SECTION 1447(e)'S DISCRETIONARY JOINDER AND REMAND: SPEEDY JUSTICE[1] OR DOCKET CLEARING?

INTRODUCTION

In October of 1988, Congress enacted the Judicial Improvements and Access to Justice Act of 1988 (Judicial Improvements Act),[2] the purpose of which was to "improve the administration of justice in this nation."[3] Consideration of legislative reform began in 1977;[4] in the intervening years the House Subcommittee on Courts, Civil Liberties, and the Administration of Justice held hearings on the state of the judiciary and determined that "[f]ederal courts were then overloaded with cases and access to justice suffered from an inadequate number of judges."[5] Thus, although the mandate of the federal court system was the "just, speedy and inexpensive determination of every action,"[6] courts and litigants faced "delay," "spiraling costs," and "unfair and inconsistent decision caused by the pressures placed on judges who must cope with the torrent of litigation."[7] In the view of Congress, the situation demanded a legislative remedy.

In order to partially alleviate the rising federal caseload, the Judicial Improvements Act contains several provisions to reduce the number of diversity-of-citizenship cases on the federal docket. The Act increases

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1. FED. R. CIV. P. 1.

2. Judicial Improvements and Access to Jnstice Act of 1988, Pub. L. No. 100-702, 102 Stat. 4642 (codified as amended in scattered sections of 28 U.S.C.) [hereinafter Judicial Improvements Act]. The President signed the Act into law on November 19, 1988.

3. H.R. REP. NO. 889, 100th Cong., 2d Sess. 22 (1988), *reprinted in* 1988 U.S. CODE CONG. & ADMIN. NEWS 5982, 5983 [hereinafter H.R. REP. NO. 889]. The Act contains, in ten titles, a variety of solutions designed to improve court administration.

4. The subcommittee and full committee's consideration of this legislation, and federal court reforms instituted in the intervening 11 years, are outlined in the House of Representatives Judiciary Committee Report. *Id.* at 22-26, 1988 U.S. CODE CONG. & ADMIN. NEWS at 5983-86.

5. *Id.* at 22, 1988 U.S. CODE CONG. & ADMIN. NEWS at 5983.

Criticism of court administration and concern regarding case overload is not new. *See generally, e.g.*, Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice,* 29 A.B.A. Rep. 395 (1906), *reprinted in* THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE 337 (A. Levin & R. Wheeler eds. 1979).

6. H.R. REP. NO. 889, *supra* note 3, at 23, 1988 U.S. CODE CONG. & ADMIN. NEWS at 5983-84 (quoting FED. R. CIV. P. 1).

7. *Id.* at 25, 1988 U.S. CODE CONG. & ADMIN. NEWS at 5984. *See also* DEPARTMENT OF JUSTICE COMM. ON REVISION OF THE FEDERAL JUDICIAL SYSTEM: THE NEEDS OF THE FEDERAL COURTS 1 (1977) [hereinafter FEDERAL COURTS NEEDS] (federal courts are faced with a "crisis of overload . . . so serious that it threatens the capacity of the federal system to function as it should").

the amount-in-controversy requirement from $10,000 to $50,000[8] and amends the removal provisions to permit discretionary remand to state court in certain diversity cases.[9]

This Note examines 28 U.S.C. § 1447(e), which was added by the Judicial Improvements Act to the provisions that govern procedure after removal.[10] Section 1447(e) authorizes federal district courts to permit or deny a diversity plaintiff's joinder of a nondiverse defendant after removal and, if joinder is permitted, to remand the whole action to state court.[11] The amendment applies when a plaintiff, with a claim against

8. 28 U.S.C.A. § 1332 (West Supp. 1989). Judges already can be heard breathing sighs of relief at the prospect of fewer diversity cases before their courts. *See, e.g.*, Campbell, Athey & Zukowski v. Thomasson, 863 F.2d 398, 399 n.1 (5th Cir. 1989) ("It is not without some pleasure that we note that Congress recently amended § 1332 to increase from $10,000 to $50,000 the amount that must be in controversy for jurisdiction to arise under § 1332. This case, unfortunately, was filed under prior law.") (citation omitted). It is estimated that the increase in amount in controversy required will reduce the number of diversity cases by as much as 40%. H.R. REP. NO. 889, *supra* note 3, at 45, 1988 U.S. CODE CONG. & ADMIN. NEWS at 6006.

9. 5 U.S.C. § 5584 (1988). *See generally* Holloman, *Changes in Federal Court Procedure*, 31 FOR THE DEFENSE, Feb. 1989, at 5 ("highlight[ing] the most significant provisions of the Act"); Siegel, *Changes in Federal Jurisdiction and Practice Under the New Judicial Improvements and Access to Justice Act, reprinted in* 123 F.R.D. 399 (1989) (a broad review of the major new provisions based largely on Siegel's Practice Commentaries, which follow the various sections in Title 28 of the United States Code Annotated).

Undoubtedly, the most radical recommendation by the subcommittee was the elimination of diversity jurisdiction, which accounts for more than 33% of all civil filings in district court and over fifteen percent of all appeals in civil actions. ADMINISTRATIVE OFFICE OF THE U.S. COURTS, 1989 ANNUAL REPORT OF THE DIRECTOR App. 1: Detailed Statistical Tables 16 (Table B-7), 38 (Table C5A (1989)). Obviously, exclusion of diversity cases would shrink the federal docket. And although judges, academics, and commentators challenge diversity jurisdiction as unnecessary and costly, *see* C. WRIGHT, LAW OF FEDERAL COURTS 132-37 (4th ed. 1983); *see also id.* at 129-30 nn.14 & 16-18 (citing literature in debate over abolishing diversity), diversity jurisdiction continues to enjoy strong support, particularly from the organized bar. *See* Frank, *The Case for Diversity Jurisdiction*, 16 HARV. J. ON LEGIS. 403, 406 (1979). In the end, elimination of diversity apparently was too controversial and died in committee. H.R. REP. NO. 889, *supra* note 3, at 25, 1988 U.S. CODE CONG. & ADMIN. NEWS at 5985-86.

10. Addition of section 1447(e), and all of the removal amendments, stemmed from proposals made in 1987 by the Judicial Conference of the United States' Committee on Court Administration. In fact, the House Judiciary Committee Report is, in almost all respects, the Judicial Conference's committee report. The only recommendation that Congress did not accept, and the only significant distinction in the two reports, was the suggested amendment of section 1441(a) to permit removal by "any" defendant. *See* JUDICIAL CONFERENCE OF THE UNITED STATES, COMMITTEE ON COURT ADMINISTRATION, REMOVAL JURISDICTION 37 (Sept. 21, 1987). *See also infra* notes 143-48 and accompanying text.

11. 28 U.S.C.A. § 1447(e) (West Supp. 1989). Section 1447(e) provides:

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

Id. The addition of this joinder and remand procedure was one of several removal amendments, which, *inter alia*, permit the court to disregard the citizenship of "Doe" defendants for purposes of removal, eliminate the "petition" filing requirement for removal jurisdiction (despite the previous terminology requiring "petition" filing, notice filing has been all that is required), establish a one-

diverse and nondiverse parties, sues only the diverse defendant in state court. If the defendant removes to federal court on the basis of diversity, then the question is whether the plaintiff can join successfully the nondiverse defendant in federal court. Under the complete diversity rule of *Strawbridge v. Curtiss,* the answer is no.[12] Complete diversity is lacking unless "*each* defendant is a citizen of a different State from *each* plaintiff."[13] Thus, presence of the nondiverse party would prevent or destroy federal court jurisdiction. Under the Federal Rules of Civil Procedure, when joinder would deprive the court of jurisdiction, and if the person who cannot be joined is "indispensable,"[14] the action should be *dismissed,* rather than remanded. Prior to the 1988 amendment, because removal under section 1447(c) was proper and jurisdictionally correct,[15] no basis for remand existed when the party sought to be joined was nondiverse.

Section 1447(e) provides two alternatives if the plaintiff seeks to join a defendant whose joinder, by eliminating diversity, will defeat subject

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year limit on removal based on the creation of diversity, and eliminate the bond requirement when removal is sought. Most notable, perhaps, was the amendment to 28 U.S.C.A. § 1441(a) (West Supp. 1989), making irrelevant the citizenship of fictitious defendants for purposes of removal.

For a discussion of the problems in Doe pleading to which the amendment responded, see H.R. REP. NO. 889, *supra* note 3, at 71, 1988 U.S. CODE CONG. & ADMIN. NEWS at 6032; *see also* Comment, *Doe Pleading to be Disregarded in Diversity Jurisdiction: Congressional Response to* Bryant v. Ford Motor Co., 19 GOLDEN GATE U.L. REV. 127 (1989) (discussing reasons for congressional response).

One final comment on the removal amendments, generally: The components of the Judicial Improvements and Access to Justice Act have varying effective dates. The provisions affecting removal procedure were enacted without an effective date. Courts interpreting the removal provisions have held that they became effective immediately on November 19, 1988. *See, e.g.,* Greer v. Skilcraft, 704 F. Supp. 1570, 1573 (N.D. Ala. 1989); Ehrlich v. Oxford Ins. Co., 700 F. Supp. 495, 498 (N.D. Cal. 1988).

12. 7 U.S. (3 Cranch) 267, 267 (1806).

13. Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 373 (1978).

14. FED. R. CIV. P. 19(b).

15. Prior to amendment, section 1447(c) stated in pertinent part: "If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case . . . ." 28 U.S.C. § 1447(c) (1982). The Court in Carnegie-Mellon University v. Cohill, 484 U.S. 343 (1988), held that discretionary authority to remand a case for reasons not included in section 1447(c) exists only when the exercise of jurisdiction is discretionary, as in the case of pendent jurisdiction. *Id.* at 354-55 & n.11.

Some courts, however, have argued that when the party sought to be joined is indispensable, the case can be said to have been "removed improvidently and without jurisdiction," and thus authority to remand is given by section 1447(c). *See, e.g.,* Steel Valley Auth. v. Union Switch & Signal Div., 809 F.2d 1006, 1010-11 (3d Cir. 1987) (when nondiverse party in diversity case is indispensable, remand is mandated under section 1447(c)); Trombino v. Transit Casualty Co., 110 F.R.D. 139, 150 & n.10 (D.R.I. 1986) (section 1447(c) dictates remand when jurisdictional defects, such as absence of indispensable party, arise after removal); Donaldson v. Werblow, 140 F. Supp. 244, 245 (N.D. Tex. 1956) (remand pursuant to section 1447(c) when court has no jurisdiction to hear case absent indispensable party).

matter jurisdiction. First, the court can deny joinder and permit the action to continue without the nondiverse party in federal court. Alternatively, however, the court may "permit joinder and remand the action to the State court."[16] Significantly, section 1447(e) does not require the court, in considering whether joinder of a nondiverse party should be permitted to deprive the court of jurisdiction, to determine whether the party is "indispensable" to the action according to Federal Rule 19(b). Unlike the approach under the Federal Rules,[17] joinder of a non-indispensable party can deprive the court of jurisdiction. Also, the language of the section does not attempt to define what constitutes proper joinder.[18] The approach of several reported cases has been to determine whether the party is "proper" under Federal Rule 20.[19] If the party is proper, the court may exercise its discretion to permit joinder and remand.[20] Finally, section 1447(e) works in conjunction with amended section 1441(a), which permits removal of a case in which any of the defendants are fictitious or "Doe" defendants.[21] If after removal the fictitious party is named and found to be nondiverse, the court pursuant to section 1447(e) may remand the whole action to state court.[22]

The flexible approach of section 1447(e) may enable district courts, by bringing all parties together in a single state court action, to achieve efficient resolution of diversity cases. Efficiency is one goal of the Federal

16. 28 U.S.C.A. § 1447(e) (West Supp. 1989).

17. *See infra* uotes 65-89 and accompanying text.

18. On the requirements of permissive joinder as a threshold determination under section 1447(e), sec *infra* notes 65-69, 84-89 and accompanying text.

19. *See, e.g.,* Wilson v. Famatex GmbH Fabrik Fuer Textilausruestungsmaschinen, 726 F. Supp. 950, 957 (S.D.N.Y. 1989) (joinder proper since requirements of Rule 20 are clearly satisfied). *But see* Righetti v. Shell Oil Co., 711 F. Supp. 531, 535 (N.D. Cal. 1989) (neither the language of 1447(e) nor its legislative history require court to look to Rules 19 and 20). As to permissive joinder of defendants, Federal Rule of Civil Procedure 20(a) provides in part:

> All persons (and any vessel, cargo or other property subject to admiralty process in rem) may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrences, or series of transactions or oceurrences and if any question of law or fact common to all defendants will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded.

FED. R. CIV. P. 20(a).

For background on what courts were doing, and the mess that had been created prior to enactment of section 1447(e), see *infra* notes 55-62 and accompanying text.

20. As to the factors courts have considered in exercising their discretionary authority to remand, see *infra* notes 84-111 and accompanying text.

21. 28 U.S.C.A. § 1441(a) (West Supp. 1989).

22. *See, e.g.,* Righetti v. Shell Oil Co., 711 F. Supp. 531, 533-34 (N.D. Cal. 1989). The House report notes that section 1447(e) "helps to identify the consequences that may follow removal of a case with unidentified fictitious defendants." H.R. REP. NO. 889, *supra* note 3, at 73, 1988 U.S. CODE CONG. & ADMIN. NEW at 6033. *See also infra* notes 79-83 and accompanying text.

Rules,[23] and as Judge Richard Posner argues, not a goal that can be ignored "in this era of massive case loads."[24] The legislative history of section 1447(e) also recognizes that "[j]oinder coupled with remand may be more attractive than either dismissal under civil rule 19(b) or denial of joinder."[25] This "attractiveness," however, may encourage federal district courts to use the new and broader remand power of section 1447(e) inappropriately—not as a means to achieve just and efficient resolution of cases, but instead to clear cases from the federal docket. This Note explores the concern that, as one commentator noted, attempts "to elevate judicial economy from the level of a 'trivial goal' threaten[ ] to turn justice into one."[26]

The purpose of this Note is twofold. First, the Note argues that docket clearing cannot and should not be a basis for remand to state court. Congress has the authority to shape federal court jurisdiction, and the Judicial Improvements Act attempts to respond in several respects to federal court overload.[27] However, the Supreme Court has held expressly, with strong policy support, that the courts cannot consider an overloaded court docket as a basis for remand.[28] Therefore, in keeping with congressional intent, the Supreme Court, and the Federal Rules of Civil Procedure, federal courts should exercise section 1447(e) remand power to seek efficient resolution of cases *without considering the number of cases* before their court. This Note argues that the goals of efficient, just, and fair resolution of all actions dictates that joinder and remand should not always result when the plaintiff seeks to join a merely proper party.

Second, this Note attempts to serve a practical purpose. Section 1447(e) grants courts discretion to look beyond the Federal Rules on

23. The Supreme Court in Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102 (1968), recognized the "interest of the courts and the public in complete, consistent, and efficient settlement of controversies." *Id.* at 111. The Court also noted that Federal Rule of Civil Procedure 19(b), in calling for consideration of whether the court could modify the judgment in the case before it as an alternative to dismissal for want of an indispensable party, might ask, " 'Can the decree be written so as to protect the legitimate interests of outsiders and, if so, would such a decree be adequate to the plaintiff's needs and *an efficient use of judicial machinery*?' " *Id.* at 112 n.10 (emphasis added).

24. Smith v. DeRobertis, 758 F.2d 1151, 1152 (7th Cir. 1985). As one commentator has noted, *Smith* "appears to make the due process rights of a criminal defendant turn on the case-processing interests of the federal system." Levit, *The Caseload Conundrum, Constitutional Restraint and the Manipulation of Jurisdiction,* 64 NOTRE DAME L. REV. 321, 325 (1989).

25. H.R. REP. NO. 889, *supra* note 3, at 72-73, 1988 U.S. CODE CONG. & ADMIN. NEWS at 6033.

26. Levit, *supra* note 24, at 325.

27. *See infra* notes 132-50 and accompanying text.

28. Thermtron Products, Inc. v. Hermansdorfer, 423 U.S. 336 (1976).

joinder of parties to determine who can be joined.[29] As long as joinder is not fraudulent,[30] joinder and denial of federal court jurisdiction under section 1447(e) has been permitted for any number of reasons (or for "no" reason),[31] even for convenience to a plaintiff who through sloppy pleading in state court failed to join a merely proper party.[32] This laxity in determining joinder and remand is further complicated, since if the court states that its basis for remand is statutory authority pursuant to section 1447(e), the decision to remand is presumably nonreviewable.[33] However, despite the district court's extremely broad and nonreviewable discretion to remand, this Note does not (and perhaps cannot) argue that section 1447(e) remand orders should be subject to appellate review. Statutory and decisional law appear to foreclose such an argument.[34] Nevertheless, particularly given the possible "docket clearing" attitude of the federal courts,[35] this Note urges defendants with a special interest in maintaining federal diversity jurisdiction to take particular care in preparing to contest joinder and remand of a case to state court. To this end, this Note will consider and evaluate factors that courts have and have not considered in either permitting or denying joinder. Knowledge by the parties of the factors courts consider in their exercise of section 1447(e) discretion also may help to discourage unnecessary and disruptive procedural litigation of "no win" arguments.

For practical reasons, the scope of the arguments made in this Note are perhaps limited. The court's discretion under section 1447(e) is broad; the decision to remand is and should be nonreviewable. Thus, any ability to effect change in the processes of the federal court system in its relationship to the litigants relies, not on an enforceable rule and the ability of the defendants to seek appellate review, but rather on moral suasion. The effectiveness of the reasoning turns on the integrity of the federal courts to balance parties' interests without inappropriately weighing considerations of docket overload.

Equally significant, the arguments can instruct courts and litigants both in understanding congressional intent and in establishing what should be the boundaries of this newly-created authority. Plaintiffs have available a means to achieve efficient resolution of multi-party cases; like-

29. *See infra* note 65-69, 84-89 and accompanying text.

30. *See infra* note 94 and accompanying text.

31. *See, e.g.*, Righetti v. Shell Oil Co., 711 F. Supp. 531, 533 (N.D. Cal. 1989) (emphasizing the court's "broad discretion" to permit or deny joinder).

32. *See, e.g.*, Grogan v. Babson Bros. Co., 101 F.R.D. 697 (N.D.N.Y. 1984) (permitting tactical blunder to divest court of jurisdiction).

33. *See infra* notes 180-88 and accompanying text.

34. *See infra* notes 190-214 and accompanying text.

35. *See infra* notes 156-65 and accompanying text.

wise, the courts can achieve economy and, most importantly, fairness to the parties. To the extent that courts, in reading section 1447(e) and its legislative history, structure their exercise of joinder to balance appropriate interests of the parties, they establish precedent free from considerations of case overload.

Part I describes the procedural posture of the cases to which section 1447(e) applies and the state of confusion in federal court remand practice to which the amendment responded. The Note then examines the effect of section 1447(e)—reviewing goals the amendment does and does not accomplish—and its usefulness as an efficiency mechanism. Part I also considers, in light of the efficiency and fairness goals of the Act, the balancing method by which courts may determine who should be joined and which cases should be remanded. Part II evaluates the purpose of the Judicial Improvements Act in responding, *inter alia,* to the overload of cases in federal court, the "delay caused by rising caseloads," and the "pressure placed on judges who must cope with the torrent of litigation."[36] The Part concludes that although Congress can structure institutional reforms—by means of procedural or jurisdictional changes—to relieve the overburdened federal courts, the federal courts themselves cannot and should not consider court workload as a basis for remand. Part III then examines the noureviewability of the district courts' exercise of discretion under section 1447(e). Given the courts' broad discretion, the likelihood of docket clearing, and the nature of the joinder and remand determination pursuant to section 1447(e), the Part considers whether joinder and remand determinations should be subject to appellate review and concludes, perhaps surprisingly, that they should not.

I. FEDERAL DIVERSITY JURISDICTION: REMOVAL AND REMAND PROCEDURE

A. *Federal Court Jurisdiction*

A basic tenet of our judicial system is that federal courts are courts of limited jurisdiction. Article III of the Constitution left the state courts with general jurisdiction over state and federal cases but granted Congress the power to extend federal court jurisdiction to specific types of cases.[37] Diversity of citizenship is one of the recognized bases of federal court jurisdiction,[38] and the firmly established decisional rule—which

36. H.R. REP. NO. 889, *supra* note 3, at 23, 1988 U.S. CODE CONG. & ADMIN. NEWS at 5984.

37. U.S. CONST. art. III, § 2 authorizes federal jurisdiction over specifically enumerated controversies, including cases arising under the Constitution or laws of the United States (federal question jurisdiction), and cases between states or citizens of different states (diversity jurisdiction).

38. 28 U.S.C. § 1332 (1982). Jurisdiction may also be based on a claim arising under federal law. 28 U.S.C. § 1331 (1987). When jurisdiction is based on a federal question, the issues in this

has its practical bite in litigation involving more than two parties—is that *all* plaintiffs must be of diverse state citizenship from *all* defendants.[39] In addition, the amount in controversy, as recently amended, must exceed $50,000.[40]

For a defendant who seeks to remove a case from state to federal court on the basis of diversity,[41] the jurisdictional pleading requirements are even stricter. In addition to the complete diversity requirement, no defendant may be a citizen of the forum state.[42] As a general matter, courts strictly construe removal jurisdiction to require a clear statutory basis,[43] particularly in diversity cases, where comity concerns mandate that "state courts be allowed to decide state cases unless the removal action falls squarely within the bounds Congress has created."[44]

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note do not apply, because section 1447(e) is concerned only with joinder of a party whose presence destroys diversity.

39. Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267, 267 (1806). The complete diversity requirement is a statutory and not a constitutional requirement, State Farm Fire & Casualty Co. v. Tashire, 386 U.S. 523, 530-31 (1967), and as such may be modified by Congress.

Under certain circumstances, a federal court may be permitted to retain jurisdiction despite joinder of a nondiverse party. The doctrine of ancillary jurisdiction permits a federal court to decide causes of action between parties over which it would not otherwise have jurisdiction if the claim against the nondiverse party is incidental to the primary cause before the court. 6 C. WRIGHT, A. MILLER, & M. KANE, FEDERAL PRACTICE AND PROCEDURE § 1444, at 317-19 (1990). Nondiverse persons or entities can be parties to a suit without destroying diversity jurisdiction as parties to compulsory counterclaims, *id.* § 1436, third party claims, *id.* § 1444, and compulsory intervention, 7C *id.* § 1917 (1982). However, the legislative history of the Judicial Improvements and Access to Justice Act makes clear that the plaintiff cannot use ancillary jurisdiction, or more specifically pendent party jurisdiction, to assert a claim against a nondiverse defendant. H.R. REP. NO. 889, *supra* note 3, at 73, 1988 U.S. CODE CONG. & ADMIN. NEWS at 6033-34; *see also* Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 377 (1978) (plaintiff who seeks to sue nondiverse defendant must plead an independent jurisdictional base). An interpleader plaintiff, on the other hand, by relying on a specific statutory exception to the complete diversity requirement, may sue if all adverse claimants—those parties whose interests actually conflict—are diverse. The plaintiff in an interpleader action may be from the same state as one of the claimants. 28 U.S.C. § 1335 (1982).

40. 28 U.S.C. § 1332 (West Supp. 1989).

41. The Judiciary Act of 1789 extended choice of forum to the defendant who may remove an action filed originally in state court to federal court. Judiciary Act of 1789, ch. 20, § 12, 1 Stat. 73, 79 (1789) (codified as amended at 28 U.S.C. §§ 1441 to 1452).

42. 28 U.S.C. § 1441(b) (1982). The presumption is that if the defendant is a citizen of the forum state, he will not suffer local prejudice in his own state court and, therefore, has no need for a federal forum. 14A C. WRIGHT, A. MILLER, & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3723, at 308-10 (1985).

43. Gold-Washing & Water Co. v. Keyes, 96 U.S. 199, 201 (1877); Libhart v. Santa Monica Dairy Co., 592 F.2d 1062, 1064 (9th Cir. 1979) (strictly construe removal statute against removal); Adorno Enters. v. Federated Dep't Stores, 629 F. Supp. 1565, 1568 (D.R.I. 1986) (resolve doubt as to propriety of removal against proponent of federal forum); Gorman v. Abbott Laboratories, 629 F. Supp. 1196, 1203 (D.R.I. 1986) (district court should retain removal jurisdiction only where authority is clear); *see also* 14A C. WRIGHT, A. MILLER & E. COOPER, *supra* note 42, § 3721, at 185 (right of removal is purely statutory).

44. Phillips v. Allstate Ins. Co., 702 F. Supp. 1466, 1468 (C.D. Cal. 1989); *see, e.g.*, Richmond, Fredricksburg & Potomac R.R. v. Intermodal Servs., Inc., 508 F. Supp. 804, 806 (D. Va. 1981)

Courts have relied on the principle of "narrow construction" of removal jurisdiction to support remand of removed actions to state court.[45] However, neither a defendant's statutory right to remove nor her desire to remain in federal court should be subject to the pressure on the court to clear the federal docket, the plaintiff's sloppy drafting,[46] or her desire to return the action to state court. After the defendant's right of removal is fixed, the Supreme Court has established that, as a general matter, "the plaintiff ought not to be able to defeat that right and bring the cause back to the state court at his election."[47] Although interests in efficiency and comity are factors the federal court should consider, the court also should give weight to the defendant's interest in remaining in federal court after she has established a statutory basis for removal.[48]

B. *Federal Court Remand Practice Prior to Section 1447(e)*

1. *District Court Authority to Remand: Section 1447(c) and* Carnegie-Mellon. Before enactment of section 1447(e), only two sections of the federal removal provisions authorized remand. Pursuant to section 1447(c), a court was required to remand any case that "was removed improvidently and without jurisdiction."[49] Under section 1441(c), a court may remand any independently nonremovable claim that is "sepa-

(strictly construe removal because it is in derogation of state sovereignty); *In re* La Providencia Dev. Corp., 406 F.2d 251, 252 (1st Cir. 1969) (removal is a priviledge to be strictly construed); McCaffrey v. Wilson & Co., 10 F.2d 368, 369 (D. Mass. 1926) ("[T]he right of removal being in derogation of state sovereignty, the act granting it ought not to be enlarged beyond what is 'definite and free from ambignity.' ") (quoting Lee v. Chesapeake & Ohio Ry. Co., 260 U.S. 653, 660 (1923)).

45. *See, e.g.*, Heatherton v. Playboy, Inc., 60 F.R.D. 372, 378 (C.D. Cal. 1973) ("In disposing of this matter, we take notice of the general judicial rule that removal statutes are to be strictly construed *against* removal and in favor of remand.") (citing Bradford v. Mitchell Bros. Truck Lines, 217 F. Supp. 525, 528 (N.D. Cal. 1963)); Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 108 (1941)).

46. *See infra* text accompanying notes 84-111.

47. St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 294 (1938). In *St. Paul*, the plaintiff sought to reduce the amount in controversy in a diversity case after removal of the action from state court. The Court held that "events occurring subsequent to removal which reduce the amount recoverable . . . do not oust the district court's diversity jurisdiction . . . ." *Id.* at 293. However, as the Court most recently explained, concern with fornm manipulation, such as expressed by the Court in *St. Paul*, does not "necessitate a *blanket* prohibition on remands when the federal district court's jurisdiction over a case is inherently discretionary." Carnegie-Mellon Univ. v. Cohill, 487 U.S. 343, 356 n.12 (1988) (emphasis added). Nevertheless, the *Carnegie-Mellon* Court acknowledged that "forum manipulation concerns are legitimate and serious." *Id.*

48. Thus the Supreme Court in *Marshall v. Baltimore & Ohio Railroad* recognized, "[T]he right of choosing an impartial tribunal is a privilege of no small practical importance . . . ." 57 U.S. (16 How.) 314, 329 (1853).

49. Before amendment, section 1447(c) provided, in pertinent part:

> If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs.

28 U.S.C. § 1447(c) (1982).

rate and independent" of the claim that establishes the basis for removal of the entire action.[50]

Some courts interpret the Supreme Court's decision in *Thermtron Products, Inc. v. Hermansdorfer*[51] to deny a district court additional power to remand without specific statutory authorization.[52] However, in *Carnegie-Mellon University v. Cohill,* the Supreme Court held that a district court has a non-statutory, discretionary authority to remand a removed case involving pendent state-law claims when the federal claims that are the basis for exercise of federal jurisdiction are dismissed.[53] As the Court explicitly states, the holding in *Carnegie-Mellon* "derives from the doctrine of pendent jurisdiction and applies only to cases involving pendent claims."[54] Nevertheless, before enactment of section 1447(e) some courts found—or created—the authority to both join nondiverse parties (without statutory basis) and remand the case (or even part of the case) to state court. The confusion resulting from this practice, to which section 1447(e) responded, is examined in the following discussion.

2. *Joinder of Nondiverse Parties and Pre-section 1447(e) Remand Practice.* Prior to enactment of section 1447(e), the federal courts offered a wide variety of responses to the question whether a plaintiff could defeat properly invoked removal jurisdiction by seeking to join a nondiverse defendant. Many courts relied on equitable considerations to permit joinder of indispensable, necessary, or even proper parties and to remand the whole action to state court.[55] Other courts remanded only the claim against the nondiverse party, allowing the action against the diverse party to continue in federal court.[56] Still other courts held that a federal court sitting in diversity should permit joinder of a nondiverse

50. 28 U.S.C. § 1441(c) (1982).

51. 423 U.S. 336 (1976).

52. *See, e.g.,* Levy v. Weissman, 671 F.2d 766, 769 (3d Cir. 1982); Boyle v. Carnegie-Mellon Univ., 648 F. Supp. 1318, 1321 (W.D. Pa. 1985); *see also* Boelens v. Redman Homes, Inc., 759 F.2d 504, 507 n.2 (5th Cir. 1985); Cook v. Weber, 698 F.2d 907, 909 (7th Cir. 1983).

53. 484 U.S. 343, 354-56 (1988).

54. *Id.* at 355 n.11.

55. *See, e.g.,* Hensgens v. Deere & Co. 833 F.2d 1179, 1182 (5th Cir. 1987); Desert Empire Bank v. Insurance Co. of N. Am., 623 F.2d 1371, 1377 (9th Cir. 1980); Adorno Enters., v. Federated Dep't Stores, 629 F. Supp. 1565, 1573 (D.R.I. 1986); Kamuda v. Harley Davidson Motor Co., No. CIV-84-462C (W.D.N.Y. 1986) (1986 WL 21502); Grogan v. Babson Bros. Co., 101 F.R.D. 697, 700 (N.D.N.Y. 1984); McIntyre v. Codman & Shurtleff, Inc., 103 F.R.D. 619, 623 (S.D.N.Y. 1984); Wimes v. Eaton Corp., 573 F. Supp. 331, 335 (E.D. Wis. 1983); Syme v. Rowton, 35 Fed. R. Serv. 2d 1050, 1052 (D. Mont. 1982); Shaw v. Munford, 526 F. Supp. 1209, 1214-15 (S.D.N.Y. 1981); Stanhope v. Ford Motor Credit Co., 483 F. Supp. 275, 277 (W.D. Ark. 1980); Miller v. Davis, 464 F. Supp. 458, 461 (D.D.C. 1978); Heatherton v. Playboy, Inc., 60 F.R.D. 372 (C.D. Cal. 1973); Lewis v. Producers Coop. Oil Mill, 205 F. Supp. 293, 295 (W.D. Mo. 1962); Schindler v. Wabash R. R., 84 F. Supp. 319, 320 (W.D. Mo. 1949).

56. *See, e.g.,* Kaib v. Pennzoil Co., 545 F. Supp. 1267, 1270 (W.D. Pa. 1982).

defendant to defeat jurisdiction only if that defendant was an indispensable party. If the party to be joined (or who had been joined) was merely a proper or necessary party, then the court had to deny joinder or dismiss the nondiverse party.[57] Under this approach, the nondiverse party could be dropped pursuant only to Federal Rule 15(a)[58] or the inherent authority to dismiss a party.[59] After dismissal of the nondiverse party, the action would proceed in federal court. Finally, despite the well-established rule of complete diversity and post-*Strawbridge* decisions of the Supreme Court that have refused to extend ancillary jurisdiction to joinder of claims by the plaintiff against nondiverse parties,[60] a few courts allowed

57. *See, e.g.*, Steel Valley Auth. v. Union Switch & Signal Div., 809 F.2d 1006, 1012-15 (3d Cir. 1987); Coughlin v. Westinghouse Broadcasting and Cable, Inc., 689 F. Supp. 483, 486-87 (E.D. Pa. 1988); Fortuin v. Milhorat, 683 F. Supp. 1 (D.D.C. 1988); Albers v. Sprayrite Mfg., 115 F.R.D. 579, 582 (N.D. Ind. 1987); Trombino v. Transit Casualty Co., 110 F.R.D. 139, 150 (D.R.I. 1986); Render v. Consol. Rail Co., 39 Fed. R. Serv. 2d 784, 785 (N.D. Ill. 1984); Lamar Haddox Contractor, Inc. v. Potashnick, 552 F. Supp. 11, 15 (M.D. La. 1982); Webb v. Clarion Resources, Inc., 95 F.R.D. 491, 495-97 (N.D. Tex. 1982); South Panola Consol. School Dist. v. O'Bryan, 434 F. Supp. 750, 754 (N.D. Miss. 1977); Ingersoll v. Pearl Assurance Co., 153 F. Supp. 558, 560 (N.D. Cal. 1957).

58. Federal Rule 15(a) provides in part:

> A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

FED. R. CIV. P. 15(a).

Federal Rule 21, which provides that "[p]arties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just," would not be the correct procedural device to handle a defect in jurisdiction resulting from joinder of a nondiverse party. As the court in *Kerr v. Campagnie de Ultramar* recognized, "Rule 21 was adopted to obviate the harsh common law adherence to the technical rules of joinder, and not in order to deal with problems of defective federal jurisdiction." 250 F.2d 860, 864 (2d. Cir 1958) (citation omitted).

59. In *Horn v. Lockhart*, 84 U.S. (17 Wall.) 570 (1873), the Supreme Court stated:

> And the question always is, or should be, when objection is taken to the jurisdiction of the court by reason of the citizenship of some of the parties, whether to a decree authorized by the case presented, they are indispensable parties, for if their interests are severable and a decree without prejudice to their rights can be made, the jurisdiction of the court should be retained and the suit dismissed as to them.

Id. at 579; *see, e.g., Kerr*, 250 F.2d at 864; County of Wyoming v. Erie Lackawanna Ry., 360 F. Supp. 1212, 1215 (W.D.N.Y. 1973).

60. In Owen Equipment & Erection Co. v. Kroger, 437 U.S. 365 (1978), an Iowa plaintiff sued a Nebraska electric utility in federal court for the alleged wrongful death of her husband, who was electrocuted when the boom of a crane next to which he was walking touched the utility company's line. The utility filed a third party complaint against the crane owner, and the plaintiff subsequently sought to amend her complaint to add a claim against the third party defendant. In denying the plaintiff leave to bring a claim against the third party defendant, the court explained:

> It is not unreasonable to assume that, in generally requiring complete diversity, Congress did not intend to confine the jurisdiction of federal courts so inflexibly that they are unable to protect legal rights or effectively to resolve an entire, logically entwined lawsuit. Those practical needs are the basis of the doctrine of ancillary jurisdiction. But neither the convenience of litigants nor considerations of judicial economy can suffice to justify extension

the action against diverse and nondiverse parties to proceed in federal court.[61]

In response to this decided lack of clarity in federal court remand procedure and with an eye to efficiency, ease of procedure, and flexibility in federal court practice, the Judicial Conference made specific recommendations to Congress concerning federal court remand practice.[62] These suggestions, in large part, were enacted in section 1447(e).

C. *The Operation of Section 1447(e)*

When Congress statutorily recognized federal district court discretion to either deny joinder of nondiverse defendants or to permit joinder and remand, it put to rest debate regarding the federal courts' power to join and remand nondiverse defendants. Section 1447(e) leaves the decision to join and remand within the discretion of the district court and follows the approach of the cases that looked to equitable factors in determining whether joinder and remand should be permitted.[63] Thus, whereas many federal courts prior to enactment of section 1447(e) sought to achieve efficient resolution of these joinder and remand issues without apparent statutory authorization, Congress responded to the needs of the district courts by legitimating their efforts to achieve judicial economy. The effect of the amendment[64] and its limits are explored in this section.

> of the doctrine of ancillary jurisdiction to a plaintiff's cause of action against a citizen of the same State in a diversity case. . . . To allow the requirement of complete diversity to be circumvented as it was in this case would simply flout the congressional command.

Id. at 377.

61. *See, e.g.*, Rieser v. District of Columbia, 563 F.2d 462, 472-73 (D.C. Cir. 1977), *vacated as to jurisdictional holding and aff'd in part on reh'g*, 580 F.2d 647, 658 (D.C. Cir. 1978); Domke v. Siempelkamp Co., 598 F. Supp. 1119, 1123 (E.D. Wis. 1984); Wayne Chem., Inc. v. Columbus Agency Serv. Corp., 426 F. Supp. 316, 318 (N.D. Ind.), *aff'd and modified*, 567 F.2d 692, 701 (7th Cir. 1977); Barrett v. McDonald's of Oklahoma City, 419 F. Supp. 792, 793 (W.D. Okla. 1976); Wittersheim v. General Transp. Servs., Inc., 378 F. Supp. 762, 765 (E.D. Va. 1974); Jacobs v. United States, 367 F. Supp. 1275, 1284 (D. Ariz. 1973); Campbell v. Triangle Corp., 336 F. Supp. 1002, 1006 (E.D. Pa. 1972); Eliscu v. Paramount Pictures, 73 F. Supp. 881, 882-84 (S.D. Cal. 1947); *accord* Southern Pac. Co. v. Haight, 126 F.2d 900, 903 (9th Cir.) (noting as dicta that amendment adding nondiverse party would not destroy diversity), *cert. denied*, 317 U.S. 676 (1942).

62. H.R. REP. NO. 889, *supra* note 3, at 72-73, 1988 U.S. CODE CONG. & ADMIN. NEWS at 6033-34.

63. *See supra* note 55 and accompanying text. One court, however, has held that joinder and remand are permitted without consideration of equitable factors or the plaintiff's motive in seeking joinder and remand. *See* Righetti v. Shell Oil Co., 711 F. Supp. 531, 535 (N.D. Cal. 1989).

64. In attempting to determine a way of examining the contours of procedure, Professor Cook analogized to William James' guiding maxim: "Test every concept by the question 'What sensible difference to anybody will its truth make?' and you are in the best possible position for understanding what it means and for discussing its importance." Cook, *"Substance" and "Procedure" in the Conflict of Laws*, 42 YALE L.J. 333, 336 n.9 (1933) (quoting W. JAMES, *Some Problems of Philosophy*, in THE PHILOSOPHY OF WILLIAM JAMES 82 (H. Kallen ed. 1925)).

1. *What Section 1447(e) Does.* Consistent with the approach of those district courts that, prior to enactment of section 1447(e), looked to equitable considerations to make joinder and remand determinations, the approach of the district courts in balancing the equities of joinder and remand under section 1447(e) has been to determine first whether joinder would be "permissible" under Rules 15 and 20.[65] Rule 15 provides that leave to amend pleadings "shall be freely given when justice so requires."[66] More specifically, Rule 20 permits joinder of all defendants in one action

> if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action.[67]

Second, if joinder is permissive under the Federal Rules, the courts generally have exercised their discretion to permit joinder "if joinder will comport with the principles of fundamental fairness."[68] In making joinder determinations, courts also have recognized that considerations of fairness are particularly important in cases in which joinder of a party destroys diversity and requires remand.[69]

The legislative history of section 1447(e) refers to the relative "attractiveness" of joinder and remand when compared with dismissal.[70] Joinder and remand are attractive particularly to the plaintiff when a statute of limitations has run as to the defendant whom the plaintiff seeks to join.[71] If the court denies joinder, the plaintiff may be without a remedy for what may have been a valid state claim.[72]

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65. *See, e.g.*, Wilson v. Textilausruestungsmaschinen, 726 F. Supp. 950, 951 (S.D.N.Y. 1989).

66. FED. R. CIV. P. 15(a).

67. FED. R. CIV. P. 20(a).

68. Desert Empire Bank v. Insurance Co. of N. Am., 623 F.2d 1371, 1375 (9th Cir. 1980); *see also Wilson*, 726 F. Supp. at 952; Shaw v. Munford, 526 F. Supp. 1209, 1213 (S.D.N.Y. 1981).

69. *See, e.g., Wilson*, 726 F. Supp. at 952. As to those factors which courts will consider in determining "fundamental fairness," see *infra* notes 84-111 and accompanying text.

70. The subcommittee report recognizes that "[j]oinder coupled with remand may be more attractive than either dismissal under civil rule 19(b) or denial of joinder." H.R. REP. NO. 889, *supra* note 3, at 72-73, 1988 U.S. CODE CONG. & ADMIN. NEWS at 6033.

On the balance of factors courts have considered in exercising discretion to permit joinder and remand, see *infra* notes 84-111 and accompanying text.

71. *See* Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 351-52 (1988) ("As many lower courts have noted, a remand generally will be preferable to a dismissal when the statute of limitations on the plaintiff's state-law claims has expired before the federal court has determined that it should relinquish jurisdiction over the case.") (citing *In re* Romulus Community Schools, 729 F.2d 431, 439 (6th Cir. 1984); Kaib v. Pennzoil Co., 545 F. Supp. 1267, 1271 (W.D. Pa. 1982)).

72. Some states, of course, will have state savings clauses. *See, e.g.*, 42 PA. CONS. STAT. ANN. § 5535(a) (Purdon 1981) (allowing a party to commence a new action within one year of termination). However, as the Court in *Carnegie-Mellon* notes, "the existence of such clauses in some States, while diminishing the reason for remand in particular cases," does not reverse the general

More generally, and consistent with the purpose of the section,[73] the discretionary joinder and remand procedure may be useful to the court as a means of avoiding purposeless procedural maneuvering. After dismissal of an action under Federal Rule 19(b) for failure to join an indispensable party, section 1447(e) avoids refiling of the same action, this time with the indispensable party, in state court. Joinder of the indispensable party and *remand* allow the whole action to proceed in state court without requiring the plaintiff to jump through more "judicial hoops."[74]

The Supreme Court has acknowledged the advantages of remand over dismissal when remand will serve the same purpose more efficiently. In *Carnegie-Mellon University v. Cohill,* the Court recognized the inherent power of the district courts to remand— rather than dismiss—when jurisdiction over the claim or claims in question was discretionary (in that case, exercise of federal jurisdiction over pendent state law claims). In concluding that remand "may best promote the values of economy, convenience, fairness, and comity,"[75] the Court reasoned that dismissal rather than remand "will increase both the expense and the time involved in enforcing state law."[76]

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conclusion that the remand authority may avoid the prejudicial effect of dismissal. *Carnegie-Mellon,* 484 U.S. at 353.

73. *See supra* note 25 and accompanying text.

74. Newman-Green, Inc. v. Alfonzo-Larrain, 109 S. Ct. 2218, 2225 (1989). In *Newman-Green,* the Supreme Court recognized the "practicalities" of recognizing the authority of a United States Court of Appeals to grant a motion to dismiss, pursuant to Federal Rule of Civil Procedure 21, a dispensable nondiverse party in order to preserve jurisdiction. The Court reasoned that "[i]f the entire suit were dismissed, [plaintiff] would simply refile in the District Court against [diverse defendants only] and submit the discovery materials already in hand. The case would then proceed to a preordained judgment." *Id.* at 2225. Justice Marshall concluded that the plaintiff should not be forced to "jump through these judicial hoops merely for the sake of hypertechnical jurisdictional purity." *Id.*

As an early example of arguments in favor of remand, see Schindler v. Wabash R.R., 84 F. Supp. 319, 320-21 (W.D. Mo. 1949) ("I think no good purpose could be served by dismissing the case. It could be refiled in the state court on the same complaint that is before this court, and would not be removable to this court.").

75. 484 U.S. 343, 353 (1988).

76. *Id.* The Court explained:

> Both litigants and States have an interest in the prompt and efficient resolution of controversies based on state law. Any time a district court dismisses, rather than remands, a removed case involving pendent claims, the parties will have to refile their papers in state court, at some expense of time and money. Moreover, the state court will have to reprocess the case, and this procedure will involve similar costs. Dismissal of the claim therefore will increase both the expense and the time involved in enforcing state law. Under the analysis set forth in *Gibbs,* this consequence, even taken alone, provides good reason to grant federal courts wide discretion to remand cases involving pendent claims when the exercise of pendent jurisdiction over such cases would be inappropriate.

Id. The dissent in *Carnegie-Mellon* argues that dismissal probably is not more expensive than remand. *Id.* at 363 n.2 (White, J., dissenting).

A second means by which section 1447(e) promotes efficiency and judicial economy is by encouraging joinder of all the parties in a single action, thereby reducing or eliminating the possibility of parallel actions and inconsistent obligations in state and federal court.[77] Joinder to avoid parallel actions is particularly efficient if the claims against the diverse and nondiverse parties involve virtually the same legal and factual issues.[78]

Finally, section 1447(e) complements the efficiency function of amended section 1441(a), which authorizes the court to disregard fictitious or Doe defendants for purposes of removal.[79] By permitting removal before the plaintiff identifies the fictitious defendant and, therefore, before the citizenship of the defendant is known, section 1441(a) prevents disruption of a case after it "has progressed through several stages in State court."[80] Section 1441(a) also eliminates "great uncertainty as to the time when removal becomes possible, premature attempts to remove and litigation over removability, and forfeiture of the removal opportunity by delay after the point that in retrospect seems to have made clear the right to remove."[81] Frequently, presence of the Doe defendant ultimately does not create an obstacle to exercise of federal jurisdiction.[82] However, if after removal the plaintiff identifies the Doe defendant as a nondiverse party, then pursuant to section 1447(e) the court may either deny joinder or permit joinder and remand. Thus, section 1447(e) provides a necessary procedure for efficiently handling those Doe defendant cases in which lack of diversity would have defeated removal.[83]

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77. For cases basing joinder on the possibility of parallel action, see *infra* note 99.

78. *See, e.g.*, Shaw v. Munford, 526 F. Supp. 1209, 1214 (S.D.N.Y. 1981).

79. 28 U.S.C. 1441(a) (1982).

80. H.R. REP. NO. 889, *supra* note 3, at 71, 1988 U.S. CODE CONG. & ADMIN. NEWS at 6032. The subcommittee report explains that prior to enactment of section 1441(a),

> [t]he general rule has been that a joinder of Doe defendants defeats diversity jurisdiction unless their citizenship can be established, or unless they are nominal parties whose citizenship can be disregarded even if known. This rule in turn creates special difficulties in defining the time for removal. Removal becomes possible when the Doe defendants are identified or dropped, perhaps as late as the start of trial, or when it becomes clear than any claims against the Doe defendants are fictitious or merely nominal.

Id.

81. *Id.*

82. The subcommittee report notes that "[e]xperience in the district courts in California, where Doe defendants are routinely added to state court complaints, suggests that in many cases no effort will be made to substitute real defendants for the Doe defendants, or the newly identified defendants will not destroy diversity." *Id.*

83. *See, e.g.*, Greer v. Skilcraft, 704 F. Supp. 1570, 1578 (N.D. Ala. 1989) (recognizing opportunity of plaintiff to invoke section 1447(e) if Doe defendant when named would destroy diversity).

2. *Section 1447(e) and the Courts: Permissive Joinder and Fundamental Fairness.* Whereas Rule 19 permits only absence of an indispensable party to defeat federal jurisdiction, section 1447(e) does not utilize Federal Rules' definitions of "proper," "necessary," or "indispensable" parties to determine when the court can exercise its discretion to permit joinder and remand the action to state court. The House Judiciary Committee recognized that "[t]he flexibility built into the framework of rule 19(b) fully supports this approach";[84] thus, section 1447(e) is an equally flexible but distinct determination.

Congress, however, in describing the procedure for "joining" a nondiverse party after removal, presumably did not intend the courts to redefine the term. Therefore, when courts exercise their discretion pursuant to section 1447(e), they have relied on the Federal Rules' basic concept of joinder and amended pleadings to guide their determination. The concept of joinder generally is understood to mean that if the underlying facts or transaction on which the plaintiff relies may be the proper subject of relief, then she should be permitted the opportunity to test that claim on the merits.[85] Similarly, Rule 15(a) provides that leave to amend "should be freely given when justice so requires."[86]

In applying section 1447(e), courts have looked to the limits of "joinder" as a threshold determination. Thus, the court in *Berrera v. Hyundai Motors American Corp.*[87] asked whether "justice" required joinder of the nondiverse party and remand. The *Berrera* court concluded that "justice requires that the district court consider a number of factors to balance the defendant's interest in maintaining the federal forum with the competing interest of not having parallel lawsuits."[88] Similarly, in *Wilson v. Famatex GmbH Fabrik Fuer Textilausruestungsmaschinen* the district court looked to the threshold determination of Rule 20, which "embodies the federal policy of permissive joinder."[89]

However, in exercising discretion to join under section 1447(e), the courts generally have required more than a bald assertion that the events requiring joinder involve the "same transaction, occurrence, or series of transactions or occurrences" and a "common question of law or fact," which is the broad standard of Rule 20. Permissive joinder is discretionary and, if joinder will defeat federal jurisdiction, the court "must deter-

84. H.R. REP. NO. 889, *supra* note 3, at 72, 1988 U.S. CODE CONG. & ADMIN. NEWS at 6033.
85. Foman v. Davis, 371 U.S. 178, 182 (1962).
86. FED. R. CIV. P. 15(a).
87. No. CIV A 89-1665, slip op. at 1 (E.D. La. 1989) (1989 WL 62545).
88. *Id.* slip op. at 1 (quoting Hensgens v. Deere & Co., 833 F.2d 1174, 1182 (5th Cir. 1987)).
89. 726 F. Supp. 950, 951 (S.D.N.Y. 1989).

mine if joinder will comport with the sound principles of fundamental fairness."[90]

To determine "fundamental fairness" under section 1447(e), courts have drawn on pre-section 1447(e) decisions that utilize equitable considerations to either permit or deny joinder of nondiverse parties.[91] In interpreting "fundamental fairness," courts have examined "whether the plaintiff is seeking to add a nondiverse defendant solely to destroy diversity, whether any party would be unduly prejudiced by the joinder, or whether other equitable considerations bear on the joinder issue."[92] More specifically, in considering prejudice to the parties and other equitable considerations to determine whether joinder and remand should be permitted, a synthesis of existing case law indicates that the following are appropriate factors to consider: the defendant's interest in remaining in the federal forum;[93] the plaintiff's motive in seeking to join the nondiverse defendant;[94] whether the plaintiff knew the identity of the defendants at the time of the original complaint;[95] any delay by the plaintiff in moving to amend and any reasons for that delay;[96] whether joinder and

90. *Id.* at 952 (quoting Shaw v. Munford, 526 F. Supp. 1209, 1213) (S.D.N.Y. 1981); *see also* Desert Empire Bank v. Insurance Co. of N. Am., 623 F.2d 1371, 1375 (9th Cir. 1980).

Professor Moore, before enactment of section 1447(e), noted that in a removed action, "in the exercise of sound discretion the district court may permit a new party to be added, although his citizenship destroys diversity and requires a remand." 1A MOORE'S FEDERAL PRACTICE, ¶ 0.161 [.1-3] (1983). However, he cautioned that "strong equities in favor of the amendment" must be present. *Id.*

91. *See, e.g.,* Heininger v. Wecare Distribs., Inc., 706 F. Supp. 860, 862-63 (S.D. Fla. 1989).

92. Kamuda v. Harley Davidson Motor Co., Inc., No. CIV-84-462C (W.D.N.Y. 1986) (1986 WL 21502).

93. *See, e.g.,* Hensgens v. Deere & Co., 833 F.2d 1179, 1182 (5th Cir. 1987); Filippini v. Ford Motor Co., 110 F.R.D. 131, 138-39 (N.D. Ill. 1986); McIntyre v. Codman & Shurtleff, Inc., 103 F.R.D. 619, 621-22 (S.D.N.Y. 1986); Stanhope v. Ford Motor Credit Co., 483 F. Supp. 275, 277 (W.D. Ark. 1980); Pacific Gas & Elec. Co. v. Fibreboard Prods., 116 F. Supp. 377, 381 (D. Cal. 1953).

94. *See, e.g., Hensgens,* 833 F.2d at 1182; *Desert,* 623 F.2d at 1375-76; *Filippini,* 110 F.R.D. at 138; Wimes v. Eaton Corp., 573 F. Supp. 331, 335 (E.D. Wis. 1983); Boyd v. Diebold, Inc., 97 F.R.D. 720, 723 (E.D. Mich. 1983); Adorno Enter. v. Federated Dep't Stores, 629 F. Supp. 1565, 1573 (D.R.I. 1983); Syme v. Rowton, 35 Fed. R. Serv. 2d (Callaghan) 1050, 1051 (D. Mont. 1982); Shaw, 526 F. Supp. at 1209; *Stanhope,* 483 F. Supp. at 277. *Cf.* Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 356 n.12 (1988) (in considering whether to remand pendent state law claims, forum manipulation concern provided "auxiliary policy consideration" supporting determination that district court's remand was inappropriate). *But see* Righetti v. Shell Oil Co., 711 F. Supp. 531, 535 (N.D. Cal. 1989) (section 1447(e) does not require inquiry into plaintiff's motives for joinder of nondiverse party).

95. *See, e.g., Heininger,* 706 F. Supp. at 862; *Filippini,* 110 F.R.D. at 138-39; *McIntyre,* 103 F.R.D. at 623; *Shaw,* 526 F. Supp. at 1214; Sham Corp. v. Trane Corp., 506 F. Supp. 302, 308 (S.D.N.Y. 1980); Harper Fin. Corp. v. Hanson Oil Corp., 403 F. Supp. 1405, 1407 (W.D. Tenn. 1975).

96. *See, e.g., Hensgens,* 833 F.2d at 1182; Giger v. Mobil Oil Corp., 823 F.2d 181 (7th Cir. 1987); Wallace v. Knapp-Monarch Co., 234 F.2d 853, 860 (8th Cir. 1956); *Wilson,* 726 F. Supp. at

remand will prejudice the defendant;[97] whether the plaintiff will be injured if joinder is denied;[98] the likelihood of parallel litigation in state and federal court;[99] comity concerns;[100] the existence of a motion to amend in the state court;[101] the possibility of delay;[102] the difference between the original and proposed amended complaints;[103] and the nature of the party to be added.[104]

Despite the courts' concern with protecting the defendant's interest in the federal forum from the improper motives of the plaintiff,[105] fundamental fairness is not a difficult standard for plaintiffs to meet when seeking joinder and remand.[106] Moreover, the courts have not inquired heavily into plaintiffs' motives.[107] If the plaintiff seeks to add an additional defendant, he can almost always claim that he will file a separate and parallel action in state court against the nondiverse party if joinder is

951; *Berrera,* 1989 WL 62545; *Filippini,* 110 F.R.D. at 138; *Kamuda,* 1986 WL 21502; *Wimes,* 573 F. Supp. at 335; *Shaw,* 526 F. Supp. at 1212; Miller v. Davis, 464 F. Supp. 458, 460 (D.D.C. 1978).

97. *See, e.g., Wilson,* 726 F. Supp. at 952-53; *Heininger,* 706 F. Supp. at 862; *Filippini,* 110 F.R.D. at 138-39; *McIntyre,* 103 F.R.D. at 623; *Shaw,* 526 F. Supp. at 1214; *Sham,* 506 F. Supp. at 308; *Miller,* 464 F. Supp. at 461.

98. *See, e.g., Hensgens,* 833 F.2d at 1182; *Berrera,* 1989 WL 62545; *Filippini,* 110 F.R.D. at 139; *McIntyre,* 109 F.R.D. at 623; *Shaw,* 526 F. Supp. at 1214; *Stanhope,* 483 F. Supp. at 277; *Sham,* 506 F. Supp. at 308.

99. *See, e.g.,* Hayes v. BASF K & F Corp., No. CIV-89-590E (W.D.N.Y. 1989) (1989 WL 153785); *Wilson,* 726 F. Supp. at 952; *Heininger,* 706 F. Supp. at 862-63; *Filippini,* 110 F.R.D. at 138; *Kamuda,* 1986 WL 21502; *McIntyre,* 103 F.R.D. at 623; *Shaw,* 526 F. Supp. at 1214; *Sham,* 506 F. Supp. at 310; *Miller,* 464 F. Supp. at 460; Fort Howard Paper Co. v. Affiliated F.M. Ins. Co., 60 F.R.D. 62, 64 (E.D. Wis. 1973) ("Since the multiplicity anticipated affects the defendant, who does not object to it, much more than the plaintiff, who does, I cannot say that the interest in avoiding multiplicity outweighs the defendant's interest in having a federal forum."); Ingersoll v. Pearl Assurance Co., 153 F. Supp. 558, 560 (N.D. Cal. 1957).

100. *See, e.g., Heininger,* 706 F. Supp. at 860 (noting lack of significant federal interest in deciding the state law issues which predominate in case).

101. *See, e.g., Shaw,* 526 F. Supp. at 1212.

102. *Kamuda,* 1986 WL 21502.

103. *Id.*; *McIntyre,* 103 F.R.D. at 623; *Miller,* 464 F. Supp. at 460; Harper Fin. Corp. v. Hanson Oil Corp., 403 F. Supp. 1405, 1407 (W.D. Tenn. 1975).

104. Desert Empire Bank v. Insurance Co. of N. Am., 623 F. Supp. 1371, 1375 (S.D.N.Y. 1981); *Shaw,* 526 F. Supp. at 1215; Sham Corp. v. Trane Corp., 506 F. Supp. 302, 309 (S.D.N.Y. 1980); *Harper,* 403 F. Supp. at 1407.

105. *See supra* notes 88, 90, 92 and accompanying text.

106. *See, e.g.,* Righetti v. Shell Oil Co., 711 F. Supp. 531, 534 n.3 (N.D. Cal. 1989) ("it is not 'fundamentally unfair' for the court to curb the 'expectancy' of removal pursuant to a federal statute"); Pacific Gas & Elec. Co. v. Fibreboard Prods., 116 F. Supp. 377 (D. Cal. 1953) ("absent a showing of *any reason* for changing that election other than a desire to have the case remanded to the state court, it should not be allowed to prejudice [defendant's] right to [federal] forum").

107. The court in *Berrera* reasoned: "While the fact that [party to be joined] is a nondiverse defendant may have been a motivating factor in the plaintiffs [sic] decision to amend, the court does not find that that is the sole or overwhelming basis upon which the amendment was sought." Berrera v. Hyundai Motors Am. Corp., CIV A No. 89-1665 (E.D. La. 1989) (1989 WL 62545).

denied.[108] In almost any case in which the plaintiff seeks permissive joinder of a defendant pursuant to section 1447(e)—absent some additional showing of equity or efficiency—the plaintiff will be able to achieve joinder and remand on the basis of parallel litigation. Therefore, some courts have looked more carefully at the plaintiff's request for joinder and remand when that claim is made *solely* on the basis of the possibility of multiplicitous litigation.[109]

The case law outlined above suggests that the most efficient and equitable resolution of joinder and remand determinations may be denial of joinder in some cases in which joinder would be permitted under section 1447(e). Courts must be willing to look beyond whether joinder merely is permitted; they must consider competing inefficiencies of joinder and remand, the defendant's interest in remaining in the federal forum, and the plaintiff's motive in seeking joinder and remand.

Such an approach is consistent with the purpose of section 1447(e).[110] To deny joinder and keep the diversity action before the federal court may avoid delay, disruption, and shuffling between federal and state court. Unless fairness to the plaintiff requires joinder, maintaining federal court jurisdiction may be "just, speedy and inexpensive"[111]—even if it does not allow the court to clear the action from its docket.

3. *What Section 1447(e) Does Not Do.* Despite concern with "just, speedy and inexpensive determination of every action,"[112] the aim

108. Fraudulent joinder or joinder of nominal or formal parties should not defeat diversity jurisdiction or require remand. *Id.*; Woods v. Firestone Tire & Rubber Co., 560 F. Supp. 588, 590 (S.D. Fla. 1983); McDinney v. Rodney C. Hurt Co., 464 F. Supp. 59, 62 (W.D.N.C. 1978). To establish that joinder was fraudulent, "the removing party must show . . . that there is no possibility that the plaintiff would be able to establish a cause of action against the in-state defendant in state court." East Texas Mack Sales v. Northwest Acceptance Corp., 819 F.2d 116, 119 (5th Cir. 1987).

109. Thus, the *Filippini* court noted that "[t]he cases which have approved such discretionary joinder to avoid the possibility of more than one lawsuit at least look for a high degree of involvement by the defendant in the series of occurrences which allegedly gave rise to plaintiff's cause of action. Filippini v. Ford Motor Co., 110 F.R.D. 131, 138 (N.D. Ill. 1986) (citing Desert Empire Bank v. Insurance Co. of N. Am., 623 F.2d 1371, 1376 (9th Cir. 1980)); *see also* Fort Howard Paper Co. v. Affiliated F.M. Ins. Co., 60 F.R.D. 62, 64 (E.D. Wis. 1973) ("Since the multiplicity anticipated affects the defendant, who does not object, much more than the plaintiff, who does, I cannot say that the interest in avoiding multiplicity outweighs the defendant's interest in having a federal forum."); *and compare* Hayes v. BASF K & F Corp., No. CIV-89-590E (W.D.N.Y. 1989) (1989 WL 153785) (plaintiff, with knowledge of facts which should have alerted her to the removability of this suit, "has herself to blame for the multiplicity of actions concerning the same events. Had she sued all defendants at once in State court, there would not have been a basis for removal of such comprehensive suit to this court because the predicate of complete diversity . . . would have been absent.").

110. *See supra* note 25 and accompanying text.

111. FED. R. CIV. P. 1. *See supra* note 6 and accompanying text.

112. FED. R. CIV. P. 1; *see also* H.R. REP. NO. 889, *supra* note 3, at 23, 1988 U.S. CODE CONG. & ADMIN. NEWS at 5984.

of section 1447(e) is not, in the language of the economist, to maximize efficiency. Maximum efficiency would require that the joinder and remand provision provide the courts with the option of joining the nondiverse defendant and retaining the whole action. Joinder of the nondiverse defendant would allow the plaintiff to bring her claims against all the defendants in one action; as discussed earlier, joinder also would avoid the possibility of parallel actions in state and federal court.[113]

Permitting the action to continue in federal court would go beyond the option to remand provided by section 1447(e) by avoiding disruption of an action that may have advanced substantially in federal court. To allow the action to proceed in federal court would be convenient to the parties and avoid the unnecessary cost and possible delay of remanding the action to state court. To permit the action to remain saves the state courts and the parties the cost of starting over in a state proceeding,[114] prevents plaintiffs from forum shopping,[115] and eliminates the procedural litigation that results when the defendant seeks to block remand. Thus, maintaining federal court jurisdiction would allow the courts to achieve efficiency (defined in a sense broader than the narrow federal court perspective of some commentators), while *at the same time* fairly considering the defendant's choice of forum.[116]

The House Judiciary Committee, acting through the Subcommittee on Courts, Civil Liberties, and the Administration of Justice, recognized that Congress could have written section 1447(e) to permit the courts to retain jurisdiction over diverse and nondiverse defendants.[117] The Committee Report states that "[t]his approach would rely on the concept of

113. *See supra* notes 77-78 and accompanying text.

114. *See* H.R. REP. NO. 889, *supra* note 3, at 73, 1988 U.S. CODE CONG. & ADMIN. NEWS at 6034 (recognizing the possible advantage of not requiring parties to sacrifice the advantage of continuing proceedings in federal court). Substantial starting over would not always be the case; *see, e.g.,* Wilson v. Famatex GmbH Fabrik Fuer Textilausruestungsmaschinen, 726 F. Supp. 950, 952 (S.D.N.Y. 1989) (discovery had not yet been completed and no date had been set for trial).

115. If the plaintiff thinks that the litigation is developing unfavorably in federal court, he may try to join a nondiverse defendant—on the pretense that the party is somehow necessary to the action—in an effort to convince the judge to remand the action. If the plaintiff can effectively mask his forum-shopping intentions, he may be permitted, after remand, to try again in state court.

116. Note that a rule permitting minimal diversity for joinder purposes would not apply if the plaintiff tried to file *directly* a minimally diverse action in federal court; it would not apply if the plaintiff sought to join a nondiverse defendant after direct filing in federal court. Nor could the defendant remove the minimally diverse action. A minimal diversity rule attempts to avoid procedural shuffling while permitting the plaintiff to bring parties together in a single action. To prevent artful pleading by the plaintiff—plaintiff waits to join the nondiverse party after removal—the court could deny joinder when the plaintiff could have joined the party before removal.

117. H.R. REP. NO. 889, *supra* note 3, at 73, 1988 U.S. CODE CONG. & ADMIN. NEWS at 6033-34.

pendent party jurisdiction, and justify departure from the traditional requirement of complete diversity by the advantage of permitting the most desirable joinder of parties without sacrificing the advantage of continuing proceedings that may be well under way in the Federal court."[118] The Committee, however, yielded to the views of those who opposed even "a small enlargement of diversity jurisdiction."[119] The result is a provision that attempts to balance efficiencies and to avoid overloading federal dockets.

Congress rejected another section 1447(e) possibility that would have permitted remand of only the nondiverse claim and continued jurisdiction in federal court over the diverse defendants. Before enactment of section 1447(e), the remand authority of the federal courts was unclear: Did the courts possess *any* discretionary authority to remand nondiverse parties, and, if the authority existed, with respect to what *types* of nondiverse parties could it be exercised?[120] Particularly on a claim that had seen the statute of limitations run, some courts chose to create a remand authority rather than possibly prejudicing the plaintiff by dismissing the nondiverse claim.[121] Section 1447(e) creates a statutory basis for remand of the whole case *and* solves the statute of limitations problem by permitting remand rather than requiring dismissal.[122] Thus, the additional procedural option of permitting remand of only the nondiverse claim is unnecessary.

Having established that section 1447(e) does not permit the court to maintain federal jurisdiction over—or to remand only— the nondiverse defendant added by the plaintiff, it is equally important to recognize the narrow scope of the section as it applies to joinder issues. The joinder and remand provision addresses neither joinder by the defendant of a nondiverse party (as in impleader) nor joinder by the plaintiff or the defendant of another plaintiff (cross-claim or counterclaim). Because, as the Supreme Court has recognized, "the exercise of ancillary jurisdiction over nonfederal claims [under these circumstances] has often been upheld,"[123] a legislative solution was unnecessary. The provision also does

118. *Id.*, 1988 U.S. CODE CONG. & ADMIN. NEWS at 6033-34.

119. *Id.*, 1988 U.S. CODE CONG. & ADMIN. NEWS at 6034.

120. *See supra* notes 55-61 and accompanying text.

121. *See, e.g.*, Kaib v. Pennzoil, 545 F. Supp. 1267 (W.D. Pa. 1982). The district court in *Kaib* stated, "[W]e have deliberately selected a remand as to the added defendants, rather than dismissal, because plaintiff may be prejudiced by interdiction of the statute of limitations." *Id.* at 1271. Although the court recognized that it could not remand the diversity action without statutory authority pursuant to 28 U.S.C. § 1447(c), *see id.* at 1269, it was willing to remand the nondiverse claim without discussing the source of this authority to remand. *Id.* at 1271.

122. It also, of course, has the advantage of permitting the claims to be joined in a single action.

123. Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 376 (1978) (citing Moore v. New York Cotton Exch., 270 U.S. 593 (1926) (compulsory counterclaims); H.L. Peterson Co. v. Ap-

not permit joinder by the plaintiff of a state law *claim* against a nondiverse third-party defendant and remand of the whole action to state court. Thus, the amendment leaves unchanged the reasoning and outcome in *Owen Equipment & Erection Co. v. Kroger,* in which the Supreme Court refused to extend the doctrine of ancillary jurisdiction to a plaintiff's claim against a non-diverse third-party defendant.[124] Nor does the section permit joinder by the plaintiff of an additional nondiverse plaintiff.[125] Section 1447(e), without disturbing well-established jurisdictional limits carved out by the courts in other areas of multi-party practice,[126] enables the courts to bring all of the parties together in a single action (albeit in the state rather than federal forum) when fairness and efficiency weigh in favor of remand.

Finally, and perhaps most importantly from a practical perspective, section 1447(e) applies only to joinder following removal. The section does not apply to questions of joinder when the plaintiff files in federal court. If the plaintiff attempts to join in an original filing a nondiverse defendant in a diversity action and if no independent jurisdictional basis exists as to the nondiverse defendant, then joinder would defeat federal diversity jurisdiction.[127] Because the court cannot exercise jurisdiction over the nondiverse party, it must determine whether "in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent party being thus regarded as indispensable."[128] Unlike joinder after removal, the court on an original filing in federal court must deny joinder or dismiss the action.

The distinction made by section 1447(e) between joinder procedure after removal and joinder procedure under original jurisdiction relates to

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plewhite, 383 F.2d 430, 433 (5th Cir. 1967) (impleader); Dery v. Wyer, 265 F.2d 804 (2d Cir. 1959) (impleader); LASA Per L'Industria Del Marma Soc. Per Azioni v. Alexander, 414 F.2d 143 (6th Cir. 1969) (cross-claims); Scott v. Fancher, 369 F.2d 842, 844 (5th Cir. 1966) (cross-claims); Glen Falls Indem. Co. v. United States, 229 F.2d 370, 373-74 (9th Cir. 1956).

124. 437 U.S. at 377 ("But neither the convenience of litigants nor considerations of judicial economy can suffice to justify extension of the doctrine of ancillary jurisdiction to a plaintiff's cause of action against a citizen of the same State in a diversity case.").

125. In *Thorp v. Petrola,* for example, one of the plaintiffs was dismissed before removal for failure to comply with the statutory procedure for instituting a civil action in West Virginia, and the defendant removed. (Technically, removal in this case was inappropriate, because diversity was created by involuntary dismissal of the nondiverse party. However, the same dilemma in federal court will result if the nondiverse plaintiff has never been a party to the action in state court and the plaintiff in federal court seeks to join him.) The plaintiff then sought to add the nondiverse plaintiff pursuant to Federal Rule 15(c). 81 F.R.D. 513 (N.D. W. Va. 1979).

126. Section 1447(e) does not affect impleader, cross-claim, counterclaim, interpleader or intervention as of right; nor does it overrule the Supreme Court's holding in *Owen Equipment* as to maintaining federal jurisdiction over plaintiff's claim against a nondiverse defendant.

127. 3A J. MOORE, J. LUCAS, & G. GROTHEER, MOORE'S FEDERAL PRACTICE ¶ 20.07 [5.-2] (2d ed. 1989).

128. FED. R. CIV. P. 19(b).

the availability of a state court forum. When the plaintiff files originally in federal court, no basis for remand to state court exists. If the nondiverse party is indispensable, the action is dismissed; if the nondiverse party is merely proper or necessary, joinder is impermissible because of the jurisdictional barrier.[129] However, if the action has been removed from state court, the court has the option to remand and allow the action to continue in state court without dismissal. Thus, as the legislative history makes clear, section 1447(e) purposefully "takes advantage of the opportunity opened by removal from a state court to permit remand if a plaintiff seeks to join a diversity-destroying defendant after removal."[130]

This broad discretion to remand, coupled with Congress's express concern for the workload of the federal courts,[131] creates the possibility for misuse of the remand authority by plaintiffs and overworked federal judges. The remainder of this Note explores the role of the courts and Congress in achieving efficient resolution of federal diversity cases.

II. CRISIS AS REALITY: THE EXPANDING FEDERAL DOCKET

In drafting the Judicial Improvements and Access to Justice Act of 1988, the House Subcommittee on Courts, Civil Liberties, and the Administration of Justice recognized that "[t]he general mandate of our [federal] court system is to secure 'just, speedy and inexpensive determination of every action.' "[132] The goal of the courts is to achieve convenient and fair resolution of the parties' dispute at the least possible cost to the court and to maximize the court's effectiveness in meeting the particular needs of the parties. Thus, for example, the joinder provisions of the Federal Rules of Civil Procedure function within the jurisdictional boundaries set by Congress[133] to allow for "the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged."[134]

However, the caseload of the federal court system as a whole threatens the courts' obligation to individual litigants under the Federal Rules.

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129. FED. R. CIV. P. 82.

130. H.R. REP. NO. 889, *supra* note 3, at 72, 1988 U.S. CODE CONG. & ADMIN. NEWS at 6033.

131. *See supra* notes 1-7 and accompanying text.

132. H.R. REP. NO. 889, *supra* note 3, at 23, 1988 U.S. CODE. CONG. & ADMIN. NEWS at 5983-84 (quoting FED. R. CIV. P. 1).

133. Federal Rule 82 provides in pertinent part: "These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein." FED. R. CIV. P. 82. *See also* Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 370 (1978) (" [I]t is axiomatic that the Federal Rules of Civil Procedure do not create or withdraw federal jurisdiction.") (citing FED. R. CIV. P. 82); Snyder v. Harris, 394 U.S. 332 (1969); Sibbach v. Wilson & Co., 312 U.S. 1, 10 (1941).

134. United Mine Workers v. Gibbs, 383 U.S. 715, 724 n.10 (1966).

The courts also must decide other cases justly, speedily, and inexpensively. Thus, as the Subcommittee recognized,

> the Federal judiciary is beset by problems in all three of these areas: delay caused by rising caseloads and insufficient support services; spiraling costs caused by litigation expenses and attorneys' fees; and unfair and inconsistent decision caused by the pressures placed on judges who must cope with the torrent of litigation.[135]

In policy respects, attempts to stem the "torrent of litigation" may conflict with the objective of the Federal Rules. Although convenient to the parties, permitting the "broadest possible scope of action" by bringing claims and parties together in federal court serves only to burden further the federal court docket. One alternative, then, is to permit the parties to join together in state court.

As discussed above, section 1447(e) accomplishes precisely this result by permitting remand of the entire case to state court. It has been suggested that one way Congress attempted to respond to the workload "crisis" of the federal courts is by eliminating—or permitting the courts to eliminate—some of the cases falling within the courts' diversity jurisdiction.[136] Thus, Congress provided the district courts the power to remand. The question remains, however, whether the courts properly can use that discretionary authority simply to eliminate cases from their dockets.

A. *Remand Authority as a Means of Reducing Federal Caseload*

The intense interest in the condition of federal court dockets reflects a general concern that meaningful access to the federal courts and to "justice" may be limited as caseloads rise. As Judge Harry Edwards stated,

> What most consumers and suppliers [of justice] presumably share is a desire that legalization and the concomitant burden that it imposes on the federal courts not diminish those courts' ability to perform three basic functions—protecting individual rights, interpreting and enforcing federal law, and ensuring the vitality of democratic processes of government. In the view of many participants in and observers of the federal judicial system, the ability of the federal courts to perform these services already has been seriously impaired at both the trial and appellate levels.[137]

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135. H.R. REP. NO. 889, *supra* note 3, at 23, 1988 U.S. CODE CONG. & ADMIN. NEWS at 5984.

136. *See supra* notes 8-9 and accompanying text.

137. Edwards, *The Rising Work Load and Perceived "Bureaucracy" of the Federal Courts: A Causation-Based Approach to the Search for Appropriate Remedies*, 68 IOWA L. REV. 871, 874-75 (1983) (citing DEPARTMENT OF JUSTICE COMM. ON REVISION OF THE FEDERAL JUDICIAL SYSTEM: THE NEEDS OF THE FEDERAL COURTS 1 (1977)).

In enacting the Judicial Improvements Act, Congress obviously agreed. The legislative history recognizes that "the federal judicial system has served us well in meeting its constitutional and statutory mandates," but is "beset by problems" because of the "torrent of litigation."[138] Certainly, one target of the legislation was to reduce the number of diversity-of-citizenship cases that reach the federal courts.[139] The scope of the removal amendments—what they do and do not do—also suggests that

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Statistical surveys support claims of rising caseloads. *See, e.g.,* Heydebrand & Seron, *The Rising Demand for Court Services: A Structural Explanation of the Caseload of the U.S. District Courts,* 11 JUST. SYS. J. 303 (1986); Clark, *Adjudication to Administration: A Statistical Analysis of Federal District Courts in the Twentieth Century,* 55 S. CAL. L. REV. 65 (1981). As Judge Posner notes, district court filings increased 250% between 1960 and 1983; the Courts of Appeals' dockets swelled by 686% during the same period. R. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 61-67 (1985). The number of filings in the Supreme Court also increased during these years by approximately 115%. *Id.* at 74. In addition, Judge Posner looks to the increase in the number of published opinions, in the number of concurring and dissenting opinions, and in the number of trials completed to support his conclusion that the federal courts are overworked. *Id.* at 66-73; *see also* Levit, *supra* note 29, at 323 n.6 (citing additional statistical evidence from other sources). Some observers believe that the current caseload—with more complex cases that involve a wider range of issues—threatens to overwhelm federal judges. *See, e.g.,* McCree, *Bureaucratic Justice: An Early Warning,* 129 U. PA. L. REV. 777, 781-82 (1981); Wheeler & Levin, *Of Fundamental Questions and the Veil of Detail,* 462 THE ANNALS 9, 9-10 (1982). In all, as Robert Bork warned in 1978, "[t]he cause of the crisis is simply overload, an overload so serious that the integrity of the federal system is threatened . . . ." Bork, *Dealing with the Overload in Article III Courts,* in THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE 150, 151 (A. Levin & R. Wheeler eds. 1979); *see also* McCree, *supra,* at 781-82. The conclusion of the House Judiciary Committee was that "in order to maintain pace with societal and technological changes that are translated into constant and growing judicial workloads, more needs to be done." H.R. REP. NO. 889, *supra* note 3, at 24, 1988 U.S. CODE CONG. & ADMIN. NEWS at 5984.

Of course, not everyone is convinced that the litigation explosion threatens to undermine the federal court system. Social scientists, as one commentator noted, "have questioned the empirical basis for the claim of unprecedented caseload growth." Levit, *supra* note 24, at 323 n.12 (citing Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society,* 31 UCLA L. REV. 4 (1983); Schulhofer, *The Future of the Adversary System,* 3 JUST. Q. 83 (1986); Sarat, *The Litigation Explosion, Access to Justice and Court Reform: Examining the Critical Assumptions,* 37 RUTGERS L. REV. 319 (1985)). Other commentators have accused judges of "crying wolf." Clark, *Judge Posner's Theology and the Temples of the Law—The Federal Courts: Crisis and Reform,* 1985 WIS. L. REV. 1183, 1185 n.13 (reviewing R. POSNER, *supra*) ("Crying wolf has a long and honorable history. The chief justice normally considers it his institutional responsibility to complain about excessive work or insufficient personnel."). Perhaps Judge Edwards best summarized the issue of rising court caseload and the reason for the conflicting attitudes of observers: "Only if the [litigation] explosion prevents courts from performing their acknowledged roles, reduces the quality of judicial decision making, or creates an appearance of inadequacy that cannot be mitigated by cosmetic changes or improved public relations should more fundamental modifications be seriously considered." Edwards, *supra,* at 893. After examining whether rising caseloads affected the courts in any of the ways described above, Judge Edwards concludes, "the perceptions of a system in crisis are neither wholly accurate nor wholly baseless." *Id.*

138. H.R. REP. NO. 889, *supra* note 3, at 23, 1988 U.S. CODE CONG. & ADMIN. NEWS at 5983-84.

139. *See supra* notes 8-9 and accompanying text.

Congress intended section 1447(e) to have a "docket clearing" effect in diversity cases.

As discussed earlier, if Congress had intended section 1447(e) to be an efficiency mechanism in all respects, it could have provided courts with the option to join nondiverse defendants *and* to continue the minimally diverse action in federal court.[140] However, to maintain federal court jurisdiction—even though it may be optimal in terms of administrability and fairness—would result in a "small enlargement"[141] of federal diversity jurisdiction, and that was unacceptable. For this reason, efficiency was balanced with caseload concerns.[142]

A second way the removal amendments reflect the congressional goal of clearing federal dockets is suggested by what other removal amendments do *not* do. With the exception of one proposed amendment to section 1441(a), Congress enacted each of the recommendations made by the Judicial Conference; the House Judiciary Committee Report is taken almost verbatim without addition or deletion from the report of the subcommittee of the Judicial Conference.[143] Notably, the Conference's proposed section 1441(a), which was rejected, reinterpreted who can remove an action from state to federal court. The current statutory

140. *See supra* notes 113-19 and accompanying text.

141. H.R. REP. NO. 889, *supra* note 3, at 73, 1988 U.S. CODE CONG. & ADMIN. NEWS at 6034.

142. Of course, Congress may have had additional reasons for its decision not to expand federal diversity jurisdiction to include minimally diverse actions. Certainly, comity for state courts is a consideration in diversity actions concerning matters of state law. *See* United Mineworkers v. Gibbs, 383 U.S. 715, 726 (1966) ("Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a safer-footed reading of applicable law."). Efficiency also may weigh in favor of allowing state judges, familiar with state law, to hear and decide state law questions in these actions. As one commentator has argued, federal diversity jurisdiction should be restricted because "federal courts . . . have more pressing things to do than to try to ascertain what state law is and to apply it in private civil cases." McGowan, *Federalism—Old and New—and the Federal Courts,* 70 GEO. L. J. 1421, 1428 (1982). However, these arguments apply even where complete diversity is the rule; adding an additional nondiverse defendant to the diversity action does not make their comity or counter-efficiency arguments more persuasive.

The question may be, would efficiency most effectively be maximized if Congress completely abolished diversity jurisdiction? No shuffling of cases, no procedural litigation over jurisdiction, no federal judges hearing state law questions because of party citizenship. Certainly, the argument has its advocates. *See, e.g.,* Rowe, *Abolishing Diversity Jurisdiction: Positive Side Effects and Potential for Further Reforms,* 92 HARV. L. REV. 963, 966 (1979) ("the lack of positive reasons for it, the need for a reduction in federal caseloads and jury trials, and the appropriateness of merging more fully the power to interpret state law with the responsibility of applying it"); *see also* C. WRIGHT, *supra* note 9, at 129-30 nn.14 & 16-18 (citing literature in debate over abolishing diversity jurisdiction). And the Conference of State Chief Judges has said the state courts are "ready, willing, and able to take over the job." McGowan, *supra,* at 1429. For now, however, Congress continues to reject this "most controversial change." H.R. REP. NO. 889, *supra* note 3, at 25, 1988 U.S. CODE CONG. & ADMIN. NEWS at 5985.

143. *See* JUDICIAL CONFERENCE, *supra* note 10.

provision permits removal by "the defendant or the defendants"[144] and is interpreted to require joinder by all of the defendants in the petition for removal.[145] Thus, as the Judicial Conference committee report points out, "[a]ny one defendant can thwart removal, no matter how cogent the reasons of other defendants for seeking removal."[146] The Conference's proposal would have permitted *any* defendant to remove an action from state to federal court.[147] By rejecting the proposal to permit any defendant to remove, Congress prevented an increase in the number of cases removed to federal court. Through its rejection of the proposal, Congress denied increased federal court access to cases that the Judicial Conference felt "deserve access to the federal courts."[148]

Finally, in light of the congressional response to problems of efficiency, it is clear that section 1447(e) attempts to respond to caseload problems. The Federal Rules direct courts to weigh efficiency considerations of the parties, fairness to parties and others who would be affected by the judgment, and economy of judicial resources.[149] Consequently, federal courts already have an efficiency mechanism. Pursuant to section 1447(e), Congress permits the federal courts to create a new balance to determine what is efficient, but *only* in the context of removal. If a new level of efficiency is desired with respect to joinder of parties—and certainly section 1447(e) permits the court to achieve efficiency[150]—why not

144. 28 U.S.C. § 1441(a) (1982).

145. 7B J. MOORE, B. RINGLE, & J. WICKER, MOORE'S FEDERAL PRACTICE ch. 89.7 (Judicial Code) (2d ed. 1990).

146. JUDICIAL CONFERENCE, *supra* note 10, at 3.

147. *Id.*

148. The Judicial Conference committee report explains two problems presented by the present interpretation requiring that all defendants join in the removal petition:

> One problem, not often encountered, arises from combination of the requirement that all defendants join in removal with the fact that under § 1446(b), the time to remove begins to run when "the defendant" receives a copy of the initial pleading. Some courts have held that if the time for removal has run as to an early served defendant, removal is impossible even though all defendants wish to remove. The other problem is much more general. Any one defendant can thwart removal, no matter how cogent the reasons of other defendants for seeking removal. It is easily possible that the defendant who chooses to thwart removal is more closely aligned in interest with the plaintiff than the other defendants. The proposed amendment will resolve both problems.

Id.

149. *See* FED. R. CIV. P. 19 comment; Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 109-12 (1968). Joinder under the federal rules

> seeks to maximize the ability of the court to meet the distinctive needs of particular controversies. A great deal of authority is given to the court to grant, withhold, or modify permission to expand the number of the parties to the action before it. . . . [A]ll but the most traditional claim joinder rules hinge on considerations of judicial efficiency, procedural rationality, and . . . the potential for confusion and prejudice that might be engendered by the joint treatment of claims.

J. FRIEDENTHAL, M. KANE, & A. MILLER, CIVIL PROCEDURE § 6.1 (1985) (referring to modern joinder practice generally).

150. *See supra* notes 113-19 and accompanying text.

permit redefinition of efficiency under original jurisdiction? Section 1447(e)'s redefinition of efficient joinder, for purposes of joinder after removal, is necessary only to permit the court to "take advantage" of the opportunity to send these cases back to state court. Beyond the efficiency already available under the Federal Rules, section 1447(e) provides the federal courts with a tool to unload federal dockets.

B. *Cleaning Out the Federal Docket: Congressional Not Judicial Prerogative*

Section 1447(e) authority to remand should not result in automatic remand. Simply because the federal courts now have a means of dealing with docket overload does not mean that federal judges should use their section 1447(e) discretion without principled consideration of reasons for joinder and remand. The problem of federal court overload is structural; too few courts, judges, and resources cannot match the demand placed on the courts by rising caseloads, particularly drug cases.[151] Solutions—"realignments of the business of the federal courts"[152]—are a congressional prerogative: "Subject only to constitutional constraints, it is exclusively Congress' responsibility to determine the jurisdiction of the federal courts."[153]

In drafting the Judicial Improvements Act, Congress had available various legislative remedies to relieve federal docket overload.[154] By permitting remand of cases that after removal fall squarely within the federal courts' diversity jurisdiction, Congress has sought to reduce the demand for federal court time by eliminating an alternative forum for some cases. The state courts provide an accessible—and many would argue a better[155]—forum to determine state law between diverse parties. However, the responsibility for undertaking structural reform lies with

151. REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 6 (Apr. 1990) ("[T]he expanded federal effort to reduce drug trafficking has led to a recent surge in federal criminal trials that is preventing federal judges in major metropolitan areas from scheduling civil trials . . . . It appears that the long-expected crisis of the federal courts, caused by unabated rapid growth in case filings, is at last upon us.").

152. Edwards, *supra* note 137, at 915.

153. Fair Assessment in Real Estate Ass'n, Inc. v. McNary, 454 U.S. 100, 117 (1981) (Brennan, J., concurring); Kline v. Burke Constr. Co. 260 U.S. 226, 233-34 (1922); *see also* Sager, *The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts,* 95 HARV. L. REV. 17 (1981) (discussing limitations on Congress' power to alter federal court jurisdiction); Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic,* 66 HARV. L. REV. 1362 (1953) (same).

154. Judge Edwards considers the following range of possibilities: "Congress could attempt to increase the supply of federal judicial time, ration the existing supply among litigants desiring to use the federal courts, or reduce the demand for federal judicial time by developing effective and attractive alternative dispute resolution mechanisms." Edwards, *supra* note 137, at 917.

155. For example, according to one commentator:

Congress. Courts operate outside their authority when they expressly or by means of unreasoned determination base the decision to join and remand on Congress's desire to "take advantage" of the availability of state courts.

1. *Federal Court Efforts to Cope with Case Overload.* To cope with an overloaded docket, some federal judges have "tinker[ed] with both procedural and substantive theories in an effort to whittle down the volume of cases in their courts."[156] Some do so more openly than others. For example, in *Vicory v. Walton,* the Sixth Circuit required the plaintiff in a civil rights action to show a "systematic problem with the state's corrective process" as proof of the inadequacy of state court remedies.[157] A showing of systemic inadequacy was greater than any proof required previously.[158] The Sixth Circuit based the heightened requirement on the observation that "[s]ection 1983 damage suits take up a large part of the time of the federal courts."[159] Similarly, in *Breest v. Moran* the District Court for the District of Rhode Island, in denying a habeas corpus petition, expressed contempt for the repeated attempts by the prisoner to obtain post-conviction relief from the overburdened courts: "The cumulative effect of this tomfoolery has been to clog further already-overburdened federal and state courts and profligately to waste both judicial resources and tax dollars."[160] Finally, in *Minority Police Officers Association v. City of South Bend,* Judge Posner narrowly read Federal Rule 54(b) on certification for appeal in order to reduce the number of claims certifiable for immediate appeal.[161] He warned against the "grave practical objections" of a broader reading: "The caseload of the federal courts of appeals has increased faster than that of any other component of the

> The federal courts . . . have more pressing things to do than to try to ascertain what state law is and to apply it in private civil cases. There is also no evidence that local prejudice against non-residents is a problem of the dimensions it was thought to be as the country moved away from the colonial era.

McGowan, *supra* note 142, at 1428; *see also State of the Judiciary and Access to Justice: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Judiciary Comm.,* 95th Cong., 1st Sess. 60 (1977) (testimony of Griffin Bell); FEDERAL COURTS NEEDS, *supra* note 7, at 13-15. *But see, e.g.,* Bumiller, *Choice of Forum in Diversity Cases: Analysis of a Survey and Implications for Reform,* 15 LAW & SOC'Y REV. 749 (1981).

156. Levit, *supra* note 24, at 326. Professor Levit, in her article, discusses the effect of caseload concerns on procedural and substantive theories.

157. 721 F.2d 1062, 1064-65 (6th Cir. 1983).

158. In Smith v. Rose, 760 F.2d 102, 108 (6th Cir. 1985), the same circuit recognized that "a deprivation of due process is no less a constitutional violation for being aberrant rather than systematic."

159. *Vicory,* 721 F.2d at 1065 n.4.

160. 571 F. Supp. 343, 346 (D.R.I. 1983).

161. 721 F.2d 197, 200 (7th Cir. 1983).

federal judiciary, and is now eight times as great as it was in 1960, while the number of court of appeals judges has less than doubled."[162]

In contrast to these statements, the Supreme Court has explicitly rejected attempts by the federal courts to reduce demand for their services in an effort to conserve judicial resources. In *Davis v. Passman,* the Court held that caseload considerations should not limit the scope of constitutional rights and rejected the argument that permitting a remedy for damages would flood the federal court with claims.[163] Justice Harlan, in his concurring opinion in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* argued that "current limitations upon the effective functioning of the courts arising from budgetary inadequacies should not be permitted to stand in the way of the recognition of otherwise sound constitutional principles."[164] The question, then, is whether arguments against considering "budgetary inadequacies" as a limitation on constitutional rights apply when the court exercises statutory discretion to remand an action from federal to state court.[165]

2. Thermtron Products, Inc. v. Hermansdorfer. In *Thermtron Products, Inc. v. Hermansdorfer,*[166] the Supreme Court considered whether a federal district court could base a decision to remand on a crowded docket. Judge Hermansdorfer, the district court judge, had issued an order for remand in which he explained that "his court had reviewed its entire civil docket and found 'that there is no available time in which to try the above-styled action in the foreseeable future' and that an adjudication of the merits of the case would be expedited in the state court."[167] In addressing the issue whether a district judge may remand a

162. *Id.* For Judge Posner's recommendations for a shifting of cases from federal to state court, see R. POSNER, *supra* note 137. Among other things, Posner proposes allocating two-thirds of all diversity cases to state court. *Id.* at 189 n.31.

163. 442 U.S. 228, 248 (1979).

164. 403 U.S. 388, 411 (1971) (Harlan, J., concurring).

165. Professor Levit recognizes that

> [s]ome of the caseload-concern decisions involve purely procedural adjustments made solely to lessen the input of judicial resources, adjustments which do not tinker with jurisdictional doctrines and in no way affect substantive rights. These decisions are either benign or helpful and they are not subject to the same critiques as jurisdiction altering decisions. However, when docket concerns have an impact on the formation of jurisdictional doctrines, this creeping pragmatism has a number of institutional and substantive effects.

Levit, *supra* note 24, at 360-61.

166. 423 U.S. 336 (1976).

167. *Id.* at 339 (quoting Record 31).

properly removed case for reasons not authorized by statute,[168] Justice White concluded that a remand decision should not be based on court overload:

> Removal of cases from state courts has been allowed since the first Judiciary Act, and the right to remove has never been dependent on the state of the federal court's docket. It is indeed unfortunate if the judicial manpower provided by Congress in any district is insufficient to try with reasonable promptness the cases properly filed in or removed to that court in accordance with the applicable statutes. But an otherwise properly removed action may no more be remanded because the district court considers itself too busy to try it than an action properly filed in the federal court in the first instance may be dismissed or referred to state courts for such reason.[169]

In *Thermtron* the district court had *no* authority to decline to hear the removed case.[170] However, the Court's reasoning presumably would apply to a case in which remand was discretionary, as in section 1447(e) action, by limiting the court's consideration of *impermissible* grounds for remand. Thus, although Congress enacted section 1447(e) to "take advantage" of the opportunity that remand provides to eliminate some diversity cases from the federal docket, the federal district court may not subject the removal right of the defendant to considerations of docket overcrowding.[171]

3. *Policy Support for Excluding Considerations of Case Overload.* Strong policy arguments support the contention that docket overload is

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168. Section 1446 provided the basis for removal in *Thermtron,* and "a case removed under that section may be remanded only in accordance with § 1447 which governs procedure after removal." 423 U.S. at 342.

169. *Id.* at 344 (citing McClellan v. Carlan, 217 U.S. 268 (1910); Chicot County v. Sherwood, 148 U.S. 529 (1893); Hyde v. Stone, 61 U.S. (20 How.) 170 (1858)). The Court's subsequent ruling in Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343 (1988), that when the court exercises *pendent* jurisdiction, remand may be for reasons other than those authorized by statute, does nothing to disturb this aspect of the decision in *Thermtron.* First, the decision in *Carnegie-Mellon* was limited to the pendent jurisdiction context. *Id.* at 621 n.11. Second, and more importantly, although the *Carnegie-Mellon* Court held that the district court could base remand on nonstatutory reasons, it did not hold that nonstatutory remand for otherwise impermissible reasons was permitted.

170. As the Court in *Carnegie-Mellon* explained: "The court had diversity jurisdiction over the case, which is not discretionary. Thus, the district court could not properly have eliminated the case from its docket, whether by a remand or by a dismissal." *Id.* at 622.

171. Even if judges do not consider the size of their caseload as an aspect of the remand determination, it must be recognized that docket overcrowding may be an inevitable aspect of court decisionmaking. As the House subcommittee recognized, an overloaded federal docket has resulted in "unfair and inconsistent decisions caused by the pressures placed on judges who must cope with the torrent of litigation." H.R. REP. NO. 889, *supra* note 3, at 23, 1988 U.S. CODE CONG. & ADMIN. NEWS at 5984. Commentators have also recognized the increased likelihood of flawed decision making from overworked courts. *See, e.g.,* Dressler, *A Lesson in Incaution, Overwork, and Fatigue: The Judicial Miscraftsmanship of* Segura v. United States, 26 WM. & MARY L. REV. 375, 391, 415-16 n.204 (1985).

an improper basis for remand. First, notwithstanding Judge Hermansdorfer's desire to put the litigants into a speedier forum, the decision to remand based on the condition of the federal docket is more an administrative decision about the appropriate use of judicial resources than a concern that individuals before the court receive justice. To the extent that the court considers the efficiency of joinder, and certainly this is a legitimate factor for consideration, the efficiency determination should be based on joinder between the parties and efficiency within the case. Structural reform is the prerogative of Congress and even then, as Professor Levit has argued, "if jurisdictional theories reflect considerations not of justice to the individual litigant, but of how much justice society can pragmatically tolerate, this social judgment demands a more honest evaluation."[172]

Second, we should not easily discount the defendant's right to remove and, once in the federal forum, the interest he has in remaining. The removal statute protects a defendant's right to a federal forum for a claim that originally could have been brought in federal court.[173] Once removal jurisdiction has properly attached—as in an action to which section 1447(e) applies—the plaintiff normally cannot defeat exercise of the court's jurisdiction by her own actions. If she could, as the Supreme Court acknowledged in *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, "the defendant's supposed statutory right of removal would be subject to the plaintiff's caprice."[174] The defendant also may have an interest in continuing an action in federal court, particularly one that is substantially under way. This interest effectively could be ignored if the court wants to clear its docket of any eligible actions.[175] Thus, although the removal of diversity cases is in effect a matter of procedure dependent on the scope of congressional enactments,[176] once removal jurisdiction has

172. Levit, *supra* note 24, at 365-66.

173. Thus, 28 U.S.C. § 1441(c) prevents a plaintiff from defeating the defendant's removal right by joining a removable claim with a nonremovable, separate and independent claim. 28 U.S.C. § 1441(c) (1982).

174. 303 U.S. 283 (1928). The argument here is not that the court should never permit the plaintiff to defeat federal jurisdiction; *Carnegie-Mellon Univ. v. Cohill* made clear that *St. Paul* does not create a blanket prohibition. 484 U.S. 343, 356 n.12 (1988). However, *St. Paul* does suggest that the defendant's right to remove and his interest in the federal forum is an important one. *See, e.g., id.* (forum manipulation by the plaintiff is legitimate and serious concern).

175. *See, e.g.*, Aries Ventures Ltd. v. Axa Fin. S.A., 696 F. Supp. 965, 969 (S.D.N.Y. 1988) (recognizing defendants interest in staying in federal court when trial preparation and strategy were shaped by proceedings substantially under way in federal court).

176. *See, e.g.*, Meyers-Arnold Co. v. Maryland Casualty Co., 248 F. Supp. 140, 143-46 (D.S.C. 1965) (time limits for petition for removal depends on scope of congressional enactment).

attached, caseload pressures should not affect the defendant's recognized interest in remaining in the federal forum.[177]

A third reason why federal courts should not consider the state of their docket in determinations of remand is the possibility that such a factor creates an opportunity to inject personal bias or political predilections into the decision. Impermissible grounds for remand can be cloaked in the guise of docket concerns, and the court's remand determination leaves the defendant with no basis for appeal. Similarly, if remand is not based on the efficiency and fairness of joinder, the selectivity involved in sending cases back to state court may suggest elitism on the part of the federal courts. In effect, courts could say that only *certain* diversity cases deserve federal court attention.[178] This tendency to arrogate to federal courts preferred cases is particularly likely to have an effect on diversity cases, since many judges and commentators think that diversity jurisdiction should be eliminated altogether. Thus, consideration of factors unrelated to the equities of the case before the court not only allows the court to exercise nonjudicial power but also undermines the courts' appearance of neutrality. Docket clearing permits the courts to decline cases for either good or ill motives.[179]

Finally, individual court consideration of the condition of the federal docket distorts procedural determinations made by the court with regard to joinder of parties. Procedural rules must be clear so that parties can plan their litigation strategy with some degree of certainty. Pro-

177. Again, some would argue that diversity defendants no longer need the protection of the federal forum. *See supra* note 155. They would reject the continued vitality of the basis for diversity jurisdiction as set forth by Chief Justice Marshall in Bank of the United States v. Deveaux, 9 U.S. (5 Cranch) 61 (1809). But as the Chief Justice made clear:

> However true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true that the Constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states.

Id. at 87. Thus, until Congress chooses to abolish diversity jurisdiction, the right of the diversity defendant to remove, and its significance, cannot be ignored. Again, however, this is not to say that court discretion cannot or should not limit the diversity defendant's access to the federal forum. *See supra* note 163 and accompanying text.

178. Professor Varat has commented that "[w]e might well think that the quality of justice would be better served . . . if federal courts did more slightly less well than too little extremely well." Varat, *Economic Ideology and the Federal Judicial Task*, 74 CALIF. L. REV. 649, 655 (1986).

179. Professor Levit posits that "administrative efficiency is actually a value-laden argument for selecting which litigants should be permitted access to federal courts." Levit, *supra* note 24, at 322. She considers, for example, the federal judiciary's use of justiciability—mootness, ripeness, and standing—as a means of "manipulating the issues it chooses to decide." *Id.* at 340-44. Professor Levit concludes, not that politics has no place in court decision making, but that "political assumptions must be made express and the premises upon which 'neutral' principles of adjudication rest must be examined." *Id.* at 364.

cedural predictability is undermined if each court assesses its docket and weighs these considerations into the joinder and remand equation. By blurring the efficiency and fairness concepts of what parties to add and what cases to remand, courts send a signal to plaintiffs that even unnecessary joinder of a nondiverse party may be enough to send the case back to the state courts. Defendants who want to continue in the federal forum will argne the equities of the case before the court and the reasons why joinder is unnecessary. But litigants still must look beyond their own case to guess at what the court will do. By injecting even greater uncertainty into procedural determinations, caseload considerations will stir up procedural litigation. Thus, docket clearing *creates* inefficiency as it seeks to promote efficiency.

Establishing the limits of federal court jurisdiction and reducing the expanding federal docket is the job of Congress, not of the courts, nor of the litigants. Congress, through passage of the Judicial Improvements and Access to Justice Act, has begun to provide structural relief to the federal courts. For their part, federal district courts must balance the equities and efficiencies of joinder and remand without considering the need to reduce the number of diversity cases and without ignoring the plaintiffs' motives for defeating federal jurisdiction. Nevertheless, judges who feel overworked continue to possess the ability to express their attitudes about the overloaded court dockets, whether intentionally or unintentionally, through the power of joinder and remand.

The possibility of docket clearing, coupled with section 1447(e)'s broad, virtually standardless grant of judicial authority, might suggest to some that the remand determination under these circumstances should be subject to appellate review. Reviewability, the argument goes, would provide a safety valve for defendants who are subject to an unfair remand determination. But after raising the hue and cry over federal court docket clearing, this Note perhaps surprisingly questions reviewability as a mechanism to force "correct" remand determinations by the federal courts. The solution to improperly-based remand decisions is not so obvious.

III. NONREVIEWABILITY OF REMAND ORDERS: PRACTICAL INABILITY TO PREVENT DOCKET CLEARING

A. *Nonreviewability of Section 1447(e) Remand Orders*

If the remand order of the federal district court is nonreviewable, litigants may have little practical opportunity to challenge a remand de-

termination based on an excessive caseload or any error.[180] Section 1447(d) generally forbids review of remand orders on appeal or otherwise.[181] The Supreme Court in *Thermtron Products, Inc. v. Hermansdorfer,*[182] however, interpreted the denial of review of remand orders not to apply if the basis for remand is on grounds other than those specified in section 1447(c).[183] But if the court merely states that remand is based on either a defect in removal procedure or lack of subject matter jurisdiction, then the *Thermtron* decision clearly suggests that the remand order—no matter how erroneous—is unreviewable.[184]

Language in the *Thermtron* case and the statute itself suggests that section 1447(d), which denies review of remand determinations, may apply to remand orders not only under section 1447(c) but also under section 1447(e). Section 1447(d) is not limited in scope to section 1447(c) remand determinations; the section states only that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise."[185] Generally, the *Thermtron* Court was unwilling to permit "district courts to revise the federal statutes governing removal by remanding cases on grounds that

180. Of course, if the district court keeps the case, *denial* of remand is reviewable after final judgment, American Fire & Casualty Co. v. Finn, 341 U.S. 6, 8 (1951); Jones v. Newton, 775 F.2d 1316, 1317 (5th Cir. 1985), or by interlocutory appeal pursuant to 28 U.S.C. § 1292(b) (Supp. V 1987). *See* 1A J. MOORE & B. RINGLE, MOORE'S FEDERAL PRACTICE ¶ 0.169[2.-3] (2d ed. 1989).

181. *See infra* text accompanying note 185 (text of section 1447(d)). Section 1447(d)'s prohibition on reviewability of remand orders applies to review by interlocutory appeal under 28 U.S.C. sections 1292(a) and (b), by mandamus, or by indirect means. *See* Steinman, *Removal, Remand, and Review in Pendent Claim and Pendent Party Cases,* 41 VAND. L. REV. 923, 996 n.348 (1988) (cases cited therein). Such a result would appear to follow from section 1447(d)'s language that a remand order is not reviewable on appeal "or otherwise." *Id.* at 997 & n.350.

Section 1447(c), as amended, provides in pertinent part:

> A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.

28 U.S.C.A. § 1447(c) (West Supp. 1989).

182. 423 U.S. 336 (1976).

183. The Court read the legislative history of section 1447(d) to require that "only remand orders issued under § 1447(c) and invoking grounds specified therein—that removal was improvident and without jurisdiction—are immune from review under § 1447(d)." *Id.* at 346.

184. The Court itself suggested that courts can use the magic words of the statute to prevent review when it stated, "[i]f a trial judge *purports* to remand a case on the [statutory] ground . . . his order is not subject to challenge in the court of appeals by appeal . . . ." *Id.* at 343 (emphasis added). For commentary criticizing the decision in *Thermtron* as insulating even the most erroneous remand determinations, see Note, *Civil Procedure— Review of Remand Orders Issued on Grounds Outside the Remand Statute,* 12 WAKE FOREST L. REV. 1031 (1976).

185. 28 U.S.C. § 1447(d) (1982). The section thus makes a reviewability exception for civil rights removal pursuant to section 1443.

seem justifiable to them but which are not recognized by the controlling statute."[186] Justice White in *Thermtron* concluded that "[b]ecause the District Judge remanded a properly removed case on grounds that he had no authority to consider, he exceeded his statutorily defined power . . . ."[187] Judge Hermansdorfer's remand order, therefore, was reviewable because it was outside the scope of the statute.

Under section 1447(e), the court has discretion—"recognized by the controlling statute"—to join a nondiverse defendant and remand. Presumably, then, the remand order would not be reviewable under section 1447(d) since remand was based on statutory authority.[188] Section 1447(e) does not limit the court's exercise of discretion to remand, and that decision—no matter how erroneous—is insulated from review.

For Congress to provide an unfettered grant of decisionmaking authority in these circumstances may be startling. Under removal jurisdiction, Congress has given the courts complete and virtually standardless[189] discretion to join nondiverse defendants and remand diversity actions to state court. If the court purports to exercise its discretion pursuant to section 1447(e), any determination the court makes—for whatever reason—is nonreviewable. However, the question remains whether, given the nature of the section 1447(e) remand determination, a court's remand order under section 1447(e) should be subject to appellate review.

B. *Should Discretionary Joinder and Remand Determinations Be Subject to Appellate Review?*

In considering whether the district court's section 1447(e) remand order should be subject to appellate review, it is helpful to ask two questions. First, what are the reasons generally for denying review of remand? Second, do those reasons support nonreviewability when the court exercises its discretion to join a nondiverse party and remand the diversity action to state court?

1. *Reasons for Nonreviewability of Remand Orders.* The general rule of nonreviewability is most often justified as a way to reach adjudication of cases on the merits more quickly, albeit in state rather than federal court. In *Thermtron,* the Court stated that "in order to prevent

186. *Thermtron,* 423 U.S. at 351.

187. *Id.*

188. On review of the *joinder* determination, see *infra* notes 197-200 and accompanying text.

189. On one possible limitation on the courts' power to join, see *infra* notes 198-200 and accompanying text. As the text there makes clear, however, such a limitation is almost a practical impossibility, given the nonreviewability of the decision.

delay in the trial of remanded cases by protracted litigation of jurisdictional issues . . . Congress immunized from all forms of appellate review any remand order issued on the grounds specified in § 1447(c)."[190] Thus, the court can expedite final determination of the action in a state court with clear subject matter jurisdiction.[191]

Of course, Congress and the Supreme Court are not always concerned with avoiding protracted litigation, delay, and disruption, even in the context of review of procedural rulings. If a court determines that it lacks subject matter jurisdiction of a case or that a defect, such as improper venue, lack of personal jurisdiction, or irregular service of process cannot be cured, the court will dismiss the action with or without prejudice.[192] The plaintiff can appeal the dismissal and allege that the trial court acted erroneously.[193] If the appellate court holds that the dismissal was in error, the case will be remanded to the district court. Comparing the procedures available to a plaintiff and defendant faced with an erroneous decision, one commentator noted:

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190. 423 U.S. at 351. The dissent in *Thermtron* also reasoned that Congress made the federal district courts final arbiters of the issue of remand in order to prevent delay that defendants might achieve through appellate review of remand determinations. *Id.* at 354-55 (Rehnquist, J., dissenting); *see also* Kloeb v. Armour & Co., 311 U.S. 199, 204 (1940) (limited review of remand orders to prevent delay under 28 U.S.C. §§ 71 and 80); Missouri Pac. Ry. v. Fitzgerald, 160 U.S. 556, 581-83 (1896) (when case is remanded as improperly removed, "such remand shall be immediately carried into execution, . . . and no appeal or writ of error . . . shall be allowed" pursuant to section 2 of the Act of March 3, 1897); Browning v. Navarro, 743 F.2d 1069, 1076-78 (5th Cir. 1984) (looking to jurisprudence of section 1447(d) in determining that bankruptcy remand orders are nonreviewable under 28 U.S.C. § 1478(b)).

191. One problematic aspect of the nonreviewability of remand determinations was suggested by the court in *Corcoran v. Ardra Ins. Co.*:

> If the district court dismisses an action on grounds that are discretionary, its order may be appealed and may be reversed if it has abused its discretion; yet the effect of denying direct appeal of a reviewable remand order is to insulate the order when the district court (1) has the power to dismiss on a discretionary ground, (2) chooses instead to remand on that ground, and (3) would have abused its discretion in dismissing on that ground, for mandamus . . . will not issue to remedy an ordinary abuse of discretion. It is hardly clear to us that such insulation of a reviewable remand order is necessary or sound.

842 F.2d 31, 34-35 (2d Cir. 1988). Professor Steinman, in her article, considers this apparently anomalous result and concludes:

> In some circumstances, this procedure might work well, allowing district courts to dismiss when they welcomed appellate review of a "hard" decision, while allowing them to remand when appellate review would accomplish little. Since the standard of review in these cases would be abuse of discretion, however, review usually would be unavailing, in any event. In addition, such a system could work less benignly, allowing district judges to avoid reversal by remanding. Finally, the choice between remand and dismissal often will be driven by statute of limitations or other considerations that have no bearing on the value of appellate review in a particular case. To the extent that this is true, it is anomalous for remand and dismissal to have different appellate consequences.

Steinman, *supra* note 181, at 1004-05.

192. FED. R. CIV. P. 41(b).

193. *See generally* 15 C. WRIGHT, A. MILLER, & E. COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION § 3914, at 541-45 (1st ed. 1976).

> The system is manifestly not one in which a plaintiff is relegated to state court if the district court erroneously believes either that it lacks jurisdiction over the case, or that the plaintiff failed to comply with a procedural nicety regarding service of process. Instead, the trial court's error is corrected and the case remains and proceeds within the federal court system.[194]

Thus appellate review protects some litigants from erroneous determinations on procedural issues. The question then becomes whether, given the nature of the determination under section 1447(e), Congress should create another exception to the general rule of nonreviewability in such cases.

2. *Nonreviewability of Section 1447(e) Remand.* Nonreviewability of section 1447(e) remand, and avoiding the procedural litigation that review would entail, is consistent with the congressional policy of the Judicial Improvements and Access to Justice Act. In enacting the legislation, Congress sought to ameliorate the "torrent of litigation" that plagues the federal courts. Section 1447(e) permits courts to remand certain diversity actions, thereby reducing the federal docket. To require courts to carve out an *exception* to the general rule of nonreviewability, thus increasing the possibility of procedural litigation, is contrary to the goal of the Act. Procedural litigation in the form of appellate review would disrupt and delay the federal court proceeding, would require both the parties and the courts to utilize additional resources—and if the case is ultimately remanded—would shuffle the action between federal and state court. Because the federal court uses judicial time and resources to review the order,[195] the increased efficiency within the federal system that results from one less diversity case in federal court would be lost.

The question remains: If the courts have virtually standardless discretion to join and remand under section 1447(e), should Congress require that the decision to remand be subject to review—regardless of whether that opportunity for review spawns litigation and delay? Under section 1447(e), the court determines how many persons may be parties to the action, who the parties are, and what court will decide the case. Generally, when the plaintiff in a civil action seeks to join a "proper" defendant under Rule 20, the defendant will favor the joinder. Bringing an extra defendant into federal court normally will not prejudice the rights of the defendant who is already a party to the action; indeed, the added defendant can share litigation expenses and perhaps liability. With regard to the increase in the number of parties, the trial court can

194. Steinman, *supra* note 181, at 998.

195. *See In re* Carter, 618 F.2d 1093, 1099 (5th Cir. 1980), *cert. denied,* 450 U.S. 949 (1981).

determine whether the additional party affects fairness or hinders administrability.

One may question why the grant or denial of joinder generally is subject to reversal on appeal for an abuse of discretion,[196] whereas the decision to join pursuant to section 1447(e) is nonreviewable because the court remands the action.[197] That is, if the district court uses section 1447(e) discretion as the basis for joinder and remand, then presumably under *Thermtron* remand is nonreviewable *and* section 1447(e) manages to shield the issue of joinder from review.

Pursuant to section 1447(e), the determination to join and remand, in effect, occurs simultaneously. And upon determination of remand, jurisdiction vests immediately in the state court; the federal court no longer has jurisdiction to rule on the joinder decision. Under section 1447(e), in the improbable—but not impossible—event that the federal court adds a party whose joinder fails to satisfy even the basic requirements for permissive joinder,[198] then after remand to the state court, the defendant presumably could attack the addition of nondiverse party as fraudulent or sham joinder.[199] If the state court found either that joinder was fraudulent or that the nondiverse party was merely nominal, then the presence of the nondiverse party would not bar re-removal of the action to federal court on the basis of diversity.[200] Thus, if the plaintiff defeats diversity purely on the basis of fraudulent joinder, the defendant's interest in remaining in federal court may be protected, albeit by a circuitous method.

In fact, the defendant's choice of forum by means of removal, although grounded in the Constitution,[201] generally has been held to be a

196. Esquire Restaurant, Inc. v. Commonwealth Ins. Co., 393 F.2d 111, 116 (7th Cir. 1968).

197. Although the abuse of discretion standard is a very permissive standard of review, Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 330 (1971) (granting or denial of leave to amend is a matter within the discretion of the trial court), it, nevertheless, provides some degree of protection.

198. *See supra* text accompanying note 67 (Rule 20).

199. Navarro Savings Ass'n v. Lee, 446 U.S. 458, 461 (1980) (formal or nominal parties); Rose v. Giamatti, 721 F. Supp. 906, 913-14 (S.D. Ohio 1989) (nominal, fraudulent, or sham joinder); *see also* Coal Co. V. Blatchford, 78 U.S. (11 Wall.) 172, 177 (1877) (parties on whose presence jurisdiction is grounded must be real and substantial); Marshall v. Baltimore & Ohio R. R. Co. 57 U.S. (16 How.) 314, 328-29 (1853) (same).

200. *See* 1A J. MOORE, B. RINGLE & J. WICKER, MOORE'S FEDERAL PRACTICE ¶ 0.169 [3] (2d ed. 1989) ("The remand order is . . . conclusive only as to the matters that were adjudged or could have been presented at that time as a basis for removal. And when subsequent developments make the case removable, since these were not concluded by the prior remand order, a timely second petition for removal may be made.") (footnote omitted).

201. U.S. CONST. art. III, § 2 cl. 1 ("The judicial Power shall extend . . . to Controversies . . . between Citizens of Different States . . . .").

matter of procedure.[202] By remanding, the court does not make a determination that the action cannot be heard at all;[203] rather, the court determines that the diversity action must be heard in state rather than federal court.[204] The court remands the action to the forum in which the case would have remained if the plaintiff had made the nondiverse party a defendant in the original complaint. Thus, as the District Court for the Northern District of Alabama in *Greer v. Skilcraft* commented, "[r]emoval affects the forum where a dispute is to be resolved, not the substantive merits of the dispute."[205]

Some diversity defendants faced with remand to state court may question—and have questioned[206]—the soundness of the "it's just a forum change" rationale. However, the Supreme Court has considered and rejected defendants' reliance on forum choice in several related contexts. Perhaps the most relevant example is *Hallowell v. Commons,*[207] in which the Court upheld legislation that allowed the Secretary of the Interior, rather than the federal courts, to provide the forum for Indians arguing over succession rights. The Court reasoned that

> reference of the matter to the Secretary . . . takes away no substantive right, but simply changes the tribunal that is to hear the case. In doing so it evinces a change of policy, and an opinion that the rights of the Indians can be better preserved by the quasi paternal supervision of the general head of Indian affairs.[208]

Similarly, section 1447(e) *reinforces*[209] recognition of the ability of the state courts to hear and determine state law in diversity actions. The section places the determination of whether the defendant would be prejudiced in state court within the discretion of the district court judge.[210]

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202. *See, e.g.,* Greer v. Skilcraft, 704 F. Supp. 1570, 1579 (N.D. Ala. 1989); Meyers-Arnold Co. v. Maryland Casualty Co., 248 F. Supp. 140, 146 (D.S.C. 1965).

203. In fact, that might be the most favorable result for the defendant.

204. *See* Herrmann, Thermtron *Revisited: When and How Federal Trial Court Remand Orders are Reviewable,* 19 ARIZ. ST. L.J. 395, 414 (1987) (remand orders based on lack of jurisdiction "will affect only the forum").

205. 704 F. Supp. at 1579. The court also recognized that "the federal court after removal would be obliged to apply the same substantive rules of decision which the state court is to apply. Moreover, in a state . . . that has adopted rules of procedure patterned on the federal rules, even the procedural rules would be substantially identical." *Id.* at 1579-80.

206. *See, e.g., supra* notes 93-104 and accompanying text.

207. 239 U.S. 506 (1916).

208. *Id.* at 508.

209. *See, e.g., supra* note 155 and accompanying text.

210. Thus, the *Greer* court concluded, "[t]he defendants' alleged 'right' to remove to federal court based on prior law is no more inviolate than the plaintiffs' alleged 'right' to prevent removal based on prior law." Greer v. Skilcraft, 704 F. Supp. 1570, 1580 (N.D. Ala. 1989); *see also* Righetti v. Shell Oil Co., 711 F. Supp. 531, 534 n.3 (N.D. Cal. 1989) ("The 'right' of removal is merely an expectancy contingent on plaintiffs' failure to add non-diverse defendants, and depends on the stat-

The efficiency rationale for avoiding protracted procedural litigation when the only risk to the defendant is that she will have to defend in another forum does carry weight; the nonreviewability rule is effective in that respect, whether under section 1447(c) or 1447(e). The balance is between expense, delay, and disruption on the one hand, and on the other hand, the risk of erroneously depriving a small number of defendants[211] of a federal forum.[212] By means of section 1447(e), Congress has "immunized [remand determinations] from all forms of appellate review."[213] Therefore, consistent with the language and policy of section 1447(d), the court's section 1447(e) discretion should remain nonreviewable.

To argue that the remand determination *should* be nonreviewable is not to suggest that defendants have no basis to question a court's decision to permit joinder of a nondiverse party and remand *prior to* that decision. As a practical matter, whether defendants who would contest joinder and remand should be troubled by the lack of review probably depends on one's opinion regarding the need for diversity jurisdiction as a "friendly-forum" means to protect defendant's rights. Particularly in removed actions, the parties may perceive that the choice of forum does affect their substantive rights. The defendant may have removed originally because she believed that the federal forum provided additional protection. Section 1447(e) relies on the assumption that district courts generally will have an institutional interest in efficient and equitable resolution of joinder and remand determinations. In many cases, joinder and remand will be fair and efficient. However, courts must recognize that when fairness to the plaintiff does not require joinder, maintaining federal court jurisdiction may be the most "just, speedy and inexpensive"[214] option—even if it does not allow the court to clear the action from its docket.

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ute then in effect. . . . It is not 'fundamentally unfair' for the court to curb the 'expectancy' of removal, pursuant to a federal statute.").

211. First, even if appellate review were permitted, not all defendants would be able to block remand. Second, if remand is permitted, some defendants will win on the merits of the action in state court. Thus, denial of a federal forum ultimately may have no affect on them. Finally, some defendants would have lost even if the action had remained in federal court. And these factors are in addition to the small number of diversity action in which a plaintiff, after removal, tries to join a nondiverse party.

212. *See, e.g.*, Thermtron Prods. Inc. v. Hermansdorfer, 423 U.S. 336, 355 (1976) (Rehnquist, J., dissenting) (Congress has balanced delay and disruption of review against the "minimal possible harm" to the removing party in concluding that no review is permitted). *See also* United States v. Rice, 327 U.S. 742, 751 (1946) (emphasizing policy of "not permitting interruption of the litigation of the merits . . . by prolonged litigation of questions of jurisdiction").

213. *Thermtron*, 423 U.S. at 351.

214. FED. R. CIV. P. 1.

IV. CONCLUSION

Through section 1447(e)'s procedure for joining—or exercising discretion not to join—nondiverse parties and remanding to state court, the Judicial Improvements and Access to Justice Act provides the federal district courts with an effective means of accommodating the interests of both the parties and the court in fair and efficient dispute resolution. The Act recognizes the competency of the court in balancing the interests of the parties by means of fact-specific inquiry into the nature of the joinder and the efficiency goals of the court and the litigants. To this end, and as a way to avoid the delay and disruption of procedural litigation, remand determinations pursuant to section 1447(e) are nonreviewable. Thus, section 1447(e) relies on the federal district court to determine the equities or prejudices of joinder and remand. The section recognizes the competency of the state court to determine matters of state law between citizens and non-citizens. In deciding whether to join a nondiverse party and remand the entire case, this Note urges federal courts—consistent with "improving the delivery of justice by Federal and State courts"[215]—to look beyond whether joinder merely is permitted, to consider the countervailing inefficiencies of joinder and remand, and to examine both the defendant's interest in a federal forum and the plaintiff's motive in seeking remand.

Finally, although the concern of the Judicial Improvements Act is the efficient administration of justice—and although it responds to the delay and rising costs that have resulted from caseload pressures on the federal system and on the individuals that use and administer that system—speed and efficiency cannot be the only goals of the Act. Neither should the courts use the newly-enacted remand procedure as a means of clearing the federal docket, lightening their caseloads, and speeding up determinations on the merits. Thus, as the Pound Conference Follow-Up Task Force has stated:

> Keep firmly in mind that neither efficiency for the sake of efficiency, nor speed of adjudication for its own sake are the ends which underlie our concern with the administration of justice in this country. The ultimate goal is to make it possible for our system to provide justice for all.[216]

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215. H.R. REP. NO. 889, *supra* note 3, at 23, 1988 U.S. CODE CONG. & ADMIN. NEWS at 5983.

216. American Bar Association, *Report of Pound Conference Follow-Up Task Force (1976), reprinted in* THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE 337 (A. Levin & R. Wheeler eds. 1979).