

**ERRONEOUS REMOVAL AS A TOOL FOR SILENT TORT
REFORM: AN EMPIRICAL ANALYSIS**

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

procedures and judicial tools to deter erroneous removals. In Part II, I

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.

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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

<u>Single Year:</u>	<u>Torts:</u>	<u>Contracts:</u>
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)
<u>Time Period:</u>		
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)

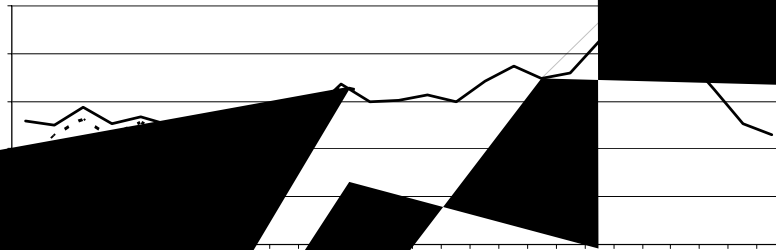
One possible objection to the preceding analysis of yearly remand rates is that the wrong year was used. When cases are

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filing (in federal court) would be a better measure of decided removal was proper. Another possible measure is the year in which the judge considered whether to remand, 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 using the year of termination.

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



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.

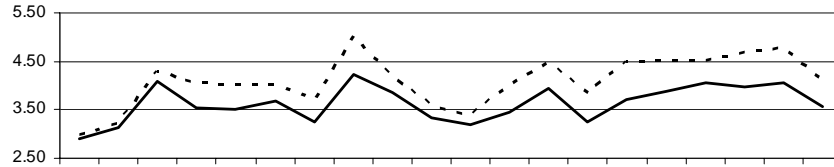
I find no significant linear relationship between the number of fee awards in a given year and the percentage of diversity tort suits remanded that same year or in future years. Nor can I conclude that the number of fee awards has a meaningful effect on the probability of remand.³⁷ Also, the hypothesis 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.^{39xm}

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}



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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.

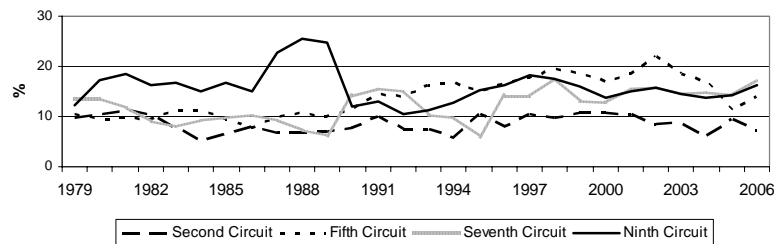
49. See *supra* note 45.

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

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, *lwow7584%.Tc0.0 yae0.250b,.2(6)however*.

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

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

side of the erroneous removal debate. Here, defendants complain that

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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

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

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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

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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

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%

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.

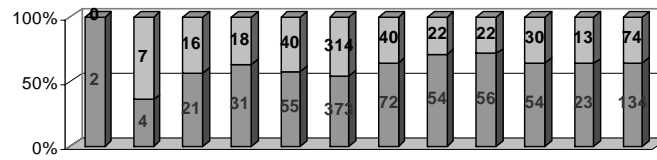
One way to estimate the remand rate for all fraudulent joinder cases is to use the findings in the previous subsection. Specifically, 62.5% and 68% of challenged fraudulent joinder cases in the Eastern District of Louisiana in 2004 and 2006, respectively, were remanded.¹⁰⁰ This is similar to the 59.6% 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’

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



<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

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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