steady rise from 1988 until 2000, followed by a dramatic decrease back to the pre-1988 levels around 2000. Second, I explore whether the number of fee awards or the size of the fee awards played any role in the rise of the remand rate after 1988 and its subsequent fall around 2000. Third, I ask whether the elimination of the bond requirement—which likely had a disparate impact on the litigation choices of those defendants with less wealth—was a factor in the rise of the remand rate.

The data used were gathered by the Administrative Office of the United States Courts (the AO data), available through the Inter-University Consortium for Political and Social Research.²² These data include nearly all diversity cases terminated in a federal district court from 1979 through 2006, with the exception of 3,332 diversity personal injury cases remanded on the same day from the Northern District of Ohio.²³

21. Even if the goal of limiting erroneous removals is not achieved by fee awards, such awards would cause defendants to internalize the risk of removing cases on flimsy grounds. If fees are rarely awarded, defendants are able to externalize some of the cost of this risk onto the plaintiff. In either situation, however, the federal court bears some of the cost because it is generally not thought that § 1447(c) allows courts to require the plaintiff to pay to the court the costs imposed on the court, absent a Rule 11 violation.

22. See Inter-University Consortium for Political & Social Research (ICPSR), Federal Court Cases: Integrated Data Base, 2006, ICPSR Study No. 4685 (2007); ICPSR, Federal Court Cases: Integrated Data Base, 2005, ICPSR Study No. 4382 (2006); ICPSR, Federal Court Cases: Integrated Data Base, 2004, ICPSR Study No. 4348 (2006); ICPSR, Federal Court Cases: Integrated Data Base, 2003, ICPSR Study No. 4026 (2005); ICPSR, Federal Court Cases: Integrated Data Base, 2002, ICPSR Study No. 4059 (2005); ICPSR, Federal Court Cases: Integrated Data Base, 2001, ICPSR Study No. 3415 (2005); ICPSR, Federal Court Cases: Integrated Data Base, 1970–2000, ICPSR Study No. 8429 (2005).

23. The cases were remanded on September 11, 1990 and appear to relate to asbestos exposure. Cf. Jack B. Weinstein & Eileen B. Hershenov, *Evidence and Procedure for the Future: The Effect of Equity on Mass Tort Law*, 1991 U. ILL. L. REV. 269, 295 n.145 (1991) (discussing asbestos cases in Northern District of Ohio in 1990).

I also dropped a case supposedly filed in 1901 and terminated in 1995. The federal courts are not that slow. For discussion and analysis of the reliability of the AO data, see Theodore Eisenberg & Margo Schlanger, *The Reliability of the Administrative Office of the U.S. Courts*

A. *Aggregate Data: An Overview*

As Figure 1 below suggests, the number of removals on the basis of diversity has slowly risen, even though the number of non-removal cases has decreased since 1988. More cases are being removed, but it is unclear whether the added cases have weaker removal arguments or whether defendants who had previously elected to remain in state court are now removing to federal court. An alternative way to determine if erroneous removals have increased since 1988 is to examine changes in the rate of remand.²⁴ This has the advantage of making it easy to compare different years and time periods, although it cannot be the sole focus because other factors (such as a fluctuation in the number of products liability cases) may complicate cross-year comparisons. In the analysis below, I calculate remand rates in both tort and contract cases removed on the basis of diversity jurisdiction.²⁵

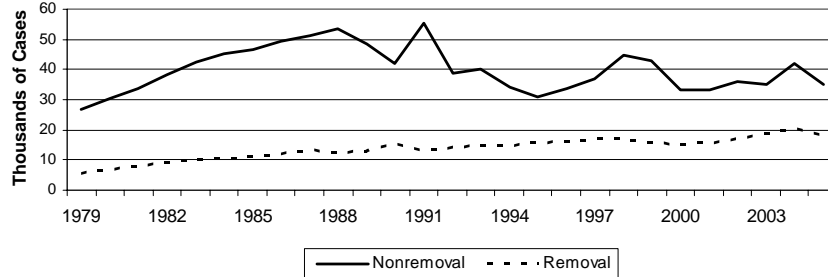
Database: An Empirical Analysis, 78 NOTRE DAME L. REV. 1455, 1496 (2003) (concluding that “AO data can provide reasonably accurate estimates” for some case categories, but correction techniques may be needed for other categories, depending on the research question).

24. Data are not available on when the judge decided whether or not to remand the case. For most of this analysis, I use the year of termination when measuring yearly remand rates. For all cases that are removed, about 80% of them end one calendar year after they were filed in federal court, and over 98% end within three calendar years.

25. Contract cases include: insurance; marine contract actions; Miller Act; negotiable instruments; overpayments and enforcement of judgments; overpayments under the Medicare Act; recovery of defaulted student loans; recovery of overpayments of vet benefits; stockholder’s suits; other contract actions; and contract product liability.

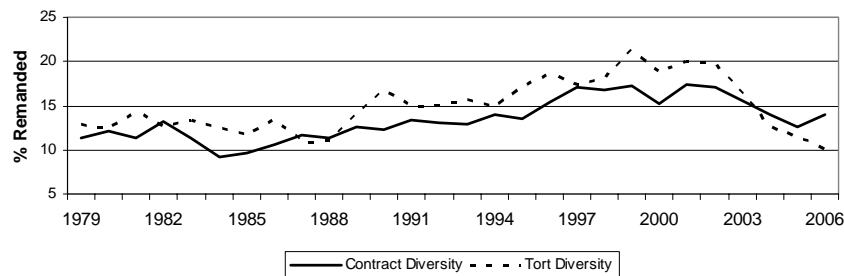
Tort cases include three subsets. The first, real property, includes: land condemnation; foreclosure; rent, lease, and ejectment; torts to land; tort product liability; and other real property actions. The second, torts personal injury, includes: airplane personal injury; airplane product liability; assault, libel, and slander; federal employers’ liability; marine personal injury; marine product liability; motor vehicle personal injury; motor vehicle product liability; other personal injury; medical malpractice; personal injury product liability; and asbestos personal injury product liability. Lastly, torts personal property damage includes: truth in lending; other fraud; other personal property damage; and property damage product liability.

Figure 1: Federal Tort and Contract Diversity Cases Filed in Federal Court versus Those Originating as Removals



Eisenberg and Morrison performed the pioneering empirical study on the growth of erroneous removal, finding that the national remand rate of removed diversity cases had “generally increased” over the prior two decades.²⁶ As the authors noted, there was a slight decrease in the remand rates of such cases from 1999 to 2003. In fact, this trend has continued through 2006, as shown by Figure 2 below. While the remand rate for contract and tort cases before 1988 was well below 15% and often closer to 10%, the rate steadily climbed in 1999 to a high of 21% for torts and 17% for contracts. By 2005, these rates had declined to 11.5% for torts and 12.65% for contracts.

Figure 2: Remand Rate of Removed Tort and Contract Diversity Cases



Explaining the rise after 1988 and the later decline starting around 2000 (which led to the lowest rates in torts cases since 1988) is important for both judges and legislators interested in reducing erroneous removal. The remand rates for four time periods, listed

26. Eisenberg & Morrison, *supra* note 3, at 568.

below in Table A with 95% confidence intervals,²⁷ significantly rose during the 1995–2003 period. Even at the 99% confidence level, this period is significantly different from the other time periods for both tort and contract cases. One qualification to these results is that the sample size, per year, of diversity cases originating from removal is so large²⁸ that even relatively small differences between years would be statistically significant.²⁹ However, this concern is perhaps reduced for tort cases because the remand rate in 1999 was approximately double that of the 1988 and 2005 years, and the period-level data suggest a similar trend.

Table A: Remand Rate of Diversity Cases: Point Estimate and 95% Confidence Intervals

Single Year:	Torts:	Contracts:
1988	(10.25, 11.04 , 11.82)	(10.50, 11.28 , 12.07)
1999	(20.45, 21.32 , 22.20)	(16.34, 17.21 , 18.09)
2005	(10.93, 11.51 , 12.10)	(11.88, 12.67 , 13.46)
Time Period:		
1979–1988	(12.11, 12.41 , 12.70)	(10.88, 11.14 , 11.41)
1989–1994	(14.87, 15.20 , 15.54)	(12.70, 13.04 , 13.38)
1995–2003	(18.24, 18.50 , 18.77)	(15.90, 16.19 , 16.47)
2004–2006	(11.24, 11.59 , 11.93)	(13.05, 13.53 , 14.01)

One possible objection to the preceding analysis of yearly remand rates is that the wrong year was used. When cases are remanded, termination often happens soon after the remand decision,³⁰ unlike in cases where removal is allowed and termination could occur many years after the remand decision. Perhaps the year of

27. See, e.g., Stephen E. Fienberg et al., *Understanding and Evaluating Statistical Evidence in Litigation*, 36 JURIMETRICS J. 1, 24 (1995) (“To express the uncertainty of estimating [a] population parameter, a *confidence interval* is often employed. Simply put, a confidence interval describes a set of plausible values for the parameter. A *confidence level* describes how plausible the values are.” (emphasis in original)).

28. See *supra* Figure 1.

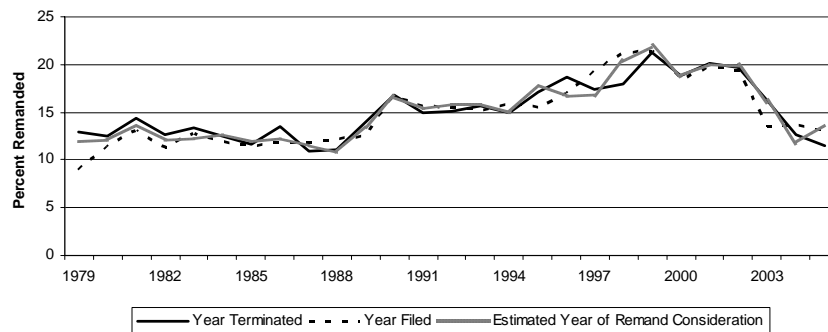
29. See generally FED. JUDICIAL CTR., REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 123–25 (2d ed. 2000) [hereinafter SCIENTIFIC MANUAL] (“Significance depends not only on the magnitude of effect, but also on the sample size (among other things).”).

30. In about 57% of cases remanded, the year of removal and the year of remand are the same. This is substantially higher than non-remanded cases, in which only 32% terminate within the same calendar year.

filing (in federal court) would be a better measure of when the judge decided removal was proper. Another possible measure estimates the year in which the judge considered whether to remand, by limiting it to, at most, one year after the filing date.³¹ However,

Figure 3 below suggests that there is not much difference between the three possible measures. In fact, the confidence intervals for the two alternate time periods closely track those obtained by using the year of termination.

Figure 3: Remand Rate of Tort and Contract Cases, by Year of Filing, Termination, and Estimated Consideration



B. Fee Awards

One of the main changes made to the removal statute by the 1988 amendments was the expansion of the power to grant the plaintiff a monetary award in cases in which there was an erroneous removal. Whereas the statute previously authorized only payment of “costs,” the 1988 revision expanded the category to include costs, expenses, and attorney fees.³² I will refer in this Article to the expanded collection of awards available under § 1447(c) as “fee awards.” This term does not include sanctions under Rule 11, which are not necessarily paid to the plaintiff.³³

To test whether judges have used fee awards to deter erroneous

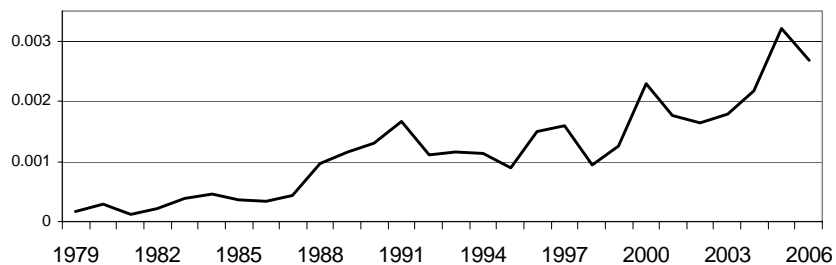
31. If the year of filing and termination are the same, this year is used. Otherwise, one year after the year of filing is used.

32. See *supra* Section I.

33. See FED. R. CIV. P. 11(c)(2) (“[T]he sanction may consist of, or include . . . an order to pay a penalty into court, or . . . an order directing payment to the movant of some or all of the reasonable attorneys’ fees and other expenses incurred as a direct result of the violation.”).

removals, data on such awards were collected from published district court opinions available on LexisNexis.³⁴ Over five hundred published opinions awarded fees to the plaintiff based on § 1447(c), although only about 40% of these opinions published the actual amount awarded. A problem with these data is their scattershot quality: earlier cases are less likely to be published online; publication practices may vary across circuits; and many fee awards may occur without a written opinion, much less a published one. The national trend for fee awards, shown below in Figure 4, is strongly increasing, especially since 1988, with a second sustained increase after 1999. In this section, I examine whether the 1988 increase was affected by the number of fee awards per year, the mean fee award per year, the maximum fee award per year, or a combination of these three factors.

Figure 4: Rate of Fee Awards per Number of Diversity Remands



1. Number of Fee Awards per Year

The number of times fees are awarded in a given year provides insight into (1) the ebbs and flows in clearly erroneous removals and (2) judicial attempts to deter such removals. One difficulty with fee awards is that they are viewed by many people as a sanction for unprofessional conduct.³⁵ Judges thus may be especially wary of

34. The search string was “(28 USC 1447(c) w/p “attorney’s fees”) OR (28 USC 1447(c) AND “payment of just costs”) AND NOT ((fees w/2 denied) OR (costs w/2 denied) OR (remand w/2 denied) OR (bear w/2 “own costs”) OR (“bear their own” w/3 (fees or costs)) OR “declines to award” OR “exercises its discretion not to grant”).” The type of jurisdiction alleged by the removing plaintiff was not tracked, but may include diversity, federal question, or federal government defendant.

35. See, e.g., Linda Ross Meyer, *When Reasonable Minds Differ*, 71 N.Y.U.L. REV. 1467, 1480 n.40 (1996) (“[V]arious federal statutes provide for attorney’s fees in cases in which frivolous claims are filed. See 28 U.S.C. § 1447(c) (1994) (allowing fees for improper removal).”).

awarding fees if awards are an uncommon occurrence.³⁶ However, the opposite may be true if there are many recent awards. This suggests that although judges can be influenced by how they perceive the legal environment, they also may be able to influence others. Using this framework, I take two approaches to the analysis: first, I examine whether fee awards affect the rate or probability of remands; second, I ask whether the rate of remands is associated with fee awards in later years—that is, whether judges were more likely to award fees after a rise in erroneous remands.

I find no significant linear relationship between the number of fee awards in a given year and the percentage of diversity tort suits remanded that same year or in future years. Nor can I conclude that the number of fee awards has a meaningful effect on the probability of remand.³⁷ Also, the hypothesis that judges had a delayed reaction to changes in the remand rate was not supported by empirical analysis. While the number of fee awards has tended to rise since 1988, the peaks and valleys in awards do not correspond to those of the remand rate, even if one shifts the time period by a few years to account for delayed reactions.

2. Mean and Maximum Amount of Fee Awards per Year

A second model to test whether the change in fee awards after 1988 had an effect on the probability of remand focuses on the amount awarded. This is an important measure for fee awards because although the 1988 revision expanded the authority to make an award (by removing the qualifier “improvidently”), it also increased what could be awarded. Thus, I focus here on the mean or maximum value of published awards in a given year.³⁸ More specifically, I use a \log_{10} transformation of the mean or maximum value per year to test this effect, holding constant the year of termination.³⁹

36. Cf. Christopher R. McFadden, *Removal, Remand, and Reimbursement under 28 U.S.C. § 1447(c)*, 87 MARQ. L. REV. 123, 125 (2003) (“Since judges are reluctant to label a party’s actions ‘unreasonable,’ they suboptimally deter erroneous removals and suboptimally reimburse aggrieved parties for their costs needlessly incurred as a result of a meritless removal.”).

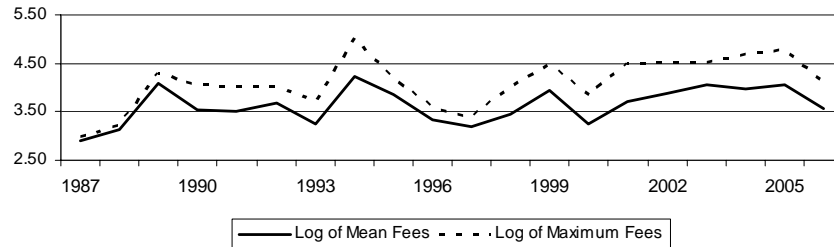
37. I did not perform logistic regression with the \log_{10} transformation of the number of fee awards in a given year because there was a multicollinearity problem. The relevant correlations were between 0.8327 and 0.9205.

38. About 60% of the published opinions that awarded fees did not list an amount. This analysis focuses on the remaining 40% of the cases (206 out of 522 recorded cases).

39. Logarithmic transformations are often used to mitigate the effect of skewness in the data, in an attempt to ensure that the data are normally distributed. See, e.g., Neill D. Fuquay,

Figure 5 below shows the changes since 1987, and the rest of this subsection details the effects that these two variables have on the probability of remand.

Figure 5: Mean and Maximum Fee Awards per Year, based in Log_{10}



When dealing with fee awards, a variety of hypotheses are possible. Fee awards could be associated with changes in the remand rate: (1) in years following the award (having a deterrent effect on erroneous remands), (2) in the same year, or (3) in previous years (suggesting a judicial response to a rise in erroneous removals by awarding more fees the next year). I do find some support for the third hypothesis, with about 11% more remands occurring two years after the mean fee award increases by a factor of ten, and a 22% increase occurring when the maximum award increases by a factor of ten.⁴⁰ This suggests that judges had a delayed reaction to higher rates of remand. On the other hand, I also have some evidence of the opposite phenomenon: a factor-of-ten increase in the mean fee award corresponded to a 7.3% decrease in the probability of remand two years later, providing support for the deterrent effect of fee awards.⁴¹

It is theoretically possible that the fee awards in a particular year influence the remand rate in future years and are related to the past

Note, *Be Careful What You Wish For, You Just Might Get It: The Effect on Chapter 11 Case Length of the New Cap on a Debtor's Exclusive Period to File a Plan*, 85 TEX. L. REV. 431, 449 n.83 (2006); Douglas A. Henderson, *Mediation Success: An Empirical Analysis*, 11 OHIO ST. J. ON DISP. RESOL. 105, 140 n.147 (1996). Also, a dummy variable for every year was used in the logistic regression model.

40. For the mean fee awards, the z-statistic was 7.890 with $p < .001$, and for the maximum fee awards, $z = 3.992$ and $p < .001$.

41. The z-statistic equals -2.299, with $p = 0.022$. However, the data on the maximum fee award per year suggested the opposite result: an 18.8% increase in the probability of remand two years after a factor-of-ten increase in the maximum fee award ($z = 5.483$, $p < .001$).

remand rate, but the results here do not support that theory. As one gets further away from the year of the fee award (even into the third and fourth years), the statistical relationship gets stronger—which is the opposite of what one would expect. A partial explanation may be that when you “lead” or “lag” a variable, you shift the contents in one direction, cutting off observations at the other end. This eliminates a significant amount of data when you are working at the yearly level, casting doubt on the robustness of the results. Thus, although mean and maximum fee awards may be highly salient to litigants, I cannot state that this was a factor in the rise of the remand rate after 1988.

One possible reason for not finding a significant result for fee awards is that another change in 1988 may have had offsetting effects. Before 1988, there was a bond posting requirement, in which the bond had to be conditioned on payment of removal costs “should it be determined that the case was not removable or was improperly removed.”⁴² This is potentially very expansive: any case that was remanded must have been “determined” to be “not removable,” which would seem to require the defendant to pay costs incurred by the plaintiff. However, this requirement may not have been a large burden in the early years because courts interpreted “just payment of costs” to refer to court costs and other filing fees. Once courts began interpreting the language more expansively to include the plaintiff’s expenses and attorney fees, this likely caused defendants (and less wealthy ones, in particular) to have greater apprehension about filing for removal. I explore the effect of the bond requirement in the next subsection.

C. Identity of the Plaintiff and Defendant

Although the expansion in the scope of fee awards, explored in the previous two subsections,⁴³ was one important change instituted in 1988, a second important change was the elimination of the requirement that defendants post bond on removal. Did this change

42. *Ely Valley Mines, Inc. v. Hartford Accident & Indem. Co.*, 644 F.2d 1310, 1315 (9th Cir. 1981) (quoting 28 U.S.C. § 1446(d)).

Each petition for removal of a civil action or proceeding, except a petition in behalf of the United States, shall be accompanied by a bond with good and sufficient surety conditioned that the defendant or defendants will pay all costs and disbursements incurred by reason of the removal proceedings should it be determined that the case was not removable or was improperly removed.

Id.

43. See Sections II.A and II.B.

have an effect on the remand rate? Looking at the identity of the parties is one way to evaluate this hypothesis. The bond requirement presumably deterred removal by defendants with a lesser ability to borrow money⁴⁴ and by defendants with a weak case for removal. Here I ask whether removing the distributive impact led to a rise in remand rates, perhaps because those defendants also hired less expensive lawyers. Although this analysis focuses on the identity of the removing defendant, it must also account for the identity of the *plaintiff* because there may be different levels of remand success within that group.

For this analysis, I compare three different party arrangements: cases between individuals; cases between corporations; and cases with an individual plaintiff and a corporate defendant.⁴⁵ Figure 6 below shows that after 1988 tort suits between corporations had a steady remand rate of about 12-14%. However, when the plaintiff—the party most harmed by an erroneous removal—was an individual, the remand rate for such cases tracked the overall rate in Figure 3, rising to almost 20% by 2003, and then falling dramatically thereafter. One interesting point is that it did not matter whether the defendant removing the case was an individual or a corporation. Perhaps the answer is that defense lawyers think differently about removal when they are facing individuals. In general, the added benefit of delay caused by removal may affect individual plaintiffs much more than corporate plaintiffs. Or perhaps, these litigant lineups are involved in different types of cases, which in turn drives the different remand results. This possibility is explored in Table B below.

44. This was one of the justifications provided by the House Report, which recognized that the “bond requirement imposes a cost that may be substantial to some litigants.” H.R. REP. NO. 100-889, at 72 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 5982, 6033.

45. The astute reader will note that there is a missing fourth category: Corporation vs. Individual. Unfortunately, there were too few cases in this category to examine their effect. In no year since 1987 were there more than ten remanded cases or more than fifty total cases in this category. Many years had substantially fewer such cases.

Figure 6: Rate of Remands in Tort Cases, Based on the Identity of the Litigants⁴⁶

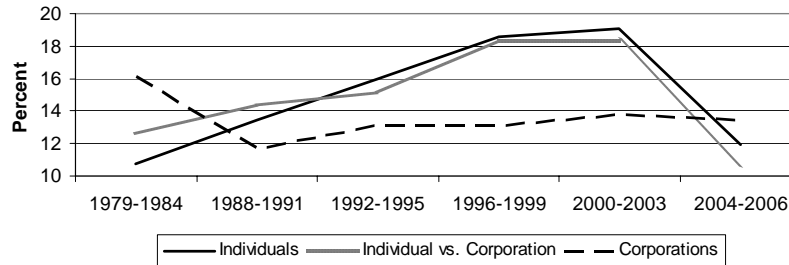


Table B: Logistic Regression: Association Between the Identity of Parties and Tort Remands, Clustered by Circuit⁴⁷

Tort Remands	Odds Ratio	Std. Err.	z	P> z	[95% Conf. Interval]	
<i>Baseline: Foreign Individual, Foreign State, In-State Defendant</i>						
Ind. V. Ind.	.3878571	.1150142	-3.19	0.001	.2168995	.6935615
Ind. v. Corp.	.3594136	.1142471	-3.22	0.001	.1937624	.6701415
Corp. v. Corp.	.2935969	.0690407	-5.21	0.000	.1851771	.4654955
<i>Baseline: Real Property</i>						
Personal Injury	.9481815	.1702647	-0.30	0.767	.6668704	1.34816
Personal Property	.8775148	.1516885	-0.76	0.450	.6253375	1.231387
<i>Baseline: 1979-1987, 2004-2006</i>						
1988-1991	.9946186	.1275155	-0.04	0.966	.7736203	1.278749
1992-1995	1.004018	.1944035	0.02	0.983	.6869536	1.467425
1996-1999	.9987013	.137914	-0.01	0.992	.7618866	1.309124
2000-2003	3.597167	.9636389	4.78	0.000	2.127814	6.081176

46. There is a gap from 1985-1987 because the AO data used three different coding schemes for party identity during this period. Disentangling which office of a district court used which scheme and for how long would be an arduous exercise, with little expected benefit.

47. The number of observations in this model was 242,284; Wald $\chi^2(9) = 597.63$; Prob > $\chi^2 = 0.0000$; and Pseudo $R^2 = 0.1072$.

To test this interpretation of Figure 6, the logistic regression model in Table B above will be helpful. All three of the categories of litigant lineups discussed earlier have a significant negative association with the probability of remand when controlling for the time period, circuit, and type of case. Looking at the odds ratios, cases between individuals were 61% less likely to be remanded than cases with foreign litigants; those between an individual plaintiff and a corporate defendant were 64% less likely; and those between corporations were 71% less likely. The only statistically significant difference between these three categories is between individual-only cases and corporation-only cases.⁴⁸ This brings into question the interpretation of

Figure 6 as indicating that the important difference is the type of plaintiff in the case.

However, a more complex regression model that controls for the effect of the twenty-plus types of tort cases (instead of the three broad categories above) supports the plaintiff-based interpretation of

Figure 6. Cases between individuals were 47% less likely to be remanded; cases between an individual plaintiff and a corporate defendant were 56% less likely to be remanded; and cases between corporations were 87% less likely to be remanded. In this model, both litigant categories with an individual plaintiff were significantly different from the corporation-only category at $p < .0025$. The two categories with individual plaintiffs were not distinguishable from each other, with a $\chi^2(1) = 1.01$ and $p = .3158$. Thus, the results do not seem to turn on the identity of the defendant; rather, any differences appear to be traceable to the type of plaintiff, perhaps because of a defendants-side perception that delay is a particularly effective tactic against individuals.

Although the hypothesis about the elimination of the bond requirement had focused on the identity of individual *defendants*, the above empirical analysis suggests that the identity of the *plaintiffs* was the key distinguishing factor. This mistake does not disprove the hypothesis, however. I had predicted that certain defendants (most likely individuals) would be more able to remove once posting bond

48. The difference between the coefficients for Individual v. Individual and Corporation v. Corporation is significant at $p = 0.009$ with $\chi^2(1) = 6.82$. However, the difference between the coefficients for Individual v. Corporation and Corporation v. Corporation is not significant ($p = 0.167$ and $\chi^2(1) = 1.91$), nor is the difference between Individual v. Individual and Individual v. Corporation ($p = 0.168$ and $\chi^2(1) = 1.90$).

was no longer required. Since corporations rarely bring tort suits against individuals,⁴⁹ the defendants affected by the elimination of the bond requirement were likely to be facing individual plaintiffs. And as mentioned above, suits with individual plaintiffs have a relatively high remand rate, at least compared to corporation-only suits. An increase in the relative number of these cases could have led to an overall increase in the remand rate. This story is especially believable if the deterrent effect of the bond requirement was not perfectly offset by the enhanced authority to award fees. In the next section, I study whether the doctrinal tests adopted by individual circuit courts were able to fill this gap.

III. THE CIRCUIT COURTS: STANDARDS FOR FEE AWARDS AND FRAUDULENT JOINDER

The first hypothesis was based on the 1988 amendments to the removal statute, and it focused solely on the national level, making an implicit assumption that the law was the same and was applied similarly in all of the district courts throughout the nation. In this section, I explore two areas in which this assumption was false: fee awards and fraudulent joinder. In both situations, the circuit courts, for a period of time, had come to different conclusions about the proper legal test that should be applied. Although a reader of the circuit courts' opinions could have easily determined that different standards had been articulated, discovering how these standards have been applied is more difficult. The empirical analysis below will try to shed some light on this question.

The hypothesis in this section is that circuits with doctrinally "looser" fee award and fraudulent joinder standards will also have higher remand rates. By "looser," I mean standards that make it less likely that fee awards will be regularly awarded (unlike a mandatory fee-shifting rule), and standards of fraudulent joinder review that canvass a wide swath of evidence (as opposed to merely the face of the plaintiff's complaint). To analyze this hypothesis, I will use the fee award data discussed in the previous section, and I will examine a new source of data on fraudulent joinder, which includes both yearly statistics and the individual outcomes of such cases.

49. See *supra* note 45.

A. *Fee Awards: From Fee-Shifting to Objective Reasonableness*

In which situations are fee awards appropriate? The language of the § 1447(c) fee award provision—that provides “[a]n order remanding [a] case *may* require payment of [fees]”⁵⁰—has given rise to a number of different interpretations. For example, the Seventh Circuit used a fee-shifting rule, under which the plaintiff was “presumptively entitled” to a fee award if removal was improper;⁵¹ the Ninth Circuit left the award to the judge’s discretion, allowing an award even when defendant’s position was “fairly supportable”;⁵² and the Fifth Circuit limited fee awards to situations in which the defendant “lacked objectively reasonable grounds” for removal.⁵³

With these three standards, different remand rates between circuits would not be surprising. One prediction is that jurisdictions with a standard more conducive to fee awards would also have lower remand rates, or at least their remand rates would decrease once they adopted the tougher standard.⁵⁴ Or perhaps, the application of these different standards did not differ enough in practice for the deterrence to be precisely tailored. In 2005, the U.S. Supreme Court settled the question of which standard should apply by opting for the Fifth Circuit’s “objectively reasonable” standard.⁵⁵ There is now doctrinal uniformity among the circuits, although differences in application

50. 28 U.S.C. § 1447(c) (2006) (emphasis added). It is helpful to contrast the use of “may” above with the use of “shall” in the preceding sentence in § 1447(c), which states that if “the district court lacks subject matter jurisdiction, the case *shall* be remanded.” *Id.* (emphasis added).

51. *E.g.*, *Sirotzky v. New York Stock Exchange*, 347 F.3d 985, 987 (7th Cir. 2003).

52. *E.g.*, *Hofler v. Aetna U.S. Healthcare of Cal., Inc.*, 296 F.3d 764, 770 (9th Cir. 2002).

53. *E.g.*, *Hornbuckle v. State Farm Lloyds*, 385 F.3d 538, 541 (5th Cir. 2004) (quoting *Valdes v. Wal-Mart Stores, Inc.*, 199 F.3d 290, 293 (5th Cir. 2000)).

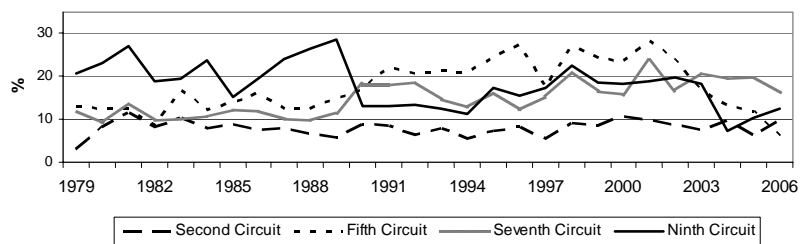
54. Three of the circuits studied appear to have adopted their test around 1993, while the Seventh Circuit’s fee-shifting test is of more recent origin, adopted in 1999. *See Garbie v. DaimlerChrysler Corp.*, 211 F.3d 407, 410 (7th Cir. 2000) (“We held in *Tenner v. Zurek*, 168 F.3d 328, 329–30 (7th Cir. 1999), that sec. 1447(c) is not a sanctions rule; it is a fee-shifting statute.”); *Miranti v. Lee*, 3 F.3d 925, 928 (5th Cir. 1993) (“[W]e hold that the propriety of the defendant’s removal continues [after the 1988 revision] to be central in determining whether to impose fees.”); *TTM Systems, Ltd. v. KMC Trading*, 1993 U.S. App. LEXIS 480, *2 (9th Cir. 1993) (upholding award even where “the district court failed to find that [Defendant] lacked a colorable ground for the removal. . . . [because] the amended statute shifts the object of our examination away from the intent of the removing party and focuses instead on such factors as the absence of subject matter jurisdiction”); *Morgan Guaranty Trust Co. v. Republic of Palau*, 971 F.2d 917, 924 (2d Cir. 1992) (asking whether award was “fair and equitable under all the circumstances”).

55. *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 136 (2005).

may persist given the judicial discretion allowed in ordering a payment of fees.⁵⁶

Focusing on four selected circuits, there are some interesting removal-rate patterns for tort and contract cases. Given the interesting contrasts, I will examine the three circuits whose divergent fee-award standards were mentioned above, as well as the Second Circuit, which left fee awards to judicial discretion.⁵⁷ The data show that for tort cases, the rate of remanded cases in the Fifth Circuit was generally about double that in the Second Circuit. The remand rates for the Seventh and Ninth Circuits were usually somewhere in the middle. In the past few years, the Fifth and Ninth Circuits' remand rates have plummeted to near the Second Circuit's rate, while the Seventh Circuit's rate has remained stable. The remand rates among the circuits in contract cases do not differ as much as in tort cases. Once again, the remand rate for the Second Circuit is very low, often below 10%. For many of the years after 1988, the Fifth Circuit had the highest rate, although there was a sharp decline in recent years, which is similar to what happened in Fifth Circuit tort cases.

Figure 7: Rate of Tort Remands in Four Selected Circuits



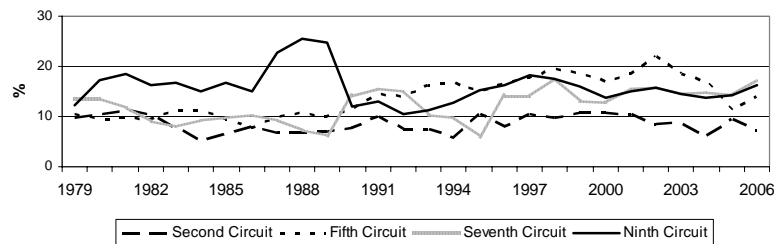
56. *See id.* at 140–41.

The appropriate test for awarding fees under § 1447(c) should recognize the desire to deter removals sought for the purpose of prolonging litigation and imposing costs on the opposing party, while not undermining Congress' basic decision to afford defendants a right to remove When a court exercises its discretion [to depart from the “objectively reasonable” rule], its reasons . . . should be “faithful to the purposes” of awarding fees under § 1447(c).

Id.

57. *Morgan Guaranty Trust Co.*, 971 F.2d at 924 (asking whether award was “fair and equitable under all the circumstances”).

Figure 8: Rate of Contract Remands in Four Selected Circuits



Given the apparent differences between the Second and the Fifth Circuits, the fee award analysis will center on these two circuits. About four or five years after the 1988 changes to the removal statute, the Second and Fifth Circuits settled on doctrinal tests for fee awards. In 1992, the Second Circuit signaled that it would grant district courts “a great deal of discretion and flexibility” in awarding fees⁵⁸ and affirmed the use of a test examining the “overall fairness given the nature of the case, the circumstances of the remand, and the effect [of removal] on the parties.”⁵⁹ In contrast, the Fifth Circuit in 1993—although it cited the Second Circuit’s leading case in support—examined only the reasonableness of the removal, not the effect on the parties or the nature of the case.⁶⁰ Furthermore, the Fifth Circuit overturned the district court’s fee award, which would seem quite unlikely in the Second Circuit, where trial judges are granted a “great . . . discretion and flexibility.”

What were the consequences of the Second Circuit’s (arguably) more expansive standard, compared to the Fifth Circuit’s standard? Controlling for the case type and the year of termination, Second Circuit tort cases were associated with a decreased risk of remand (29% less likely),⁶¹ whereas the other three circuits that were analyzed were associated with a higher likelihood of remand. In particular, tort cases in the Fifth Circuit increased the risk of remand by 85%

58. *Id.*

59. *Morgan Guaranty Trust Co. v. Republic of Palau*, 767 F. Supp. 561, 564 (S.D.N.Y. 1991), *aff’d*, 971 F.2d 917, 924 (2d Cir. 1992) (“Whatever the precise boundaries of a district court’s discretion to award costs and fees under . . . section 1447(c) may be, we are confident that the district court did not abuse its discretion in this case and that the award was fair and equitable under all the circumstances.”).

60. *Miranti v. Lee*, 3 F.3d 925, 928 (5th Cir. 1993) (citing *Morgan Guaranty*, 971 F.2d at 923–24).

61. The p-value is less than .001, with a z-statistic of -5.767.

compared to the other eight circuits.⁶² Indeed, other possible regression models lead to the same conclusion: cases in the Second Circuit are associated with a decreased risk of remand, while those in the Fifth Circuit have a much higher likelihood of remand.

To determine whether the difference between the two circuits resulted from external factors like a different mix of cases, instead of differing doctrinal standards as I hypothesized, I examined the factors that might affect the circuits' individual remand rates. I controlled for the year of termination,⁶³ the substantive category of the case (e.g., personal injury),⁶⁴ the identity of the plaintiff and the defendant, the number and mean amount of fee awards, and the size of the plaintiff's monetary demand.⁶⁵

In the analysis, reproduced below in Table C, none of these variables emerged as the distinguishing element between the Second and Fifth Circuit remand rates. One possibility, however, is the real property case category. This category appears to contain a disproportionate percentage of remanded tort cases in the Second Circuit (at least compared to personal injury cases), while there are no significant differences between the case types in the Fifth Circuit. National fee awards also had an interesting effect: the likelihood of remand decreased with higher mean fee awards in the Second Circuit and with greater numbers of fee awards in the Fifth Circuit. With these results, I cannot reject the possibility that the difference in the standards for fee awards is one reason for the difference in the

62. For the Fifth Circuit, $p < .001$, $z = 11.85$. The Seventh Circuit has an odds ratio of 1.50, $p < .001$, $z = 7.14$, and the Ninth Circuit has an odds ratio of 1.72, $p < .001$, $z = 10.09$. The "other eight circuits" mentioned above refer to all but the four circuits examined in Section III.A.

63. Table C is clustered on the year of termination so that the standard errors were adjusted for possible intragroup correlation. Alternative models using the years of termination as independent variables did not show different results.

64. The real property variable was dropped from the model due to collinearity. While 5.77% of removed real property cases in the Second Circuit were remanded, more than three times that percentage were remanded in the Fifth Circuit: 17.84%. This treble relationship was not unique among the case categories, however. In the Second Circuit, 7.79% of removed personal injury cases were remanded, while 24.26% were remanded in the Fifth Circuit. The numbers for removed personal property cases were 5.46% and 18.74% for the Second and Fifth Circuits, respectively.

65. The Administrative Office has explicitly warned that courts may not always correctly report the amount demanded in thousands of dollars, instead returning the actual award, which means the above figures may be skewed upwards. For example, the 2000 Codebook (for civil cases terminated in federal court in 2000) warns: "[C]ourts have not always reported [plaintiff's demand] in thousands of dollars, therefore [the] data may not be accurate.").

circuits' remand rates. In the next subsection, I examine a second possible reason for the inter-circuit differences: the doctrinal standards for fraudulent joinder.

Table C: Logistic Regression: Tort Remands in the Second and Fifth Circuits, Clustered by Year of Termination

Second Circuit		n = 12,237				
Tort Remands	Odds Ratio	Robust Std. Err.	z	P> z	[95% Conf. Interval]	
log10 (# of fees)	1.564542	.4489653	1.56	0.119	.8915053	2.745683
Mean fee award	.9999754	.000011	-2.23	0.026	.9999537	.999997
No demand listed	.893367	.279196	-0.36	0.718	.4841852	1.648346
log10 (demand)	.8990017	.0802173	-1.19	0.233	.7547592	1.07081
<i>Baseline: Foreign Individual, Foreign State, In-State D</i>						
Ind. v. Ind.	1.005031	.1292533	0.04	0.969	.7811055	1.293152
Ind. v. Corp.	.7796886	.0908127	-2.14	0.033	.6205534	.9796326
Corp. v. Corp.	.4722506	.153268	-2.31	0.021	.2499867	.8921302
<i>Baseline: Real Property</i>						
Personal Injury	.5487014	.1048052	-3.14	0.002	.3773562	.7978489
Personal Property	.8583501	.2078538	-0.63	0.528	.5338787	1.380023
Fifth Circuit		n = 42,161				
Tort Remands	Odds Ratio	Robust Std. Err.	z	P> z	[95% Conf. Interval]	
log10 (# of fees)	.3101919	.1271432	-2.86	0.004	.1389105	.692669
Mean fee award	.9999934	.0000145	-0.46	0.647	.999965	1.000022
No demand listed	1.573158	.3084876	2.31	0.021	1.074465	2.310406
log10 (demand)	.892333	.0647756	-1.57	0.117	.7739931	1.028766

Fifth Circuit		n = 42,161			
Tort Remands	Odds Ratio	Robust Std. Err.	z	P> z	[95% Conf. Interval]
<i>Baseline: Foreign Individual, Foreign State, In-State Defendant</i>					
Ind. v. Ind.	.8289985	.0819699	-1.90	0.058	.6829493 1.00628
Ind. v. Corp.	.7175409	.0790382	-3.01	0.003	.5782099 .8904465
Corp. v. Corp.	.5052139	.0712452	-4.84	0.000	.3832119 .6660573
<i>Baseline: Real Property</i>					
Personal Injury	.816639	.1347619	-1.23	0.220	.590969 1.128484
Personal Property	.8864809	.1501823	-.071	0.477	.6360099 1.235591

B. Fraudulent Joinder: How Close Should Courts Peek at the Merits?

In this section, I first explain the basic outlines of the fraudulent joinder doctrine, focusing especially on the different ways in which the doctrine is enunciated and applied by the four selected circuit courts whose doctrines were examined above in Section III.A. Next, I ask, by circuit, whether years in which greater numbers of cases feature fraudulent joinder arguments also have more cases removed to federal courts, and whether the remand rate is higher in such years. In the third subsection, I analyze two years worth of docket sheets and notices of removal from one district court to determine whether fraudulent joinder cases are more likely to be remanded. Lastly, I use logistic regression to determine whether years with a high number of fraudulent joinder cases also have higher probabilities of removal or remand. Here I explore whether the differences in the circuits' doctrinal tests for fraudulent joinder can explain the different rates.

I. An Overview of the Doctrine

If diversity is lacking on the face of the plaintiff's state-court complaint, the federal district court, on removal, may examine whether any of the parties were improperly added to avoid diversity and thus prevent removal.⁶⁶ In one sense, fraudulent joinder is the flip

66. See, e.g., *Rose v. Giamatti*, 721 F. Supp. 906, 914 (S.D. Ohio 1989) (“[W]hen a defendant alleges that there has been fraudulent joinder, the court ‘may pierce the pleadings, consider the entire record, and determine the basis of joinder by any means available.’” (quoting *Dodd v. Fawcett Publications, Inc.*, 329 F.2d 82, 85 (10th Cir. 1964)(citations omitted))).

side of the erroneous removal debate. Here, defendants complain that plaintiffs are manipulating procedural rules to keep their cases out of an available forum.⁶⁷ When a defendant alleges that this has occurred, a jurisdiction devoted to the fraudulent joinder doctrine must undertake a “difficult and time-consuming” inquiry to decide whether the case is properly in federal court.⁶⁸ Thus, a deadweight loss can be imposed on a federal court either by a plaintiff’s improper joinder or by an erroneous removal by a defendant, where the fraudulent joinder doctrine is used as a hook to gain federal-court (jurisdictional) review even when diversity is lacking on the face of the complaint.

A couple of differences between circuits arise in the application of this doctrine.⁶⁹ First, in determining at which point the plaintiff has no “possible” claim against a certain defendant, some courts say the plaintiff must have a reasonable basis for recovery,⁷⁰ while others allow the defendant to remain if there is a “glimmer of hope” for the plaintiff’s claim.⁷¹ Second, the scope of the inquiry differs. For some courts, it is narrow (looking only at the face of the plaintiff’s complaint, as in a motion to dismiss); for others, it is expansive (a summary judgment-like inquiry, where the defendant is allowed to offer evidence of fraudulent joinder); and for still others, it is somewhere in the middle. One jurisdiction in the middle asks whether the face of the complaint states a claim against the local defendant,

67. Indeed, a chapter of the American Trial Lawyers Association, relying on the fact that a case with an in-state defendant cannot be removed, recommended that “[t]o avoid removal . . . a wise strategy for a plaintiff in a personal injury case is to look for a valid claim against a local party in the forum in which the plaintiff seeks to file the claim.” James M. Underwood, *From Proxy to Principle: Fraudulent Joinder Reconsidered*, 69 ALB. L. REV. 1013, 1043 (2006) (quoting Michael L. Williams & John Waldman, Parties, in 1 ATLA’S LITIGATING TORT CASES 5:33 (Roxanne Barton Conlin & Gregory S. Cusimano eds., 2003)).

68. Matthew J. Richardson, *Clarifying and Limiting Fraudulent Joinder*, 58 FLA. L. REV. 119, 121 (2006).

69. *Id.* at 123–24.

The circuits split on the following three issues: (1) scope of inquiry; (2) how the standard “no possibility of recovery” is defined; and, most importantly, (3) whether the fraudulent joinder inquiry is analogized to a narrow jurisdictional inquiry, or to a wider inquiry under Federal Rule of Civil Procedure 12(b)(6).

Id.

70. *See, e.g.,* *Badon v. R J R Nabisco, Inc.*, 236 F.3d 282, 286 n.4 (5th Cir. 2000) (requiring “reasonable basis” for recovery, not merely “theoretical possibility” (emphasis omitted)).

71. *Hartley v. CSX Transp., Inc.*, 187 F.3d 422, 426 (4th Cir. 1999) (“Once the court identifies [a] glimmer of hope for the plaintiff, the jurisdictional inquiry ends.”).

and if so, asks whether the plaintiff met his or her “continuing duty” under Rule 11 to “not maintain[] a frivolous suit.”⁷²

In applying the fraudulent joinder doctrine, courts must balance two concerns. While they want to ensure the correctness of the determination, they may hesitate to look too closely at the merits of the state-court plaintiff’s case at such an early jurisdictional stage. An eagerness to peek at the merits of the plaintiff’s claim could raise federalism issues⁷³ and may complicate the jurisdictional inquiry. For example, in one case removed to federal court on the basis of fraudulent joinder, it was so much easier to establish personal jurisdiction that the U.S. Supreme Court upheld the district court’s decision to dismiss the case on this ground instead of first establishing the court’s subject matter jurisdiction.⁷⁴

How do the four selected circuits, whose remand rates were examined above, apply the fraudulent joinder doctrine? Within the Fifth Circuit, “a wide scope of inquiry on the fraudulent joinder question”⁷⁵ is permitted—so wide in fact that one scholar has called the Fifth Circuit “easily the most radical jurisdiction” in this regard.⁷⁶ In contrast, the Second Circuit uses a narrower form of review, looking merely at the pleadings to determine whether a defendant has been fraudulently joined.⁷⁷ Discovering which tests are applied by the Seventh and Ninth Circuits is—to use one commentator’s words⁷⁸—“very confusing” because the cases are not all consistent, and sometimes they are not even internally consistent.⁷⁹ Nevertheless, they appear to be using standards in between those applied by the Second and Fifth Circuits.⁸⁰

72. *Katz v. Costa Armatori, S.P.A.*, 718 F. Supp. 1508 (S.D. Fla. 1989).

73. One reason for hesitation is the underlying federalism issues. *See, e.g.*, Richardson, *supra* note 68, at 174–76 (“[A]n expansive fraudulent joinder doctrine risks violating the constitutional role of the federal courts by encouraging the district courts to review matters beyond their own subject matter jurisdiction before they even determine that they have subject matter jurisdiction.”).

74. *Ruhrgas A.G. v. Marathon Oil Co.*, 526 U.S. 574 (1999).

75. Richardson, *supra* note 68, at 139.

76. Richardson, *supra* note 68, at 151.

77. *Whitaker v. Am. Telecasting, Inc.*, 261 F.3d 196, 208 (2d Cir. 2001).

78. Underwood, *supra* note 67, at 1066.

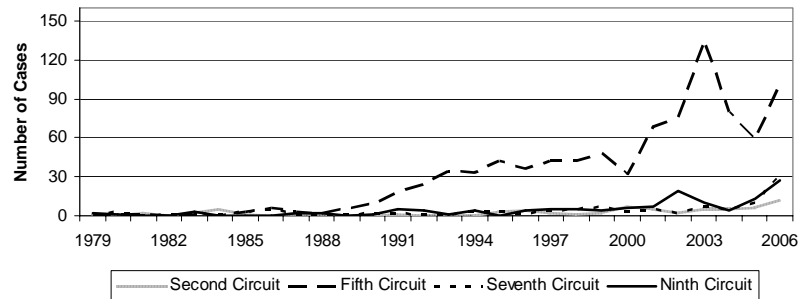
79. *See generally id.* at 1069–81.

80. *See id.* at 1069–74, 1077–81 (Seventh and Ninth Circuits, respectively).

2. Regression Analysis for Fraudulent Joinder: Yearly Rates

Fraudulent joinder, as noted above, is closely related to erroneous removals as a matter of doctrine. The two concepts are also closely related as an empirical matter. The Fifth Circuit provides a particularly nice demonstration of this fact. Within this circuit, its “radical[ly]” “wide scope of inquiry on the fraudulent joinder question”⁸¹ could have an impact on two statistics discussed above: the remand rate and/or the percentage of diversity cases that are removals.⁸² To measure how often fraudulent joinder was invoked in the context of removals, a rough yearly measure was used, based on how often the term appeared in published federal district court cases.⁸³ Unfortunately, the limitations of these data mirror those of the fee award data: the data do not reflect which cases raised fraudulent joinder arguments and which did not; the data merely tallies the aggregate number of times this event occurred in a given year. In the next subsection, however, I will analyze individual case-level data.⁸⁴

Figure 9: Number of Removal Cases Mentioning Fraudulent Joinder



The first logistic regression model examines whether the probability of *removal* in a certain year depends on the number of

81. Richardson, *supra* note 68, at 139.

82. The number of removals per year is not included in this analysis because it is taken into account in the percent of removals variable, which controls for increases in the general diversity caseload over time.

83. The search string used in the LexisNexis search of all district court cases was “‘fraudulent joinder’ w/p (remand or removal).” Unlike the fee award data above, which examined each individual case, no effort was made to determine how much weight the removing defendant placed on the fraudulent joinder argument.

84. See *infra* Section IV.B.4.

cases that year that raise the fraudulent joinder argument in the course of removal. This model controlled for the year of termination and measured the probability of removal separately for each circuit. For the Fifth Circuit, a factor-of-ten increase⁸⁵ in the number of removal cases dealing with fraudulent joinder was associated with nearly a doubling in the probability that the tort diversity case was removed.⁸⁶ Although there was no significant effect in the Ninth Circuit,⁸⁷ a factor-of-ten increase in fraudulent joinder cases was associated with a tripling or quadrupling in the rate of removal in the Seventh and Second Circuits, respectively.⁸⁸ It is difficult to interpret these results. In jurisdictions where fraudulent joinder arguments are rare, a factor-of-ten increase in such arguments may be a heuristic for many more weak removal cases that year. If true, the lack of an effect in the Ninth Circuit may have been offset by other factors unique to that circuit. In the Fifth Circuit, where such arguments are prevalent, an increase in fraudulent joinder arguments may not indicate case quality so much as strategic presentation of arguments to which the Circuit has been receptive.

One question the removal data cannot answer is whether fraudulent joinder cases lead to an increase in the number of weak removal cases in federal court. For this, the likelihood of remand must be studied. Only in the Fifth and Seventh Circuits did the number of fraudulent joinder cases have a positive association with the probability that a removed tort case would be remanded. In the Fifth Circuit, there was a 75% greater risk of remand when fraudulent joinder cases increased by a factor of ten, while the Seventh Circuit saw a 46% greater risk.⁸⁹ In the Ninth Circuit, by contrast, there was a 41% *decrease* in the risk of remand for each factor-of-ten increase in fraudulent joinder opinions.⁹⁰ There was no statistically significant relationship in the Second Circuit. Once again there are data pointing in different ways regarding the effect of fraudulent joinder arguments.

85. Stated differently, this is a one unit increase in the \log_{10} of the number of cases.

86. This variable had an odds ratio = 1.927, $n = 116,676$, $z = 20.68$, and $p < .001$.

87. For this variable, $n = 51,175$, $z = -.127$, and $p = .889$.

88. The Seventh Circuit variable had an odds ratio = 2.797, $n = 73,278$, $z = 16.69$, and $p < .001$. The Second Circuit variable had an odds ratio = 3.954, $n = 41,405$, $z = 17.926$, and $p < .001$.

89. The Fifth Circuit variable had an odds ratio = 1.745, $n = 47,797$, $z = 8.357$, and $p < .001$. The Seventh Circuit variable had an odds ratio = 1.460, $n = 41,405$, $z = 2.324$, and $p = .020$.

90. The Ninth Circuit variable had an odds ratio = .591, $n = 16,844$, $z = -4.144$, and $p < .001$. The Second Circuit variable had an odds ratio = 1.114, $n = 10,705$, $z = .457$, and $p = .648$.

Perhaps looking at the individual case-level data for fraudulent joinder in one district court will help reconcile the results.

3. *Does Fraudulent Joinder Lead to More Remands?*

Two datasets will be used to examine whether fraudulent joinder leads to more remands. In the next subsection, I use a rough query of published cases on LexisNexis, which are then matched to the AO data. In this subsection, I study every tort diversity case removed to one district court, the Eastern District of Louisiana, in two years: 2004 and 2006.⁹¹ This district was chosen because it is within the Fifth Circuit, a circuit that annually has many more fraudulent joinder cases than other circuits.⁹² I used the AO's Public Access to Court Electronic Records (PACER) service to access docket sheets, notices of removal, and orders or opinions regarding remand.

For each diversity tort case, I used the docket sheet to determine whether the removal had been challenged by the plaintiff and whether the case was ultimately remanded. Those cases lacking a motion to remand, which were nevertheless remanded, are marked as *sua sponte* remands. In addition, I read every notice of removal to determine whether the defendant was relying on fraudulent joinder to establish diversity jurisdiction.

Below in Table D and Table E, two findings stand out. First, fraudulent joinder cases were remanded at a much higher rate than all

91. One reason for the use of nonconsecutive years (2004 and 2006) was that Hurricane Katrina, which touched down on August 29, 2005, resulted in the temporary closing of both state and federal court houses in the Eastern District of Louisiana. *See* The Federal Judiciary Homepage, Press Release, *Federal Courts Seek Emergency Funding in Hurricane Katrina's Wake*, <http://www.uscourts.gov/newsroom/katrina.html> (last visited Mar. 18, 2008) (citing "September 16 [2005] letter [from] the policy-making Judicial Conference of the United States"). Cases transferred by the Judicial Panel on Multidistrict Litigation to another district court for pretrial proceedings were not included in the analysis. Nor were marine cases, whose subject-matter jurisdiction was usually based on the presence of a federal question. Note that data selection by a researcher aware of the study's hypothesis raises the possibility of unconscious bias. Orin S. Kerr, *Shedding Light on Chevron: An Empirical Study of the Chevron Doctrine in the U.S. Courts of Appeals*, 15 YALE J. ON REG. 1 21–22 (1998) ("[K]nowledge of the hypothesis creates biases in the study itself in favor of finding the hypothesis to be true. Unfortunately, like most others who have published empirical studies [regarding the application of the *Chevron* doctrine], I was unable to comply with this tenet.). To minimize this bias, I examined all of the removed diversity cases in a given year except duplicate cases and cases in the categories mentioned above.

92. *See supra* Section III.B.3. Out of the nine district courts in the Fifth Circuit, the Eastern District of Louisiana consistently saw the second-most number of fraudulent joinder cases. Only the Southern District of Mississippi saw more such cases. Unfortunately, the PACER data for that district court did not allow access to the filed documents and motions.

other removed cases. In 2004, for example, 50% of fraudulent joinder cases were remanded, while only 27% of all other removed cases were remanded.⁹³ Second, defendants were much more likely to challenge a case removed on fraudulent joinder grounds, with a motion for remand in 77% of such cases in 2004, compared to only 33% for all other removals that year.⁹⁴ Plaintiffs appear to view such removals as relatively weak legally, a view that gains support from the higher remand rate.⁹⁵ However, the finding that, in 2004, removal was not challenged in a sizable amount of fraudulent joinder cases (23%) combined with the finding that 41% of such cases are not remanded when challenged, suggests that plaintiffs often do add defendants to destroy diversity, even if the plaintiff has no real claim against the defendant.⁹⁶ In the next subsection, I examine whether these patterns hold, using a rough search of published opinions in all circuits since 1979.

93. The story is the same in 2006, where 42.5% of fraudulent joinder cases were remanded, a fate that befell only 24.1% of all other cases.

94. In 2006, there was a motion to remand by a plaintiff in 62.5% of fraudulent joinder cases and 26.6% of all other cases.

95. Note that challenges for fraudulent joinder cases in 2004 were successful only 59.1% of the time, compared to 70.8% for all other removals. In 2006, the numbers were similar: 68.0% for fraudulent joinder cases and 78.6% for all other cases. However, in neither year were the challenge success rates different from each other at the 0.05 or 0.1 confidence level.

96. Again, the 2006 numbers tell the same story. Removal went unchallenged in 37.5% of fraudulent joinder cases, and even when challenged, 32% of the cases are not remanded.

Table D: Outcomes for Diversity Tort Cases in the Eastern District of Louisiana During 2004

	<i>Include Sua Sponte Remands</i>			<i>Exclude Sua Sponte Remands</i>		
	Remand Denied	Remanded	No Motion	Remand Denied	Remanded	No Motion
Fraudulent Joinder (N)	18	30	12	18	26	13
Percent	30.0%	50.5%	20.0%	31.6%	45.6%	22.8%
All Other Removals (N)	21	62	145	21	51	145
Percent	9.2%	27.2%	63.6%	9.7%	23.5%	66.8%
Total (N)	39	92	157	39	77	157
Percent	13.5%	31.9%	54.5%	14.3%	28.2%	57.5%

Table E: Outcomes for Diversity Tort Cases in the Eastern District of Louisiana During 2006

	<i>Include Sua Sponte Remands</i>			<i>Exclude Sua Sponte Remands</i>		
	Remand Denied	Remanded	No Motion	Remand Denied	Remanded	No Motion
Fraudulent Joinder (N)	8	17	15	8	17	15
Percent	20.0%	42.5%	37.5%	20.0%	42.5%	37.5%
All Other Removals (N)	12	53	155	12	44	155
Percent	5.5%	24.1%	70.5%	5.7%	20.9%	73.5%
Total (N)	20	70	170	20	61	170
Percent	7.5%	26.9%	65.4%	8.0%	24.3%	67.7%

4. Regression Analysis for Fraudulent Joinder

To determine whether removed cases mentioning fraudulent joinder are more likely to be remanded, as suggested by the previous subsection, I will use a dataset of 1,475 cases from LexisNexis,

matched to their equivalents in the AO data.⁹⁷ Here, the data are composed entirely of published opinions, but unlike the last subsection, the data are not limited to tort diversity cases.⁹⁸ I first analyze the effect of fraudulent joinder on all cases, and then I examine whether differences exist between circuits.

The first finding to note is that 59.6% of fraudulent joinder cases were remanded to state court. Controlling for year, type of case, and circuit, cases mentioning fraudulent joinder were about 6.7 times more likely to be remanded than all other removed cases.⁹⁹ However impressive this sounds compared to the 10–20% historical remand rate for all cases, a different baseline of comparison may need to be chosen. There is a selection bias: published opinions result from a dispute over removal, and such cases are more likely to be remanded.

One way to estimate the remand rate for all fraudulent joinder cases is to use the findings in the previous subsection. Specifically, 62.5% and 68% of challenged fraudulent joinder cases in the Eastern District of Louisiana in 2004 and 2006, respectively, were remanded.¹⁰⁰ This is similar to the 59.6% of cases with published opinions, so perhaps the Eastern District of Louisiana's 47% remand rate for all cases removed on fraudulent joinder grounds—challenged or not—is close to reality.

Having found evidence of a relatively high remand rate for fraudulent joinder cases (in the Fifth Circuit and in the aggregate), I ask whether the circuits' divergent fraudulent joinder doctrines could have played a role. As Figure 10 below suggests, the remand rate for fraudulent joinder cases has been relatively consistent across the

97. As in the search of the aggregate data, I used the search string “‘fraudulent joinder’ w/p (remand or removal)” in a database of all district court cases. For each of the approximately 1,750 opinions we examined on LexisNexis, I recorded the circuit, district, and (where indicated) the office of the court, as well as the docket number of the case. I was unable to match approximately 275 cases, which is about 15.7% of the cases we found on LexisNexis.

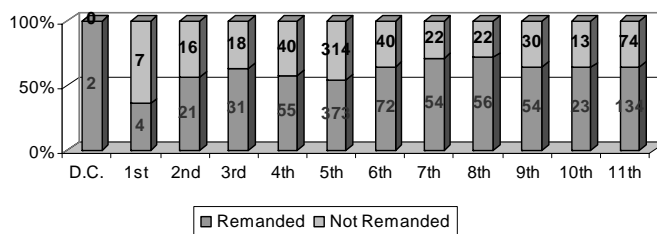
98. However, 82.5% of the cases are based on diversity jurisdiction and are either tort or contract cases.

99. The variable had an odds ratio = 6.662, $n = 710,805$, $z = 14.08$, and $p < .001$.

100. Out of 50 challenged cases, 31 were remanded. *See* Table D. Another attempt to find the appropriate baseline focuses on the two Alabama districts studied by Eisenberg and Morrison and compares the remand rate for challenged cases (80%, Eisenberg & Morrison, *supra* note 3, at tbl.2) with that of fraudulent joinder cases. In those districts, I matched 96 cases in the AO data, and I found a 72.9% remand rate for fraudulent joinder cases over all terminating years, and a 76.6% remand rate for years 1998–2004 ($n = 47$). This rate is very close to the overall rate in Alabama cases in which a motion to remand was made (80%).

circuits.¹⁰¹ The question is whether a different flow of cases conceals important differences between the circuits. Here, I ran separate regression models for the Second, Fifth, Seventh, and Ninth Circuits, and then compared the influence that fraudulent joinder cases had on the remand rate. Unlike the bar graph in Figure 10 below, I controlled for factors mentioned in previous sections: identity of the plaintiff and the defendant, the year of termination, and the type of case.

Figure 10: Number and Percentage of Remanded Fraudulent Joinder Cases by Circuit



For all of the four circuits, remand was more likely in fraudulent joinder cases—from 6 to 12.5 times as likely.¹⁰² The Fifth Circuit was on the low end, perhaps because of the high baseline rate of remand in that jurisdiction. However, because there were many more Fifth Circuit fraudulent joinder cases, the variable measuring the effect of these cases had greater statistical significance in the Fifth Circuit than in the other circuits, even though they all met the 99.9% confidence level.¹⁰³ I cannot conclude that there are differences in how the selected circuits treat fraudulent joinder cases that are challenged with a motion to remand.¹⁰⁴ However, as seen with the removal data above in Figure 9, some circuits (such as the Fifth) might be more

101. For those circuits with more than ten remands in fraudulent joinder cases (i.e., not the First or D.C. Circuits), the lowest rate of remand was 54.29% for the Fifth Circuit, and the highest was 71.79% by the Eighth Circuit.

102. The Second Circuit variable had an odds ratio = 11.89, $n = 18,867$, $z = 6.59$, and $p < .001$. The Fifth Circuit variable had an odds ratio = 6.297, $n = 67,065$, $z = 21.39$, and $p < .001$. The Seventh Circuit variable had an odds ratio = 12.52, $n = 14,441$, $z = 8.47$, and $p < .001$. The Ninth Circuit variable had an odds ratio = 9.12, $n = 42,122$, $z = 7.70$, and $p < .001$.

103. For example, the z-statistic of 21.39 for the effect of fraudulent joinder cases on the Fifth Circuit's remand rate has a 95% confidence interval of (5.32, 6.30, 7.45), while the Second Circuit's z-statistic is 6.59, and the confidence interval for the odds ratio is (5.69, 11.89, 24.84).

104. That is, for the fraudulent joinder dummy variables, the odds ratio confidence intervals (95%) overlapped for all of the circuits.

welcoming of such cases and hear more of them. If so, and if fraudulent joinder cases are challenged more frequently than other removals, then this would result in a greater absolute number of erroneous removals.

IV. A COMPREHENSIVE MODEL

So far, this Article has examined explanations for changes in the remand rate based on historical statutory changes or based on differences in the circuits' doctrinal tests. Although remands in tort and contract cases increased after 1988 and then plummeted around 2000, it is unclear whether the number of fee awards or the amount awarded influenced these changes. Another statutory change in 1988—the elimination of the bond requirement—may have offset any effect caused by the change in fee awards. Eliminating the bond requirement likely gave individual defendants a greater opportunity to remove cases. This historical change could have affected the remand rate because defendants (even individual defendants) appear to be willing to file for removal based on weaker arguments (as measured by the remand rate) when they face an individual plaintiff instead of a corporate plaintiff.

For the hypothesis about circuit differences, I uncovered different rates of remand between the Second Circuit (low) and the Fifth Circuit (relatively high)—two circuits that applied very different legal standards for fee awards and fraudulent joinder. I found that the national remand rate for challenged fraudulent joinder cases is high (about 59%). Although challenged cases are only a subset of all fraudulent joinder cases—and a biased one at that—the evidence from the Eastern District of Louisiana in 2004 and 2006 suggests that fraudulent joinder cases are remanded more often than the other removed tort cases. Also, I was unable to find a major difference in the treatment of fraudulent joinder cases across circuits, although some circuits had many more fraudulent joinder cases than did other circuits. If the finding about the high rate of remands for fraudulent joinder cases is sustained, the greater number of such cases in some circuits (like the Fifth) would help explain the higher rate of remand in those circuits.

With those findings in mind, I turn now to a final analysis of the data. The variables discussed above are used to produce a comprehensive model, below in Table F, which is clustered on the 94 different federal district courts. The model is designed to estimate the

likelihood of remand in tort and contract removal cases based on the explanatory variables in the left-hand column below.

Table F: Comprehensive Logistic Regression Model of Tort and Contract Remands, Clustered by District Court, n = 400,959

Remands	Odds Ratio	Robust Std. Err.	Z	P> z	[95% Conf. Interval]	
Fraud Joinder	7.598689	.8462729	18.21	0.000	6.10857	9.452306
Fees after '99	1.312194	.1429082	2.49	0.013	1.059974	1.624428
No demand listed	2.247734	.6297366	2.89	0.004	1.29798	3.892439
Log10 (demand)	1.240657	.1788959	1.50	0.135	.9352188	1.64585
<i>Baseline: 1979–1987, 2004–2006</i>						
1988–1991	1.670755	.3310793	2.59	0.010	1.13302	2.463702
1992–1995	1.699431	.3680571	2.45	0.014	1.111612	2.598089
1996–1999	1.680333	.2082899	4.19	0.000	1.3179	2.142438
2000–2003	2.776344	.500988	5.66	0.000	1.949284	3.954318
<i>Baseline: Contracts</i>						
Real Prop.	1.51744	.1233566	5.13	0.000	1.293943	1.779541
Personal Inj.	1.388606	.1606513	2.84	0.005	1.106882	1.742034
Personal Prop.	1.2724	.1203584	2.55	0.011	1.057079	1.531582
<i>Baseline: Foreign Individual, Foreign State</i>						
Ind. v. Ind.	.4760643	.0879255	-4.02	0.000	.3314783	.6837167
Ind. v. Corp.	.4438265	.0894404	-4.03	0.000	.2990048	.6587918
Corp. v. Corp.	.3348568	.0527196	-6.95	0.000	.2459499	.4559021
In-state D	1.060542	.1600027	0.39	0.697	.7890569	1.425436

<i>Baseline: 9th Circuit</i>						
D.C. Circuit	.3981561	.04243	-8.64	0.000	.3231053	.4906398
1st Circuit	.515692	.0808398	-4.22	0.000	.3792767	.7011722
2nd Circuit	.5605389	.1627605	-1.99	0.046	.3172833	.9902943
3rd Circuit	.8855117	.1163085	-0.93	0.355	.6845297	1.145503
4th Circuit	1.230848	.2241061	1.14	0.254	.8614341	1.758678
5th Circuit	1.000212	.1544449	0.00	0.999	.7390203	1.353718
6th Circuit	1.916797	.7053421	1.77	0.077	.9318612	3.942765
7th Circuit	1.194418	.2912212	0.73	0.466	.7406577	1.926171
8th Circuit	.9720568	.2418016	-0.11	0.909	.5969709	1.582815
10th Circuit	.9730485	.1134266	-0.23	0.815	.7743039	1.222806
11th Circuit	1.464298	.2562354	2.18	0.029	1.039151	2.063384

This model confirms the above findings and sheds some light on the above issues that were not definitively answered. Once again, fraudulent joinder cases are much more likely to be remanded than other tort and contract cases, although as previously noted, these are all challenged removals. Also, this Article's two main hypotheses are supported by the model. First, regarding the 1988 statutory change hypothesis, there is a large and significant increase in the likelihood of remands when compared to cases before 1988 and after 2003. The period from 1988–1999 is largely indistinguishable, but the period from 2000–2003 (right before the downturn) has a significantly higher likelihood of remand.¹⁰⁵ Second, there was some evidence of a difference in likelihood of remand between the Second and Fifth Circuits, which had drastically different doctrinal standards. Although there was no discernable difference between the Fifth, Seventh, and Ninth Circuits, the Second Circuit had a lower likelihood of remand, significant at $p = 0.05$. Second Circuit cases were about 44% less likely to be remanded than those in the Fifth Circuit, controlling for the other explanatory variables in Table F.

One new finding is that there is a positive linear relationship between the number of fees awarded after 1999 and the likelihood of remand in tort and contract cases.¹⁰⁶ As the remand rate went either

105. Tests for the differences between the coefficients for 2000–2003 vs. the earlier years were statistically significant. For example, the difference between the periods 1996–1999 and 2000–2003 was significant at $p = .008$ and had a $\chi^2(1) = 9.35$. Comparisons with 2000–2003 for the other periods after 1988 had similarly significant statistics.

106. Although Table F does not have space to list the scale of the “fees after 1999” variable, it has been transformed to base \log_{10} . Thus, using the odds ratio, for every factor-of-

up or down, so did the number of fee awards. This relationship was investigated because the relative number of fee awards after 1999 (shown in Figure 4 above) looked similar to the national remand rate after 1999, and during this time period, the decade-long rise in the remand rate began to slow and reverse itself. Thus, there is some support for the claim that the fee awards after 1999 had some role in the decline, although one cannot necessarily infer causation from this model.

There are three other interesting results in the model in Table F, and they deal separately with the amount demanded by the plaintiff, the case type, and the identity of the plaintiff and the defendant. Taking the amount demanded into consideration first, there was no significant relationship for the \log_{10} transformation of the demand. The lack of a relationship may be explained by the fact that over 60% of the cases studied did not have an amount demanded (i.e., the demand variable was coded as missing in the AO data). I uncovered a curious statistical relationship for the cases that lacked a demand coded by the AO, however. At a significance level of $p = 0.004$, these cases were 125% more likely to be remanded than were cases coded with an amount demanded. It is hard to know what to make of this result without knowing why an amount demanded was not coded for certain cases. I could not detect clear patterns of omissions at the district level or year level, although omissions may be more likely in some districts or years.¹⁰⁷

Case types and litigant types are the last variables to study. Comparing types of cases, tort cases were much more likely to be remanded than contract cases. In this model, there are no significant differences between the three tort categories,¹⁰⁸ although real property cases had the highest likelihood of remand and personal property had the lowest, with personal injury cases in the middle. Moving to the identity of plaintiffs and defendants, there is a significant difference between cases brought by an individual plaintiff and those brought by

ten increase in the number of fee awards after 1999, there was a 31% increase in the remand rate.

107. For example, in both the District Court of New Jersey and the District Court of the Northern Mariana Islands (9th Circuit), more than 95% of the cases lacked an amount demanded. At the other extreme, the Eastern District of Virginia and the District of North Dakota omitted an amount demanded for only about 20% of the cases.

108. More accurately, there are no significant differences at the 95% confidence level. Moreover, even at the 90% confidence level there are no significant differences.

a corporate plaintiff, regardless of the identity of the defendant.¹⁰⁹ When the removing defendant faces an individual plaintiff, the likelihood of remand is about 55% lower than in cases with foreign litigants, whereas when the plaintiff is a corporation the figure is about 67% lower.¹¹⁰ This suggests that remands are more likely in cases in which the defendant faces an individual plaintiff instead of a corporate plaintiff.

The comprehensive model, then, provides a measure of support for both of the hypotheses in this Article. First, the change in the remand rate after the 1988 statutory amendments may have been influenced by both the elimination of the bond requirement and, at least after 1999, court awards of fees. Second, there are differences between circuits, although the main finding is that the Second Circuit is different from the others (specifically the Fifth, Seventh, and Ninth). This was somewhat surprising because, based on the analysis of the circuits' fee award and fraudulent joinder doctrines, I had expected the Fifth Circuit to stand out from the other circuits; it did not.

CONCLUSION

Remand rates provide a unique insight into both the practice of law in federal and state courts and legal doctrine. In practice, the decision by a defendant to remove a borderline case depends not on the defendant's identity—an individual or a corporation—but rather, it depends on the identity of the plaintiff. Defendants find removing a case brought by an individual plaintiff to be more attractive than when facing other types of plaintiffs. Doctrinally, several scholars have voiced concerns that the fraudulent joinder doctrine has been used to effect silent tort reform,¹¹¹ to “cause unnecessary delay, or to needlessly increase the cost of litigation.”¹¹² This Article found that

109. Recall from note 45, *supra*, that there were not enough cases in the category of Corporation v. Individual to include it in the analysis.

110. The difference between the coefficients for Individual v. Individual and Corporation v. Corporation is significant at $p < 0.001$ with $\chi^2(1) = 33.59$, and the difference between Individual v. Corporation and Corporation v. Corporation is significant at $p < 0.001$ with $\chi^2(1) = 15.77$.

111. See, e.g., Kevin M. Clermont, *Jurisdictional Fact*, 91 Cornell L. Rev. 973, 1011 n.170 (2006) (“[S]ome lower courts of late . . . have expanded the fraudulent joinder doctrine . . . This expansion has come without statutory authorization and appears to be undesirable. . . . The undesirability only grows in this era of increasingly abusive removal.”).

112. See FED. R. CIV. P. 11(b)(1).

this possibility for abuse does exist: fraudulent joinder removals are more frequently erroneous than are other comparable removals.

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