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THE ONE-YEAR LIMIT ON REMOVAL: AN ACE UP THE SLEEVE OF THE UNSCRUPULOUS LITIGANT?

INTRODUCTION

Consider this scenario: Plaintiff, a resident of Georgia, sues two defendants.[1] One defendant is a resident of Georgia, and the other defendant is a resident of Florida.[2] When the plaintiff files the lawsuit, the plaintiff knows the damages will exceed the $75,000 minimum amount in controversy required for removal to federal court.[3] However, the plaintiff states in the initial state court petition that the amount in controversy will be less than $75,000 but, after the one year statutory limit for removal has passed, plaintiff increases the amount in controversy to over $75,000 and dismisses the non-diverse defendant.[4] Defendant immediately attempts to remove to federal court, but the one-year time limit on removal already expired.[5] Should the defendant be allowed to remove despite the one-year time limit?[6]

Alternatively, assume that the plaintiff has a valid claim against the Georgia resident, but unbeknownst to the defendant, the plaintiff has no intention of pursuing the claim.[7] Should the defendant be allowed to remove after the one-year time limit has expired?[8]

As indicated by the above examples, "[i]t is no secret that plaintiffs often deliberately structure their state court lawsuits to prevent removal by defendants to federal court."[9] The reason plaintiffs try to prevent defendants from removing to federal court is because,

1. *See generally* Foster v. Landon, No. 04-2645, 2004 U.S. Dist. LEXIS 22440 (E.D. La. Nov. 3 2004).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *See* discussion *infra* Part IV.
7. *See generally* Ardoin v. Stine Lumber Co., 298 F. Supp. 422 (W.D. La. 2003).
8. *See* discussion *infra* Part IV.
9. Laura J. Hines & Steven S. Gensler, *Driving Misjoinder: The Improper Party Problem in Removal Jurisdiction*, 57 ALA. L. REV. 779, 781 (2006).

statistically, plaintiffs are more likely to win the case if it is tried in state court.[10]

Several jurisdictions have considered whether plaintiffs should be allowed to prevent removal through the use of strategic joinder or fraudulent joinder.[11] Strategic joinder occurs when a plaintiff joins a party, but has no intention of pursuing his or her claim against the party.[12] In contrast, fraudulent joinder occurs when the plaintiff joins a party against whom he or she has no claim.[13] Courts disagree about the ability of a plaintiff to successfully prevent a defendant from removing by strategically or fraudulently joining a party.[14]

More importantly, courts remain split on the issue of whether the one-year time limit on removal stated in 28 U.S.C. § 1446(b) is subject to an equitable exception or whether it is an absolute bar to removal after one year from commencement of the action.[15] Courts allowing an equitable exception focus on the fairness of allowing a defendant to remove compared to the unfairness of allowing a plaintiff to manipulate the forum.[16] In contrast, courts interpreting the one-year time limit as an absolute bar focus on the plain language of the statute, the legislative reasoning behind the limitation, and Congress's ability to amend the statute if it so desires.[17]

This Note advocates adopting an equitable exception to the one-year limit on removal when a plaintiff joins a party, but has no intention of pursuing his or her claim against the party.[18] Conversely, this Note advocates an absolute bar on removal after one year from

10. Kevin M. Clermont & Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates & Removal Jurisdiction*, 83 CORNELL L. REV. 581, 606–07 (1998) [hereinafter *Win Rates & Removal*] (finding that removal in diversity cases reduces the plaintiffs' odds of winning from approximately even to about 39%, concluding that "[t]he residual 11% reduction represents the impact of forum.").

11. *See* discussion *infra* Part III.

12. *See* discussion *infra* Part III.D.

13. *See* discussion *infra* Part III.C.

14. *See* discussion *infra* Part IV.

15. *See* discussion *infra* Part III.

16. E. Kyle McNew, *Are Rules Meant To Be Broken? The One-Year Two-Step in* Tedford v. Warner-Lambert Co., 62 WASH. & LEE L. REV. 1315, 1344 (2005).

17. *Id.* at 1345.

18. *See* discussion *infra* Part V.

commencement of the action when the plaintiff joins a party against whom he or she has no claim.[19] Part I describes the ability of a defendant to remove to federal court on the basis of diversity jurisdiction.[20] Part II describes the history of the one-year limit on removal and interprets the relevant language included in the statute.[21] Part III discusses joinder of parties, including permissive joinder, compulsory joinder, fraudulent joinder, and strategic joinder.[22] Part IV examines various interpretations of 28 U.S.C. § 1446(b), focusing on whether the one-year limitation on removal is absolute or whether an equitable exception to the time limit is possible in certain situations.[23] Finally, Part V encourages the United States Supreme Court to allow an equitable exception to the one-year time limitation in cases of strategic joinder while discouraging an equitable exception in cases of fraudulent joinder.[24]

I. REMOVAL BASED ON DIVERSITY JURISDICTION: 28 U.S.C. § 1332

Defendants are allowed to remove an action from state court to federal court when diversity exists and the amount in controversy requirement is met.[25] 28 U.S.C. § 1332 gives federal courts the power to adjudicate diversity cases.[26] However, this statute is subject to strict construction so that the power of state courts to decide their own controversies is not intruded upon.[27] Strict construction requires that removal only be allowed in clearly defined circumstances.[28]

19. *See* discussion *infra* Part V.
20. *See* discussion *infra* Part I.
21. *See* discussion *infra* Part II.
22. *See* discussion *infra* Part III.
23. *See* discussion *infra* Part IV.
24. *See* discussion *infra* Part V.
25. *See* 16 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 107.03 (3d ed. 2006); *and* 28 U.S.C. §1332(a) (2000 & Supp. 2005).
26. 28 U.S.C. § 1332 (2000 & Supp. 2005).
27. City of Indianapolis v. Chase Nat'l Bank, 314 U.S. 63, 76 (1941).
28. *See id.* at 77.

A. *Defining Diversity*

Two types of diversity exist.[29] The first type, complete diversity, exists when "*all* plaintiffs are from different states from *all* defendants."[30] The second type, minimal diversity, only requires that "one plaintiff be a citizen of a different state from that of at least one defendant."[31] In most cases, complete diversity is required for a federal court to hear a case.[32] However, under some circumstances, a federal court has jurisdiction to hear a case despite the fact that only minimal diversity is present.[33]

B. *Purpose of Allowing Removal in Diversity Cases*

One main reason for allowing removal in diversity cases is to alleviate the danger of prejudice to out-of-state residents in a foreign state court that the out-of-state resident might not otherwise encounter in their own local courts.[34] State judges are elected and have closer ties to their community; this creates the potential to influence the judges to make decisions favoring their local community.[35] Federal courts do not have the same tie to a local community, so they are more neutral when making decisions.[36] Overall, diversity jurisdiction provides a neutral forum for the parties and helps avoid dangers of prejudice to defendants in out-of-state courts.[37]

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29. *See* 15 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 102.12 (3d ed. 2006).

30. *Id.* (emphasis in original).

31. *Id.*

32. *Id.*

33. *See* 28 U.S.C. § 1367 (2000); Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (2005).

34. Stifel v. Hopkins, 477 F.2d 1116, 1125–26 (6th Cir. 1973); Galva Foundry Co. v. Heiden, 924 F.2d 729, 730 (7th Cir. 1991); *see also* John P. Frank, *For Maintaining Diversity Jurisdiction*, 73 YALE L.J. 7, 12 (1963). *See generally* John P. Frank, *The Case for Diversity Jurisdiction*, 16 HARV. J. ON LEGIS. 403 (1979).

35. *See* Class Action Fairness Act of 2005, P.L. No. 109-2 § 2(a)(4)(B), 119 Stat 4, 5 (2005).

36. *Id.*

37. China Basin Props., Ltd. v. Allendale Mut. Ins. Co., 818 F. Supp. 1301, 1304 (N.D. Cal. 1992).

II. THE ONE-YEAR LIMIT ON REMOVAL: 28 U.S.C. § 1446

Despite courts allowing defendants to remove diversity cases to federal court, "a case may not be removed . . . more than 1 year after commencement of the action."[38]

A. History of the Statute

A one-year limitation on removal did not always exist.[39] Before enacting the one-year time limit, defendants could remove to federal court at any time during the course of the proceedings.[40] However, in 1988, Congress amended 28 U.S.C. § 1446(b) to include a one-year time limitation on removal.[41] This limitation imposed barriers that prevent defendants from removing at any time during the case.[42]

B. Purpose of Amendments to the Statute

There are many reasons for the amendment to 28 U.S.C. § 1446.[43] As discussed by Congress, the amendment was enacted in order to "reduc[e] the opportunity for removal after substantial progress has been made in state court" because "[r]emoval late in the proceedings may result in substantial delay and disruption."[44] Another purpose of the amendment was to reduce the number of cases over which federal courts have jurisdiction.[45] Through enacting the amendment, Congress expected a "modest curtailment in access to diversity

38. 28 U.S.C. § 1446(b) (2000).

39. *See* Russaw v. Voyager Life Ins. Co., 921 F. Supp. 723, 725 (M.D. Ala. 1996) (indicating that 28 U.S.C. § 1446 was amended to include a one-year limit on removal).

40. William D. Underwood, *Survey Article: Civil Procedure*, 35 TEX. TECH. L. REV. 587, 601 (2004).

41. *Id.* at 602.

42. *See id.* at 601–02.

43. *See* Kite v. Richard Wolf Med. Instruments Corp., 761 F. Supp. 597, 599 (S.D. Ind. 1989); *see also* H.R. Rep No. 100-889 (1988), *as reprinted in* 1988 USCCAN 5982, 6032–33.

44. H.R. Rep. No. 100-889 (1988), *as reprinted in* 1988 USCCAN 5982, 6032–33; *see also Kite*, 761 F. Supp. at 599 (indicating that the purpose of the amendment was to "prevent[] potential manipulation and forum shopping by defendants who are either attempting to delay proceedings by removing at the last second prior to trial, although removal was available earlier, or attempting to find a more friendly forum after substantial progress has been made in the State forum.").

45. Ferguson v. Security Life of Denver Ins. Co., 996 F. Supp. 597, 601 (N.D. Tex. 1998).

jurisdiction."[46] However, "Congress wanted to *reduce* the opportunity for removal, not eliminate it entirely."[47]

C. *Interpreting the Statute*

In order to properly interpret 28 U.S.C. § 1446, the following two issues must be addressed: when an action is "commenced" and when the one-year limitation applies.[48] The first issue to determine is when the action "commenced."[49] Rule 3 of the Federal Rules of Civil Procedure provides that "[a] civil action is commenced by filing a complaint with the court."[50] Courts agree that an action commences on the date the action is filed in court.[51]

Second, courts must determine when the one-year limitation applies.[52] The majority of courts addressing this issue have stated that the one-year limitation only applies in cases that were not initially removable to federal court.[53] However, a minority of courts have found that the one-year limitation applies no matter when the case became removable.[54]

After interpreting the meaning of the literal language of the statute and interpreting when the statute's one-year limitation comes into

46. H.R. Rep. No. 100-889 (1988), *as reprinted in* 1988 USCCAN 5982, 6032.

47. *Ferguson*, 996 F. Supp. at 601; *see also Kite*, 761 F. Supp. at 600 (making it clear that the rule was not intended to "circumvent diversity jurisdiction altogether" because this would encourage plaintiffs to join non-diverse defendants in order to force adjudication of the case in state court) (emphasis in original).

48. *See* Ardoin v. Stine Lumber Co., 298 F. Supp. 2d 422, 425 (W.D. La. 2003) (interpreting when an action is commenced); *see also* Brierly v. Alusuisse Flexible Packaging, Inc., 184 F.3d 527, 534 (6th Cir. 1998) (interpreting when the time limitation in 28 U.S.C. § 1446(b) applies).

49. *See id.* at 425 (interpreting "commencement" before discussing whether an equitable exception applies to the one-year limitation on removal).

50. FED. R. CIV. P. 3.

51. *See, e.g., Ardoin*, 298 F. Supp. 2d at 425.

52. *See Brierly*, 184 F.3d at 534 (discussing that the one-year time limitation to 28 U.S.C. § 1446(b) applies to cases "not initially removable"); *see also* Brown v. Tokio Marine Fire Ins. Co., 284 F.3 871, 873 (8th Cir. 2002) (stating that the one-year limitation period only applies to cases not removable to federal court when initially filed).

53. *See, e.g.*, Brown v. Tokio Marine & Fire Ins. Co., Ltd., 284 F.3d 871, 873 (8th Cir. 2002); Johnson v. Heublein, Inc., 227 F.3d 236, 241 (5th Cir. 2000); *Brierly*, 184 F.3d at 534–35; New York Life Ins. Co. v. Deshotel, 142 F.3d 873, 886 (5th Cir. 1998); Ritchey v. Upjohn Drug Co., 139 F.3d 1313, 1316 (9th Cir. 1998).

54. *See* Martine v. Nat'l Tea Co., 841 F. Supp. 1421, 1422 (M.D. La. 1993).

play, courts can determine whether the statute imposes an absolute bar on removal after one year or whether the statute allows an equitable exception to the one-year time limitation.[55]

III. DESCRIPTION OF JOINDER

A. Permissive Joinder

Permissive joinder "is often called the joinder of 'proper parties.'"[56] Permissive joinder allows a plaintiff to join parties to a suit as long as two requirements are met.[57] First, the claims must "aris[e] out of the same transaction, occurrence, or series of transactions or occurrences."[58] Second, the claims must present a common question of law or fact.[59] However, even if these two requirements are met, Rule 20 of the Federal Rules of Civil Procedure states only that the plaintiff *may* join a party, it does not require it.[60]

B. Compulsory Joinder

Compulsory joinder requires that certain parties be joined to the suit.[61] A plaintiff is required to join a party to the suit in two situations.[62] First, a plaintiff is required to join a person as a party to the suit if "in that person's absence, the court cannot accord complete relief among existing parties."[63] Second, a plaintiff must join a person as a party to the suit if "that person claims an interest relating to the

55. *See generally Ardoin*, 298 F. Supp. 2d 422 (defining commencement before determining that an equitable exception was allowed to the one-year limitation on removal); *Brierly*, 184 F.3d 527 (determining that the one-year time limitation on removal applies only to cases not initially removable before determining whether the one-year limitation on removal applied to the case).

56. 4 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 20.02 (3d ed. 2006) (citing FED. R. CIV. P. 20(a)).

57. *See* FED. R. CIV. P. 20(a)(1).

58. *Id.* at 20(a)(1)(A).

59. *Id.* at 20(a)(1)(B).

60. *Id.*

61. FED. R. CIV. P. 19.

62. *Id.* at 19(a)(1).

63. *Id.* at 19(a)(1)(A).

subject of the action and is so situated that the disposing of the action in the person's absence may" either "impair or impede the person's ability to protect the interest" or cause a person who is already a party to be at "risk of incurring double, multiple, or otherwise inconsistent obligations."[64] If either of these requirements are met and a plaintiff refuses to join the party, the court will join the party anyway.[65]

C. *Fraudulent Joinder*

Courts define fraudulent joinder in different ways.[66] Some courts say that fraudulent joinder occurs if the plaintiff joined a party solely to defeat removal.[67] Other courts say that fraudulent joinder occurs when the plaintiff pleads false jurisdictional facts.[68] Still other courts say that fraudulent joinder occurs if the plaintiff procedurally misjoined a non-diverse party to prevent removal.[69] Despite different definitions of fraudulent joinder, in all cases of fraudulent joinder, the plaintiff has no claim against the fraudulently joined defendant.[70]

Not only do courts define fraudulent joinder in different ways, courts also use various standards to determine if a defendant can

64. *Id.* at 19(a)(1)(B).

65. *Id.* at 19(a)(2).

66. E. Farish Percy, *Making a Federal Case of It: Removing Civil Cases to Federal Court Based on Fraudulent Joinder*, 91 IOWA L. REV. 189, 194 (2005).

67. Jerome-Duncan, Inc. v. Auto-By-Tel, L.L.C., 176 F.3d 904, 907–10 (6th Cir. 1999) (finding that the non-diverse defendant was joined solely to defeat removal, based on evidence that there was no claim against the non-diverse defendant and the non-diverse defendant was not involved in the dispute between the plaintiff and the diverse defendant.); Poulos v. Naas Foods, Inc., 959 F.2d 69, 73–74 (7th Cir. 1992) (finding that the joinder of a non-diverse defendant was fraudulent because the plaintiff had no chance of recovering damages from him as no impropriety was alleged against him).

68. Crowe v. Coleman, 113 F.3d 1536, 1538 (11th Cir. 1997) (finding that fraudulent joinder did not occur because the defendant seeking removal did not meet the burden of showing that the plaintiff pled false jurisdictional facts); B., Inc. v. Miller Brewing Co., 663 F.2d 545, 549, 555 (5th Cir. 1981) (finding that fraudulent joinder did not occur because the plaintiff did not plead false jurisdictional facts against at least one of the non-diverse defendants).

69. Tapscott v. MS Dealer Serv. Corp., 77 F.3d 1353, 1360 (11th Cir. 1996) (finding that fraudulent joinder occurred because non-diverse defendants were procedurally misjoined when they had no real connection with the controversy); Greene v. Wyeth, 344 F. Supp. 2d 674, 685 (D. Nev. 2004) (finding that fraudulent joinder occurred when the non-diverse defendants were not properly joined under the Federal Rules of Civil Procedure).

70. *See infra* footnotes 71-75 (indicating that fraudulent joinder occurs anytime when there is no claim against the non-diverse defendant).

prove fraudulent joinder.[71] Some courts require that the defendant prove there was *no reasonable basis* for the claim against the non-diverse party when the action was filed.[72] Some courts require that the defendant show there is *no possibility* that the plaintiff will recover from the non-diverse party.[73] Other courts require that the defendant show there is *no reasonable possibility* that the plaintiff will recover from the non-diverse party.[74] Some courts require that the defendant show that the plaintiff *failed to state a claim* against the non-diverse party.[75] Similar to the court's definitions of fraudulent joinder, all of the tests for fraudulent joinder require the removing defendant to carry the burden of showing that the plaintiff has no claim against the fraudulently joined, non-diverse defendant.[76]

71. Percy, *supra* note 66, at 194.

72. Filla v. Norfolk S. Ry. Co., 336 F.3d 806, 811 (8th Cir. 2003) (finding that fraudulent joinder was not present because a reasonable basis for predicting liability existed against the non-diverse defendants for the plaintiff's personal injuries when the defendants were a business that could have warned of the dangerous conditions existing near their place of business); Boyer v. Snap-On Tools, Corp., 913 F.2d 108, 111 (3d Cir. 1990) (finding that fraudulent joinder was not present because the plaintiff had colorable claims against the non-diverse defendants in a breach of contract action when they were negligent in assessing the potential profitability of a business).

73. Hartley v. CSX Transp., Inc., 187 F.3d 422, 424 (4th Cir. 1999) (finding that fraudulent joinder was not present because there was at least some possibility that the plaintiff could recover from the non-diverse, government defendant in a tort action); Pampillonia v. RJR Nabisco, Inc., 138 F.3d 459, 461 (2d Cir. 1998) (finding that a plaintiff fraudulently joined a non-diverse, corporate parent of the company plaintiff worked for in an employment action for discriminatory discharge because the plaintiff had no possibility of recovering from the defendant since the defendant had no control over the working conditions or the employment practices at the company).

74. Gray v. Beverly Enters.-Miss., Inc., 390 F.3d 400, 409 (5th Cir. 2004) (finding that fraudulent joinder was not present because the plaintiff showed evidence strong enough to demonstrate a reasonable possibility of recovery against the non-diverse defendant who could have been a participant in tortious conduct since they failed to remedy conduct by their subordinates which caused injury to the plaintiff); *Poulos*, *supra* note 67, at 73 (finding that fraudulent joinder was established because the non-diverse defendant was a parent corporation and could not be held liable for its subsidiary's actions; therefore, there was no reasonable possibility that the plaintiff could recover from the non-diverse defendant).

75. Polyplastics, Inc. v. Transconex, Inc., 713 F.2d 875, 877 (1st Cir. 1983); *Ritchey*, *supra* note 53, at 1318–19 (finding that fraudulent joinder was present because the plaintiff failed to state a claim against the non-diverse defendants when the non-diverse defendants could assert statute of limitations and res judicata defenses in order to avoid being parties in the suit); Hill v. Delta Int'l Mach. Corp., 386 F. Supp. 2d 427, 430–32 (S.D.N.Y. 2005) (finding that fraudulent joinder was established because the plaintiff's complaint failed to state a cause of action against the non-diverse defendant in a tort action where the sole remedy available to an employee injured in the course of employment was a worker's compensation claim).

76. *See also supra* notes 72–75. *See generally* Omi's Custard Co. v. Relish This, 2006 U.S. Dist. LEXIS 60016 (S.D. Ill., Aug. 24, 2006).

D. Strategic Joinder

Another tactic commonly used by plaintiffs in order to defeat removal to federal court is strategic joinder.[77] Courts agree that strategic joinder occurs when the plaintiff has a viable claim against a non-diverse defendant, but has no intention of pursuing the claim.[78] In cases of strategic joinder, the plaintiff's only reason for joining the non-diverse party is to prevent removal to federal court.[79] Plaintiffs often deliberately manipulate the forum in this way to prevent defendants from removing a case to federal court.[80]

IV. COURTS' INTERPRETATION OF 28 U.S.C. § 1446

Not every court has interpreted the one-year time limit on removal.[81] However, courts who have addressed the one-year limitation remain split.[82] In fact, even courts within the same circuit are sometimes split.[83] Some courts allow an equitable exception to the one-year time limit, while others treat the one-year time limit on removal as an absolute bar to removal after one year.[84]

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77. *See* Scott R. Haiber, *Removing the Bias Against Removal*, 53 CATH. U. L. REV. 609, 645–48 (2004) (discussing the use of token defendants to prevent removal).

78. *See* Cofer v. Horsehead Research & Development Co., Inc., 805 F. Supp. 541, 543 (E.D. Tenn. 1991) (suggesting that a plaintiff can attempt to avoid removal by joining a defendant they do not intend to sue, but who is arguably liable); *see also* Haiber, *supra* note 77, at 645–46 (stating that "it is not unusual for a plaintiff to name as a defendant a party from whom the plaintiff has no intention of seeking any recovery", nor is it unusual for a plaintiff to "defeat removal by finding a friendly, impecunious, or disinterested non-diverse defendant and then waiting until after the one-year expiration before dismissing that defendant.").

79. *See* Haiber, *supra* note 77, at 645–48 (discussing various ways to prevent removal).

80. Hines & Gensler, supra note 9, at 781.

81. *See* discussion *infra* Part IV.A–B.

82. *See* discussion *infra* Part IV.A–B (showing that courts in the 7th Circuit allow an equitable exception, whereas courts in the 4th Circuit and the 10th Circuit treat the one-year time limitation as an absolute bar).

83. *See* discussion *infra* Part IV.A–B (showing that some courts in the 5th Circuit allow an equitable exception to the one-year limit on removal, while other courts in the 5th Circuit treat the one-year limitation as an absolute bar).

84. *Compare* Tedford v. Warner-Lambert Co., 327 F.3d 423, 426–28 (5th Cir. 2003) *with* Mantz v. St. Paul Fire & Marine Ins. Co., 2003 U.S. Dist. LEXIS 10123 at *5 (S.D. W. Va., June 13, 2003).

A. Allowing an Equitable Exception to the One-Year Limitation

Several courts allow an equitable exception to the one-year time limitation imposed by 28 U.S.C. § 1446(b).[85] Courts consider various factors when deciding if an equitable exception should apply.[86] Most courts allowing an equitable exception discuss how fairness to the defendant requires allowing a defendant to remove in proper cases and how it is unfair for the plaintiff to manipulate the forum.[87]

1. Cases in the Fifth Circuit

The leading case allowing an equitable exception to the one-year limitation is *Tedford v. Warner-Lambert*.[88] In *Tedford,* the plaintiffs joined a non-diverse defendant after they were notified that the original defendant intended to remove to federal court.[89] A few days before the one-year limitation on removal ran, the plaintiff dismissed the non-diverse defendant.[90] The defendant attempted removal for a second time only ten days after the one-year limitation on removal had run.[91] The Fifth Circuit allowed an equitable exception to the one-year time limit on removal, reasoning that the defendants vigilantly worked to try the case in federal court because they sought removal each time the opportunity arose.[92]

Several other Fifth Circuit cases have agreed with *Tedford*, allowing an equitable exception to the one-year limitation on removal.[93] For example, in *Ardoin v. Stine Lumber Co.*, the Western

85. Amy D. Harmon, *Equitable Considerations in Removal: Is One Year the Final Answer?*, 16 S. CAROLINA LAWYER 28, 30 (2004).

86. *See Hill*, *supra* note 75, at 431 (indicating that courts weigh "the plaintiff's behavior, the fairness to the defendant of allowing or denying the extension, and the systemic interest in efficiency and respect for state courts.").

87. McNew, *supra* note 16, at 1344.

88. *Tedford*, 327 F.3d at 423.

89. *Id. at 425.*

90. *Id.*

91. *Id.*

92. *Id.* at 428.

93. *See* Ardoin v. Stine Lumber Co., 298 F. Supp. 2d 422, 429 (W.D. La. 2003); Morrow v. Wyeth, 2005 U.S. Dist. LEXIS 43194, at *21 (S.D. Tex. 2005); Morrison v. Nat'l Benefit Life Ins. Co., 889 F. Supp. 945, 950 (S.D. Miss. 1995).

District of Louisiana allowed an equitable exception to the one-year limitation on removal when plaintiffs began dismissing non-diverse defendants after one year had lapsed.[94] In *Ardoin*, evidence showed that the plaintiff deliberately joined non-diverse defendants and left them as parties to the suit until one year passed for the purpose of defeating diversity and preventing removal.[95] The court reasoned that the "plaintiffs' efforts to avoid removal to federal court, if successful, would undermine the purpose of diversity jurisdiction."[96] Moreover, the Congressional concern that substantial progress is made in state court after one-year was not present in the case because any discovery already conducted was transferable to another court.[97]

Additionally, courts in the Fifth Circuit have allowed an equitable exception to the time limit on removal when the court finds that the plaintiff engaged in bad faith forum manipulation.[98] For instance, in *Morrow v. Wyeth*, the Southern District of Texas allowed an equitable exception to the one-year limit on removal when the plaintiff specifically requested that the defendants not be served within one year from commencement of the action.[99] The court focused on the fact that this constituted bad faith forum manipulation.[100] Additionally, in *Morrison v. National Benefit Life Insurance Co.*, the Southern District of Mississippi allowed an equitable exception to the one-year time limit on removal when the plaintiff sought to increase the amount in controversy over the statutory minimum for diversity jurisdiction just seven days after the one year limit ended.[101] The court reasoned that failing to claim the proper amount of damages from the beginning constituted bad faith because the sole reason for doing so was to avoid removal within the one-year time limit.[102]

94. *Ardoin*, 298 F. Supp. 2d at 427.
95. *Id.* at 428.
96. *Id.* at 429.
97. *Id.* at 428.
98. *See id.* at 428–29; *Morrow*, 2005 U.S. Dist. LEXIS 43194, at *21.
99. *Morrow*, 2005 U.S. Dist. LEXIS 43194, at *20–21.
100. *Id.* at *21.
101. Morrison v. Nat'l Benefit Life Ins. Co., 889 F. Supp. 945, 947 (S.D. Miss. 1995).
102. *Id.* at 950.

2. *Cases in the Seventh Circuit*

Additionally, a Seventh Circuit court has allowed an equitable exception to the one-year time limit on removal.[103] In *Kite v. Richard Wolf Medical Instruments, Corp.*, a case with facts similar to *Tedford*, the Southern District of Indiana allowed removal after one-year from commencing the action because the defendant had initially removed to federal court within one year and sought removal again only one month after the diversity-destroying party was dismissed.[104] The court reasoned that if courts were to grant remands in cases where the defendant seeks removal immediately after the diversity-destroying defendant is dismissed, it would "encourage plaintiffs to manipulate the removal process and undermine Congressional intent to provide a federal forum to defendants who expediently seek removal to federal court . . . ."[105]

B. *Enforcing an Absolute Bar to Removal After One Year*

Several courts treat the one-year time limitation imposed in 28 U.S.C. § 1446(b) as an absolute bar to removal after one year.[106] Courts that treat the time limitation as an absolute bar discuss the plain language of the statute, the reasons behind the limitation, and Congress's ability to amend the statute if it so desires.[107]

1. *Cases in the Fourth Circuit*

Cases in the Fourth Circuit have held that "the plain language of the statute and its legislative history preclude application of equitable

103. *See* Kite v. Richard Wolf Med. Instruments, Corp., 761 F. Supp. 597, 601 (S.D. Ind. 1989).

104. *Compare id.* at 598, 601, *with* Tedford v. Warner-Lambert Co., 327 F.3d 423, 424–25, 428–29 (5th Cir. 2003).

105. *Kite*, 761 F. Supp. at 601.

106. *See* Mantz v. St. Paul Fire & Marine Ins. Co., 2003 U.S. Dist. LEXIS 10123, at *5 (S.D. W. Va. 2003); Wilder v. Isuzu, Inc., 2006 U.S. Dist. LEXIS 37341, at *8 (Dist. Ct. S.C. 2006); Hedges v. Hedges Gauging Service, Inc., 837 F. Supp. 753, 755 (M.D. La. 1993); Jenkins v. Sandoz Pharmaceuticals Corp., 965 F. Supp. 861, 869 (N.D. Miss. 1997); Caudill v. Ford Motor Co., 271 F. Supp. 2d 1324, 1327 (N.D. Okla. 2003).

107. McNew, *supra* note 16, at 1343–45.

exceptions."[108] For instance, in *Mantz v. St. Paul Fire & Marine Insurance Co.*, the court found an absolute bar to the one-year limitation on removal when a defendant's second attempt at removal, based on fraudulent joinder and misjoinder, occurred more than one year after the commencement of the action.[109] The court indicated that allowing removal after one year from commencement of the action was a "clear violation of the plain language of § 1446(b)."[110] Yet another court in *Wilder v. Isuzu, Inc.* applied the plain language of the statute.[111] Using the plain language of the statute prevented the District Court of South Carolina from allowing an equitable exception to the one-year limitation on removal, even though the plaintiff told the defendant that they dismissed the non-diverse defendant from the case only after one year from commencement of the action had passed.[112]

2. *Cases in the Fifth Circuit*

Several cases in the Fifth Circuit focused on the strict language of the statute, preventing the courts from allowing an equitable exception.[113] For example, the Middle District of Louisiana, in *Hedges v. Hedges Gauging Service, Inc.*, did not allow an equitable exception when proceedings were stayed for over six months and the plaintiff severed claims against non-diverse defendants after one year had passed.[114] The court determined that Congress should recognize the exception before the courts do.[115] Moreover, in *Jenkins v. Sandoz*

108. Amy D. Harmon, *Equitable Considerations in Removal: Is One Year the Final Answer?*, 16 S.C. LAW. 28, 30 (2004).

109. *Mantz*, 2003 U.S. Dist. LEXIS 10123, at *4–5.

110. *Id.; see also* Russaw v. Voyager Life Ins. Co., 921 F. Supp. 723, 724–25 (M.D. Ala. 1996) (disallowing an exception to the one-year time limit on removal, even though the defendant made initial attempts at removal before one year had run from the commencement of the action, because "the language of § 1446(b) contains no exceptions to the one-year limitation").

111. *Wilder*, 2006 U.S. Dist. LEXIS 37341, at *7–8.

112. *Id.*

113. *See* Hedges v. Hedges Gauging Service, Inc., 837 F. Supp. 753, 755 (M.D. La. 1993); *see also* Jenkins v. Sandoz Pharmaceuticals Corp., 965 F. Supp. 861, 869 (N.D. Miss. 1997).

114. *Hedges*, 837 F. Supp. at 754.

115. *Id.* at 755.

Pharmaceuticals Corp., the Northern District of Mississippi did not allow an equitable exception to the one-year limitation when a federal court remanded a case to the state court after the plaintiff dismissed the only two non-diverse defendants from the action.[116] The court reasoned that "[t]he statutory language is unambiguous in providing that no diversity case may be removed more than one year after commencement of the lawsuit."[117]

3. *Cases in the Tenth Circuit*

Additionally, courts in the Tenth Circuit have found an absolute bar to removal after one year because of the plain language of the statute and its legislative history.[118] For example, in *Caudill v. Ford Motor Co.*, the Northern District of Oklahoma enforced an absolute bar to the one-year time limit on removal when the plaintiff dismissed the non-diverse defendant one year and six days after filing suit.[119] The court reasoned that "[t]here is no good reason for a federal court to 'create' removal jurisdiction outside the one-year period when the issue could have been addressed before the deadline set by Congress" and "the Court is constrained by the plain language of the statute."[120]

V. THE UNITED STATES SUPREME COURT SHOULD ESTABLISH A RULE REGARDING THE ONE-YEAR LIMITATION

The circuit split concerning whether to allow an equitable exception to the one-year limitation or to treat the one-year limitation as an absolute bar should be addressed.[121] If some jurisdictions allow an equitable exception to the time limit while others treat the time limit as an absolute bar, removal after the one-year limitation has run

116. *Jenkins*, 965 F. Supp. at 869.
117. *Id.*
118. *See* Caudill v. Ford Motor Co., 271 F. Supp. 2d 1324, 1327–28 (N.D. Okla. 2003).
119. *Id.* at 1326, 1328.
120. *Id.* at 1328.
121. *See* discussion *supra* Part IV.A.1–4.

will be based on where the parties are located, which is unfair.[122] Moreover, defendants will never know what to expect when it comes to removal because courts in the same circuit remain split on the issue.[123] The United States Supreme Court should allow an equitable exception to the one-year time limit on removal in cases of strategic joinder, but should treat the one-year time limitation as an absolute bar in cases of fraudulent joinder.[124]

A. An Equitable Exception is Needed in Cases of Strategic Joinder

Courts should allow an equitable exception to the one-year time limit on removal in cases where a plaintiff joins a party that the plaintiff has a claim against but where the plaintiff has no intention of pursuing that claim. The exception in these cases should be allowed because such strategic joinder is difficult to discover within one year, the one-year limitation is a procedural limitation, substantial progress in a trial does not always occur within one year, and the language in the statute does not expressly prohibit the use of equitable exceptions.[125]

1. Strategic Joinder is Difficult to Discover Within One Year

First, it is difficult, if not impossible, for defendants to discover strategic joinder until the plaintiff dismisses the party since from the beginning, the plaintiff has a viable claim against the party.[126] Therefore, the plaintiff is allowed to manipulate the court for the sole reason of preventing removal to federal court based on diversity jurisdiction.[127] Not only is the plaintiff allowed to manipulate statutory rules to defeat diversity, plaintiffs are encouraged "to

122. McNew, *supra* note 16, at 1317.
123. *See* discussion *supra* Part IV.A–B.
124. *Id.*
125. *See supra* Part IV.A.1–4.
126. *See* discussion *supra* Part III.B.
127. McNew, *supra* note 16, at 1316.

engage in manipulative gamesmanship in order to defeat removal."[128] Defendants do not have the same opportunity to manipulate the forum, which is unfair because defendants are much less likely to win a case in a court in the plaintiff's home state than a case in federal court.[129]

Plaintiffs should not be allowed to manipulate statutory rules simply to defeat diversity.[130] "[A] plaintiff does not possess a superior 'right' to select the forum of his choice."[131] By allowing the plaintiff to manipulate statutory rules through strategic joinder and prevent removal to federal court, the plaintiff gains a superior choice of forum which is unfair to the defendant.[132] Moreover, "[r]emoval does not deprive plaintiffs of any 'right,' but merely affords defendants an equal opportunity to litigate in federal court."[133] Giving the defendant an equal opportunity at choosing a forum is important and fair.[134]

However, at least one court has asserted that a "[d]efendant's right to remove and [a] plaintiff's right to choose his forum are not on equal footing . . ."[135] The court in *Burns* reasoned that "removal statutes are construed narrowly; where plaintiff and defendant clash about jurisdiction, uncertainties are resolved in favor of remand."[136] Although removal statutes are construed strictly and narrowly, this construction does not give plaintiffs the right to manipulate the forum and avoid removal in cases where the defendant would have the right

128. *Id.* at 1317; *see also* Kite v. Richard Wolf Med. Instruments, Corp., 761 F. Supp. 597, 601 (S.D. Ind. 1989).

129. *See* Clermont & Eisenberg, *supra* note 10, at 606–07.

130. Tedford v. Warner-Lambert, Co., 327 F.3d 423, 428–29 (5th Cir. 2003).

131. Haiber, *supra* note 77, at 612.

132. *Id.* at 612, 655.

133. *Id.* at 611.

134. *See* Clermont & Eisenberg, *supra* note 10, at 607 (showing that plaintiffs and defendants win at different rates depending on the court in which the action proceeds).

135. *See* Burns v. Windsor Ins. Co., 31 F.3d 1092, 1095 (11th Cir. 1994).

136. *Id.*; *see also* Coker v. Amoco Oil Co., 709 F.2d 1433, 1440–41 (11th Cir. 1983) (stating "[i]f there is even a possibility that a state court would find that the complaint states a cause of action against any one of the resident defendants, the federal court must find that the joinder was proper and remand the case to the state court.").

to remove if the plaintiff had not strategically joined a non-diverse party.[137]

2. *The One-Year Limitation is a Procedural Limitation*

Second, the one-year time limit imposed on removal is procedural rather than jurisdictional.[138] Procedural rules are often subject to equitable exceptions.[139] Because procedural rules can be subject to equitable exceptions, the United States Supreme Court should recognize an equitable exception to the one-year limit on removal in cases of strategic joinder.[140]

However, not all courts agree that the one-year limitation on removal is a procedural limitation;[141] some courts have determined the limitation is jurisdictional.[142] If the time limit is interpreted to be jurisdictional, no equitable exception will be allowed.[143] However, it is improper to interpret the time limit as jurisdictional because the one-year time limit is a statute of limitations, which is presumptively subject to equitable exceptions.[144] In fact, the Supreme Court has held that "[t]his equitable doctrine is read into every federal statute of limitation."[145] Therefore, because precedent allows equitable

137. *See* Tedford v. Warner-Lambert Co., 327 F.3d 423, 426–27 (5th Cir. 2003) (indicating that plaintiffs should not be allowed to manipulate the forum in order to defeat diversity).

138. *See Tedford*, 327 F.3d at 426; Kinabrew v. Emco-Wheaton, Inc., 936 F. Supp. 351, 352 (M.D. La. 1996); Morrison v. Nat'l Benefit Life Ins. Co., 889 F. Supp. 945, 950 (S.D. Miss. 1995); Barnes v. Westinghouse Electric Corp., 962 F.2d 513, 516 (5th Cir. 1992).

139. *Tedford*, 327 F.3d at 426; *see also* Irwin v. Department of Veterans, 498 U.S. 89, 95 (1990) (finding that statutes of limitations which are procedural limitations, are presumptively subject to equitable exceptions).

140. *See* Conclusion *infra*.

141. Price v. Messer, 872 F. Supp. 317, 320 (S.D. W. Va. 1995).

142. *Id.*

143. *Id.* (finding that an equitable exception was not allowed to the one-year limitation on removal when the defendant attempted removal two years after commencement of the action when the plaintiff's addition of a defendant increased the amount in controversy). The court reasoned that the time limitation was "a jurisdictional limitation that should be rigidly observed to prevent removal of diversity cases pending in state court for more than one year." *Id.*

144. *See supra* notes 141–42 and accompanying text; *see also* Smith v. City of Chicago Heights, 951 F.2d 834, 839 (7th Cir. 1991) ("Equitable tolling 'permits a plaintiff to avoid the bar of the statute of limitations if despite all due diligence he is unable to obtain vital information bearing on the existence of his claim.'" (quoting Cada v. Baxter Healthcare Corp., 920 F.2d 446, 451 (7th Cir. 1990)).

145. Holmberg v. Armbrecht, 327 U.S. 392, 397 (1946).

considerations when construing statutes of limitation and the one-year removal limitation has been construed as a procedural limitation, equitable exceptions to removal in cases of strategic joinder should be allowed.[146]

Further, if statutes of limitations are presumptively subject to equitable exceptions, other time limits in 28 U.S.C. § 1446(b) are subject to waiver.[147] Thus if one time limit in the statute is subject to waiver, all other time limits in the statute, including the one-year limitation on removal, should be subject to an equitable exception.[148]

3. *Substantial Progress in a Trial Does Not Always Occur Within One Year*

Moreover, the point of the one-year time limit is to prevent "removal after substantial progress has been made in state court."[149] Whether substantial progress has been made is determined by the facts of the particular case.[150] However, if substantial progress has not been made in the trial, an equitable exception should allow removal after one year in cases of strategic joinder, as was done in the *Ardoin v. Stine Lumber Co.* case.[151] In enacting the one-year limitation, Congress indicated that one year is the time period in

146. *See supra* notes 141–42, 144 and accompanying text; *see also* Ardoin v. Stine Lumber Co., 298 F. Supp. 2d 422, 429 (W.D. La. 2003) (allowing an equitable exception when a party was strategically joined); Kite v. Richard Wolf Med. Instruments, Corp., 761 F. Supp. 597, 601 (S.D. Ind. 1989).

147. *See* Barnes v. Westinghouse Elec. Corp., 962 F.2d 513, 516 (5th Cir. 1992) (affirming a district court decision that the thirty-day time requirement imposed by section 1447(c) is subject to waiver resulting from noncompliance with 1446(b)).

148. *See* Ferguson v. Sec. Life of Denver Ins. Co., 996 F. Supp. 597, 603 (1998) (indicating that one time limit in a statute cannot be subject to an equitable exception without the other time limits also being subject to such exceptions).

149. H.R. Rep. No. 100-889 (1988), *as reprinted in* 1988 USCCAN 5982, 6032; *see also Ardoin*, 298 F. Supp. 2d at 428; New York Life Ins. Co. v. Deshotel, 142 F.3d 873, 886 (5th Cir. 1998).

150. *See Ardoin*, 298 F. Supp. 2d at 428 (finding that substantial progress had not been made in state court after fourteen months when "merit discovery ha[d] not commenced, the case ha[d] not been set for trial, and the class certification hearing ha[d] not been held" while suggesting substantial progress would have been made if these tasks had been completed).

151. *See id.* at 428–29 (allowing an equitable exception to the one-year limitation on removal after finding substantial progress had not been made in fourteen months).

which substantial progress would be made.[152] Moreover, "[i]t is not clear that Congress intended to allow these administrative concerns to override the right to a federal forum when a potential fraud has been perpetuated on the court," and the "official commentary" sheds little light on the intent of the provision.[153]

Some courts reason that judicial economy requires the one-year limitation to be construed as an absolute bar in all cases, whether substantial progress has been made in state court or not.[154] However, judicial economy should not override fairness to the defendant when a plaintiff manipulates the forum through the use of strategic joinder to significantly increase the likelihood the plaintiff will win.[155]

4. The Statutory Language Does Not Expressly Prohibit the Use of Equitable Exceptions

The statutory language in 28 U.S.C. § 1446(b) does not expressly indicate that equitable exceptions may not apply to the one-year limitation in the statute.[156] Congress would have expressly indicated that the one-year limitation was an absolute bar if they did not intend for cases to be removable after one year under any circumstances.[157] As one court pointed out, "[i]f Congress had intended to place a one-year limitation on removal of all diversity cases, it surely would have chosen less obscure and counter-intuitive wording to accomplish that purpose."[158] Since Congress never explicitly prohibited the use of equitable exceptions to extend the one-year time limit, courts should allow an equitable exception allowing defendants to remove to

152. *See* H.R. Rep. No. 100-889 (1988), *as reprinted in* 1988 USCCAN 5982, 6032 (stating that the one-year time limit is intended to "reduc[e] the opportunity for removal after substantial progress has been made"). Congress never specifically addressed the one-year time limit. McNew, *supra* note 16, at 1332.

153. Ferguson v. Security Life of Denver Ins. Co., 996 F Supp. 597, 601 (N.D. Tex. 1998).

154. Mantz v. St. Paul Fire & Marine Ins. Co., 2003 U.S. Dist. LEXIS 10123, at *5–6 (S.D. W. Va. 2003).

155. *See* Clermont & Eisenberg, *supra* note 10, at 607 (showing that plaintiffs have a much higher win rate in state court whereas defendants have a much higher win rate in federal court).

156. *See generally* 28 U.S.C. § 1446(b).

157. *See* Brierly v. Alusuisse Flexible Packaging, Inc., 184 F.3d 527, 534–35 (6th Cir. 1999).

158. *Id.* at 534–35.

federal court after the one-year limit in cases involving strategic joinder.[159]

However, some courts interpret the statute to be an absolute bar on removal under all circumstances, asserting the plain language of the statute indicates a one-year limit on removal in all diversity cases.[160] One justification for this is Congress' apparent willingness to allow plaintiffs to strategically join defendants and defeat removal.[161] Moreover, courts interpreting the one-year limit as an absolute bar think that it is up to Congress, rather than the courts, to rewrite the language of 28 U.S.C. § 1446(b) if they want to allow an equitable exception.[162]

B. Absolute Bar is Needed in Cases of Fraudulent Joinder

Defendants should not be able to remove to federal court after the expiration of one year if the plaintiff fraudulently joined parties because fraudulent joinder does not prevent removal, fraudulent joinder is discoverable within one year, and equitable principles only aid vigilant defendants.[163]

1. Fraudulent Joinder Does Not Prevent Removal

It is well-established that fraudulently joined defendants cannot prevent removal.[164] Courts have asserted that fraudulently joined defendants, for purposes of determining diversity, will not bar removal to federal courts.[165] Since fraudulent joinder does not prevent removal, an equitable exception to the one-year time

159. *See generally id.*

160. *See* discussion *supra* Part III.B.

161. *See* Cofer v. Horsehead Research & Develop. Co., 805 F. Supp. 541, 544 (E.D. Tenn. 1991).

162. *Id.*; *see also* Martine v. Nat'l Tea Co., 841 F. Supp. 1421, 1422 (M.D. La. 1993); Hedges v. Hedges, Inc., 837 F. Supp. 753, 755 (M.D. La. 1993).

163. *See* discussion *infra* Part V.B.1–2.

164. *See* Pullman Co. v. Jenkins, 305 U.S. 534, 541 (1939); *see also* Heritage Bank v. Redcom Labs., Inc., 250 F.3d 319, 323 (5th Cir.) (stating that removal is not precluded if a non-diverse party is fraudulently joined).

165. *See Pullman*, 305 U.S. at 541, *Heritage Bank*, 250 F.3d at 323; Mayes v. Rapoport, 198 F.3d 457, 460–63 (4th Cir. 1999); Gottlieb v. Westin Hotel Co., 990 F.2d 323, 327 (7th Cir. 1993).

limitation should not be allowed to aid defendants failing to remove on a fraudulent joinder basis before the time limitation has expired.[166]

2. *Fraudulent Joinder is Discoverable Within One Year*

Defendants are able to discover and make fraudulent joinder arguments before the one year limitation expires.[167] By making these arguments, defendants can use fraudulent joinder as a defense.[168] If the defendant is successful in showing that the plaintiff fraudulently joined a non-diverse party, the non-diverse party will be dismissed from the action, and the defendant will be allowed to remove to federal court.[169] Because fraudulent joinder allows diverse defendants to have the non-diverse defendants dismissed before the one year statutory period expires, they should not be allowed to remove after the period has run.[170]

3. *Equity Aids the Vigilant*

Regardless of whether the one-year time limit is properly construed as a procedural limitation,[171] a defendant should not be allowed an equitable exception to removal outside of the one-year time limit imposed on removal in cases of fraudulent joinder.[172]

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166. *See* discussion *infra* Part V.B.2.

167. *See* Caudill v. Ford Motor Co., 271 F. Supp. 2d 1324, 1328 (N.D. Okla. 2003) (noting that the defendants "could have made [their] fraudulent joinder argument before the end of the statutory period" and removed the case to federal court); Clark v. Nestle USA, Inc., No. 04-1537, 2004 U.S. Dist. LEXIS 14224, at *5–6 (E.D. La., July 22, 2004) (finding that the defendant was not vigilant in asserting the right to removal when they "knew or should have known that the amount in controversy exceeded the minimum for diversity jurisdiction" before the one-year time limit had passed).

168. *See* Laura I. Ashbury, *A Practical Guide to Fraudulent Joinder in the Eighth Circuit*, 57 ARK. L. REV. 913, 913, 917 (2005).

169. Hill v. Delta Int'l Machinery Corp., 386 F. Supp. 2d 427, 430 (S.D.N.Y 2005); Mills v. Allegiance Healthcare Corp., 178 F. Supp. 2d 1, 4 (D. Mass. 2001) (citing Wilson v. Republic Iron & Steel Co., 257 U.S. 92 (1921)).

170. *See Caudill*, 271 F. Supp. 2d at 1328 (noting that there was "no good reason for a federal court to 'create' removal jurisdiction outside the one-year period when the issue could have been addressed before the deadline set by Congress").

171. *See* discussion *supra* Part V.A.2.

172. *See Caudill*, 271 F. Supp. 2d at 1328; Ferguson v. Sec. Life of Denver Ins. Co., 996 F. Supp. 597, 603 (N.D. Tex. 1998) (finding that the defendant was not deserving of an equitable exception

Further, courts have indicated "equity aids the vigilant and not those who slumber on their rights."[173] As defendants are able to discover fraudulent joinder prior to the expiration of the one-year limit on removal, defendants failing to discover fraudulent joinder prior to the expiration are not vigilant and should not be rewarded with an extension of the removal period.[174]

CONCLUSION

The United States Supreme Court should "find a way to right the wrongs of forum manipulation."[175] If some courts allow an equitable exception to the time limit while others treat the time limit as an absolute bar, removal after one year from commencement of the action will depend on a party's location, which is unfair.[176] Moreover, parties will never know what to expect as to removal when court splits exist even within circuits.[177] Thus, the United States Supreme Court should determine whether the one-year time limitation on removal in 28 U.S.C. § 1446(b) is subject to equitable exceptions or whether it is an absolute bar on removal after the one year limit.[178]

In determining the correct rule, the Court should consider both fraudulent joinder and strategic joinder.[179] When a plaintiff strategically joins a non-diverse party, the Court should allow

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because the defendant should have attempted removal before one-year; they would have known fraudulent joinder was an issue at the outset had they been vigilant).

173. *See, e.g.*, National Assoc. of Gov't Employees v. Public Service Board, 40 F.3d 698, 708 (5th Cir. 1994) (quoting NAACP v. NAACP Legal Defense & Educ. Fund, Inc., 753 F.2d 131, 137 (D.C. Cir. 1985)); *Ferguson*, 996 F. Supp. at 603; *Caudill*, 271 F. Supp. 2d at 1328; *Clark*, No. 04-1537, 2004 U.S. Dist. LEXIS 14224, at *5–6 (finding that the defendant was not vigilant in asserting the right to removal when they "knew or should have known that the amount in controversy exceeded the minimum for diversity jurisdiction" before the one-year time limit had passed); *Hill*, 386 F. Supp. 2d at 431 (finding that the defendant had plenty of time to remove prior to the expiration of one year by asserting the doctrine of fraudulent joinder).

174. *Hill*, 386 F. Supp. 2d at 433.

175. McNew, *supra* note 16, at 1344.

176. *See* discussion *supra* Part IV.A–B.

177. *Id.*

178. *Id.*

179. *See* discussion *supra* Part III.A–B.

equitable exceptions to the one-year time limit on removal because strategic joinder is difficult for defendants to discover within the one-year limit for removal, and a plaintiff should not be allowed to manipulate the forum or have a superior choice of forum at the defendant's expense.[180] However, when a plaintiff fraudulently joins a non-diverse party, the Court should treat the one-year time limitation as an absolute bar to removal because defendants are able to discover such joinder prior to the expiration of the one-year limit.[181] If defendants do not attempt removal based on fraudulent joinder before the one-year limitation expires, they are not being vigilant and should not be allowed to reap the benefits of an equitable exception to the statute.[182]

The United States Supreme Court should take the opportunity to resolve the judicial disagreements regarding 28 U.S.C. § 1446(b) so that plaintiffs, defendants, and courts will be able to follow an established rule regarding removal, aiding in judicial efficiency and fairness for all involved.[183]

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180. *See* discussion *supra* Part IV.A.1–4.

181. *See* discussion *supra* Part IV.B.1–2.

182. *Id.*

183. *See* Mantz v. St. Paul Fire & Marine Ins. Co., 2003 U.S. Dist. LEXIS 10123, at *5–6 (S.D. W. Va., June 13, 2003) (indicating that judicial economy is important); Clermont & Eisenberg, *supra* note 10, at 607 (showing that defendants have a much higher statistical chance of winning a diversity case that has been removed to federal court).