Removal, Remand, and Reimbursement Under 28 U.S.C. Section 1447(C)

Christopher R. McFadden
I. INTRODUCTION

We have it from the highest authority that the federal removal statutes are to be strictly construed.1 Although defendants have the right to remove cases on the basis of diversity,2 federal question,3 or other specific statutory grounds,4 it has been universally held that any removal attempt should be viewed with suspicion and that the case should be remanded if there is any doubt as to whether the federal court has subject matter jurisdiction.5 This is because state courts are fora of general jurisdiction empowered to hear cases arising under either federal or state law, but federal courts are tribunals of limited jurisdiction that may resolve civil disputes only if the plaintiff's well-pleaded complaint raises an issue of federal law or involves a matter of state law between completely diverse parties and the amount in controversy exceeds $75,000. Thus, the case law encourages federal judges to remand a case to state court—where it may always be heard—rather than risk erroneously exercising jurisdiction and having an appellate court vacate all of their decisions and dismiss the case several years down the road.6

1. See Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 108-09 (1941). Removal, for purposes of this Article, is the process through which a case originally filed by the plaintiff in state court is transferred by the defendant or defendants to federal court.
5. See, e.g., Univ. of S. Ala. v. Am. Tobacco Co., 168 F.3d 405, 411 (11th Cir. 1999); In re Bus. Men's Assurance Co. of Am., 992 F.2d 181, 183 (8th Cir. 1993) (per curiam); Jones v. Gen. Tire & Rubber Co., 541 F.2d 660, 664 (7th Cir. 1976).
6. See, e.g., Am. Tobacco Co., 168 F.3d at 411 ("A presumption in favor of remand is necessary because if a federal court reaches the merits of a pending motion in a removed case where subject matter jurisdiction may be lacking it deprives a state court of its right under the Constitution to
In light of the heavy burden faced by a defendant seeking to establish federal jurisdiction, it should come as no surprise that nearly fifteen percent\(^7\) of the 30,000 cases that are removed each year\(^8\) eventually are remanded to the local court in which they were originally filed. Bitter and complex jurisdictional battles often arise in these cases, and judges must expend substantial time and energy reviewing the parties' arguments and ruling on the questions presented. As a result, the process of removal-and-remand, when repeated thousands of times over, disrupts the orderly flow of litigation while burdening the judiciary and imposing steep litigation costs upon the parties themselves.\(^9\)

Congress has long recognized that disputes over subject matter jurisdiction significantly contribute to the "torrent of litigation" flooding the federal courts and overwhelming the judicial system.\(^10\) In an attempt to pare down the federal docket, Congress enacted the comprehensive Judicial Improvements Act of 1988\(^11\) ("Judicial Improvements Act"), which, among other things, expanded the courts' authority to sanction defendants who erroneously remove cases.\(^12\) The pertinent part of the statute, 28 U.S.C. § 1447(c), presently contains a fee-shifting provision that allows plaintiffs to recover their "just costs and any actual expenses, including attorney fees, resolve controversies in its own courts."; DeBoer v. South Dakota, No. Cir. No. 93-4021, 1993 WL 603761, at *4 (D.S.D. 1993) ("The basis for this rule is 'the inexpediency, if not unfairness, of exposing the plaintiff to the possibility that he will win a final judgment in federal court, only to have it determined [on appeal] that the court lacked jurisdiction.'" (quoting 14A WRIGHT, MILLER & COOPER, FEDERAL PRACTICE & PROCEDURE: JURISDICTION 2D § 3721 at 218 (2d ed. 1992) (alterations in original)).


9. See, e.g., Austwick v. Bd. of Educ., 555 F. Supp. 840, 842 (N.D. Ill. 1983) (condemning jurisdictional disputes as being "a drain on the resources of the state judiciary, the federal judiciary and the parties involved" and stating that such "tactical manipulation . . . cannot be condoned."); see also infra text accompanying notes 48-76.


incurred as a result of the removal" of a case that is subsequently remanded.\textsuperscript{13} In other words, by the terms of the statute as it now stands, a federal court is empowered to shift fees each and every time that it determines it lacks jurisdiction over a case.\textsuperscript{14} This is significant because prior to the amendments, such an award was forbidden unless the defendant acted in bad faith—something that courts were reluctant to find.\textsuperscript{15}

When Congress expanded the judiciary's fee-shifting authority, it intended to further the three related but distinct goals of: (1) discouraging removal except in cases when federal subject matter jurisdiction clearly is present; (2) protecting the rights of plaintiffs to choose the forum of the litigation; and (3) compensating plaintiffs for their costs of responding to the jurisdictional arguments raised by defendants.\textsuperscript{16} Yet despite the laudable goals of Congress, many judges have disregarded the language of the statute and the intent of the legislature by refusing to shift fees except when they deem the defendant's removal to be "unreasonable." That is to say, courts are applying a ubiquitous standard, which, for all practical purposes, is indistinguishable from the "bad faith" standard that was supposedly jettisoned by the Judicial Improvements Act.\textsuperscript{17}

Since judges are reluctant to label a party's actions "unreasonable," they suboptimally deter erroneous removals and suboptimally reimburse aggrieved parties for their costs needlessly incurred as a result of a meritless removal.\textsuperscript{18} Furthermore, because the widely employed "reasonableness" standard fails to articulate a clear rule to follow in any given case, judges often reach inconsistent results by shifting fees in some cases but not in others that are materially similar. Uncertainty about the governing legal principles, in turn, effectively deprives defendants of the notice that is essential to make a rational decision over whether to remove the case and encourages still further litigation over the propriety of any fees that might possibly be awarded.\textsuperscript{19}

In light of the frequency and number of cases remanded each year—as well as the serious costs attributable to the erroneous removal of cases—it is remarkable that no court or commentator has attempted to enunciate a

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\item \textsuperscript{13} 28 U.S.C. § 1447(c) (2000).
\item \textsuperscript{14} See, e.g., Tenner v. Zurek, 168 F.3d 328, 330 (7th Cir. 1999). \textit{See also infra} text accompanying notes 80-103.
\item \textsuperscript{15} See, e.g., Moore v. Permanente Med. Group, Inc., 981 F.2d 443, 445 (9th Cir. 1992); Bucary v. Rothrock, 883 F.2d 447, 450 (6th Cir. 1989); Cornwall v. Robinson, 654 F.2d 685, 687 (10th Cir. 1981).
\item \textsuperscript{16} \textit{See infra} text accompanying notes 24-44, 80-103.
\item \textsuperscript{17} \textit{See infra} text accompanying notes 81-87, 160-81.
\item \textsuperscript{18} \textit{See infra} Part IV.A.
\item \textsuperscript{19} \textit{See infra} text accompanying notes 77, 105-07.
\end{itemize}
universal rule for courts to follow when determining whether to shift fees under 28 U.S.C. § 1447(c).\textsuperscript{20} This Article seeks to fill that doctrinal void by replacing the arbitrary, complex “reasonableness” inquiry with a straightforward two-part test that will dictate whether fees should be awarded. Under the proposed test, the court should first determine whether the defendant properly established federal subject matter jurisdiction at the time of removal. If so, then the plaintiff’s fee request should be denied. If not, the court should proceed to award fees and costs to the plaintiff unless: (1) the plaintiff caused the erroneous removal by misrepresenting facts that were necessary for the defendant to make a well-informed decision to remove the case; or (2) the plaintiff caused the case to be remanded by divesting the court of jurisdiction after removal, often by dismissing his federal claims or joining diversity-destroying parties from his home state.\textsuperscript{21} Put another way, if the defendant is responsible for the ineffective removal, then he should be forced to bear the costs of his actions—costs that are felt not only by the plaintiff opposing the removal but also by the entire judicial system, which suffers from the added delays and burdens of resolving the jurisdictional issues raised in a myriad of cases brought before the court.\textsuperscript{22} By regularly awarding fees against the defendant, unless the plaintiff bears the true responsibility for the erroneous removal or makes a tactical decision to return a properly removed case to state court, federal judges will further the intent of Congress to discourage faulty removals, make aggrieved plaintiffs whole, and conserve judicial resources expended on jurisdictional issues that fail to resolve the merits of the underlying case in any respect.\textsuperscript{23}

Part II of this Article describes how the erroneous removal of cases contributes to the burdens faced by federal courts today, with their overcrowded dockets and staggering caseloads. This Part also discusses those well-established legal principles that require the narrow construction of the removal statutes, while further analyzing the fee-shifting statute in order to suggest that Congress intended to award fees even in situations when the defendant acted reasonably but the case is nonetheless remanded. Part III then sketches the proposed test for judges to follow when applying 28 U.S.C. § 1447(c) and provides examples of how the test would resolve the most common situations faced by courts today. Part IV elaborates upon why

\textsuperscript{20} See Mints v. Educ. Testing Serv., 99 F.3d 1253, 1260 (3d Cir. 1996) (“Congress, however, did not establish a standard governing when a court should require the payment of fees and costs . . . .”); Marriage of Nasca v. PeopleSoft, 87 F. Supp. 2d 967, 975 (N.D. Cal. 1999) (“The courts have not established precise criteria by which to make [the fee] determination . . . .”).

\textsuperscript{21} See infra Part III.

\textsuperscript{22} See infra text accompanying notes 53-76.

\textsuperscript{23} See infra Part III.A.
various alternative tests presently relied upon by some courts when
determining whether to award fees—including the “reasonableness” test—are
flawed and should be abandoned. Part V concludes.

II. REMOVAL, JUDICIAL OVERLOAD, AND THE ISSUE OF CONGRESSIONAL
INTENT

To understand why courts should enforce the fee-shifting provision of 28
U.S.C. § 1447(c) in a manner that will discourage the erroneous removal of
cases, it is useful first to examine the pressures faced by federal judges coping
with today’s oversized dockets, the extent to which the removal-and-remand
process increases those pressures, and the statute’s legislative history, which
makes clear that Congress intended for the aggrieved party to recover fees and
costs incurred as a result of the removal. It also is important to review the
fundamental principles of federal jurisdiction that call for a narrow application
of removal statutes and, by implication, a presumption in favor of awarding
fees to the plaintiff.

A. Docket Pressures in the Modern Era

Section 1447(c) was amended by the Judicial Improvements Act and
presently states, in pertinent part, that any “order remanding [a] case may
require payment of just costs and any actual expenses, including attorney fees,
incurred as a result of the removal.”24 The Act, which was promulgated
largely because of Congress’s belief that the administration of justice was
being jeopardized by the rising caseloads faced by many federal district
courts, contained numerous reforms designed to reduce the size of the federal
docket. In addition to expanding and rewriting the relevant fee-shifting
provisions, the statute authorized experimental court-annexed arbitration
programs, raised the amount-in-controversy requirements for diversity
jurisdiction, and gave district courts the discretion to approve the tardy joinder
of diversity-destroying parties and remand the case long after it was
removed—even if the remand means stripping the defendant of his right to a
federal forum in certain instances when the court otherwise would have
original jurisdiction.25 These docket-clearing measures were necessary,
according to the House Subcommittee on Courts, Civil Liberties and the
Administration of Justice, because the public interest in seeing “just, speedy
and inexpensive determination of every action” was being undermined by
“delay caused by rising caseloads” and “unfair and inconsistent decision[s]

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caused by the pressures placed on judges who must cope with the torrent of litigation” in their courtrooms.26

As the House subcommittee recognized, the federal judiciary’s resources are being stretched to the limit. This is particularly true in the district courts, which shoulder the overwhelming burden of removal-based litigation as a result of the bar on appellate review of any remand ordered pursuant to 28 U.S.C. § 1447(c).27 There has been a three-fold increase in case filings since 1960, and the average caseload per trial judge has increased more than fifty percent.28 More troubling is that the increased caseload has resulted in a still greater workload for district judges, even after accounting for the various pre-trial work handled by magistrate judges. Aside from those few types of civil cases that may be resolved in a relatively straightforward fashion (such as prisoner petitions, forfeiture proceedings, or appeals under the Social Security Act), most matters reaching federal court involve the application of difficult legal principles to a multitude of conflicting facts.29 The ratio of cases that are closed without some type of labor-intensive intervention by the district court has fallen steadily over time, and today as many as eighty percent of all cases are terminated after the trial judge has ruled on dispositive motions, conducted pre-trial mediations, or presided over status hearings and settlement conferences.30 Continuances are regularly requested, discovery standoffs are increasingly presented to the court for resolution, and pre-trial motions are increasingly filed in all but the most clear-cut cases on the docket. At the same time, the annual number of cases that survive summary judgment and proceed to trial has jumped from approximately 10,000 in 1960 to 17,800 in 1995, with their average length growing from 2.2 days to 3.4 days apiece.31

Thus, by any measure, the district courts’ workload is growing faster than their raw caseload, which itself has skyrocketed and given no indication of leveling off in the last fifteen years despite passage of the numerous provisions designed to reduce congestion within the federal courts.32 Without

27. The removal statute provides that “[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise.” 28 U.S.C. § 1447(d); see also Thermtron Prods., Inc. v. Hermansdorfer, 423 U.S. 336, 346 (1976) (discussing the bar on appellate review of remand orders).
29. See Wilkinson, supra note 28, at 1157-61.
31. Id. at 66 tbl. 3.3.
32. Furthermore, despite Congress’s hope that the Judicial Improvements Act would have noticeable docket-clearing effects, the U.S. Judicial Conference remains convinced that delays in
additional reforms, according to a U.S. Judicial Conference report, "the picture in 2020 can only be described as nightmarish."33 And, as explained in later detail, the consequences of judicial overload already are being felt in the form of delays, errors, and indeterminacy in the case law.34

Congress has attempted to limit the scope of federal subject matter jurisdiction twice within the last fifteen years. The first effort was the Judicial Improvements Act of 1988, which raised the amount-in-controversy requirement for diversity jurisdiction to $50,000 and encouraged alternative dispute resolution as a substitute to litigation.35 Then, six years later, the Federal Courts Improvement Act raised the minimal jurisdictional stakes from $50,000 to $75,000.36 Studies, however, seem to show that these reforms have had little effect on the number of cases removed to federal court. Approximately one-ninth of all cases on the federal docket, or a total of 30,000 cases, were removed in 2000, and while the number of removals has held steady since 1997,37 it has increased nearly 50 percent since 1987—the year prior to the initial congressional reforms—when defendants removed 21,070 cases.38

Diversity jurisdiction is an important means of protecting out-of-state defendants who would suffer parochial prejudices in state court, and federal question jurisdiction helps promote the uniform, faithful interpretation of federal law. Removal, after all, provides defendants with an irrevocable right to litigate in federal court when the cases fall within the court's grant of jurisdiction. Furthermore, it goes without saying that federal judges are obligated to conscientiously resolve all those questions that are properly before them. Yet, it is important to stress there is no rational basis for sympathizing with a defendant who removes a case erroneously and is ordered to return to state court for further proceedings upon remand. There is


33. Id. (quoting COMMITTEE ON LONG RANGE PLANNING, JUDICIAL CONFERENCE OF THE U.S., PROPOSED LONG RANGE PLAN FOR THE FEDERAL COURTS 18 (Mar. 1995)).

34. See infra text accompanying notes 53-79.


38. See Miller, supra note 7, at 389.
absolutely no societal benefit that results when a defendant persuades a federal district judge to exercise jurisdiction over an erroneously removed case. Either the appellate court will discover the absence of jurisdiction and all of the prior proceedings will have been for naught, or if the defective removal goes unnoticed, the plaintiff will have been deprived of the right to choose her forum and the defendant will have undermined the principle that state courts should be respected as the primary arbiters of state law. Nor is any appreciable benefit conferred by a district court's decision to grant a motion to remand, for although the ruling creates a public good in the form of a fresh legal precedent, the presumptions in favor of remand are so strong in their own right that the result should be obvious to any reasonable litigant even without the need for an independent judicial ruling.

Moreover, while defendants are entitled to capitalize on the advantages of litigating in federal court, we must not forget that plaintiffs have equally legitimate, countervailing interests in controlling where their suit will be brought, whom they will join as a defendant, which causes of action to pursue, and what amount of damages to seek. A time-honored principle of federal jurisdiction is that the plaintiff, as the party claiming injury and bearing the ultimate burden of proof, is entitled to significant deference in controlling the forum of litigation. The deference accorded to the plaintiff as "the master of his complaint" counsels strongly against removal and is one reason why a removing defendant seeking to override the plaintiff's jurisdictional wishes bears a burden that courts often describe as "heavy," "significant," or

39. See, e.g., Howery v. Allstate Ins. Co., 243 F.3d 912 (5th Cir. 2001) (vacating all proceedings for want of jurisdiction and remanding with instructions to dismiss); Wellness Cmty. Nat'l v. Wellness House, 70 F.3d 46 (7th Cir. 1995) (same).


41. Defense attorneys report that they remove cases because they believe that federal courts, on balance, are more favorable to their clients than state courts. See Miller, supra note 7, at 395-96 (presenting survey results showing that the removal decision is influenced by factors such as variations in rules of procedure and evidence, lower reported damages awards, differences in jury pools, preferences of the client, convenience of the attorney, superior judicial competence and knowledge, greater judicial pretrial involvement, and desire to delay the case or increase the opponent's litigation costs). Other commentators have similarly concluded that federal judges are more likely than state judges to grant motions to dismiss or motions for summary judgment. See POSNER, supra note 28, at 109, 178-83.

42. See Burns, 31 F.3d at 1095 ("While a defendant does have a right, given by statute, to remove in certain situations, plaintiff is still the master of his own claim. Defendant's right to remove and plaintiff's right to choose his forum are not on equal footing . . . ." (internal citations omitted)); Doe v. Allied-Signal Inc., 985 F.2d 908, 911 (7th Cir. 1993) ("Courts should interpret the removal statute narrowly and presume that the plaintiff may choose his or her forum.").
FEE-SHIFTING UNDER 28 U.S.C. § 1447(C)

“difficult” to bear. In addition, because it is inevitable that frictions and inconsistencies will result when federal courts adjudicate claims arising under the law of an independent sovereign state, basic principles of equity, comity, and federalism dictate that all doubts and uncertainties about jurisdiction must be resolved in favor of remand.

B. The Public and Private Harms of Removal

Despite the tremendous obstacles to successfully removing a case, defendants repeatedly press their luck and advance arguments that, while perhaps novel and brought in good faith, ultimately prove meritless. For judges who must rule on a motion to remand, the jurisdictional dispute requires a careful review of the pleadings and evidentiary submissions in order to determine whether there is any possibility that the operative facts could support a non-preempted state-law claim against any in-state defendant. In a world with finite resources, the time spent deciding whether to hear the case necessarily comes at the expense of all the other properly filed cases on the judge’s docket. Thus, it is not surprising for exhausted jurists, after issuing yet another detailed opinion remanding a case, to observe in an exasperated manner that the removing party has “waste[d] the time and resources” of the plaintiff and the court with its ill-fated attempt to invoke the court’s jurisdiction. Commentators are also quick to criticize “abuses” of the removal process, bemoaning that “either through ignorance or as a result of improper litigation tactics,” errant defendants “can cause severe disruption in the state court where the case has been proceeding, as well as an intolerable

43. See, e.g., Crowe v. Coleman, 113 F.3d 1536, 1538 (11th Cir. 1997) (“heavy burden” standard); Poulos v. Naas Foods, Inc., 959 F.2d 69, 72 (7th Cir. 1992) (“difficult” burden standard); Couch v. Astec Indus., Inc., 71 F. Supp. 2d 1145, 1147 (D.N.M. 1999) (“significant” burden standard). Plaintiffs alleging state law claims may defeat removal under federal question grounds unless some of their claims have been preempted by federal law. 28 U.S.C. § 1331 (2000) (federal question jurisdiction). Alternatively, plaintiffs may defeat removal under diversity grounds by: (1) joining one or more resident defendants against whom there is a possibility of establishing a valid cause of action; or (2) limiting their request for damages or failing to seek damages in excess of the jurisdictional minimum. 28 U.S.C. § 1332 (2000) (diversity jurisdiction).

44. See, e.g., Manguno v. Prudential Prop. & Cas. Ins. Co., 276 F.3d 720, 723 (5th Cir. 2002); Russell Corp. v. Am. Home Assurance Co., 264 F.3d 1040, 1050 (11th Cir. 2001); In re Business Men’s Assurance Co., 992 F.2d 181, 183 (8th Cir. 1993).

45. See infra text accompanying notes 109-20.

waste of time, money, and other resources.\(^{47}\)

By reserving their scorn for defendants who have been branded as acting “unreasonably” or in “bad faith,” courts and commentators have obscured a fact that is crucial to an enlightened understanding of the remand fee-shifting statute: The costs and harms attributable to the removal-and-remand process accrue even if the errant defendant removed the case on the basis of reasonable arguments with the purest of intentions. These harms, which may be defined as the “private harms” and the “public harms” of an erroneous removal, often reach far beyond the parties to the case. Indeed, in every situation, it is fair to say that by the time a federal judge has reviewed the parties’ submissions, found that the removal was erroneous, and remanded the case, the defendant’s actions not only “have wrought needless litigation costs upon the other party,” but also they have “upset the sensitive principles of federalism underlying our nation’s dual court system, and frustrated judicial economy.”\(^{48}\)

No commentator has discussed the nature and extent of the harms resulting from an erroneous removal, and thus, it is useful to review those harms in some detail. To facilitate our analysis, we might consider things from the position of a district judge whose docket includes a batch of newly removed cases along with hundreds of other cases in which jurisdiction is secure. The judge already is busy shepherding all of her other cases through the litigation process when motions to remand are filed in each of the removals. The judge sets briefing schedules, orders oral arguments, and then returns to her other cases while awaiting the parties’ responses. After the pleadings have arrived and the motions have been argued, the judge and her clerks block off several days in order to review the facts and consult the relevant law, and then the court issues opinions remanding several of the cases while exercising jurisdiction over the others. Meanwhile, new cases have been filed, work has piled up on the judge’s other cases, and the court must now play “catch up”—until the next removal is filed, when the process begins anew.

The most obvious costs of the removals are “private harms”—those tangible and intangible costs imposed directly upon the plaintiff who must argue the jurisdictional issues in the case. A plaintiff, of course, will suffer out-of-pocket fees and other expenses opposing the defendant’s actions.\(^{49}\) But


\(^{49}\) For a list of these costs and a discussion of the situations in which they may be recovered by the plaintiff, see infra text accompanying notes 121-27.
out-of-pocket expenses are only a small subset of all private harms, for "when an action is removed from state court, the district court first must determine whether it has original jurisdiction over the plaintiff’s claims." As a result, by the very act of removing a case, the defendant can stay any further discovery or proceedings on the merits until the motion to remand has been resolved. This delay, in turn, can work to the disadvantage of the plaintiff by reducing the accuracy of the litigation process; evidence decays as documents are misplaced and memories fade. In the extreme case, the defendant might take advantage of the standstill by becoming judgment-proof or declaring bankruptcy. In the more routine matter, delay reduces the potential value of the case in states where prejudgment interest is unavailable or is set at below-market rates. Thus, in every case, an erroneous removal confers some benefit upon the defendant at the expense of the innocent plaintiff.

In addition to these considerable private harms, an erroneous removal produces numerous “public harms” — those insidious costs that are borne by the system as a whole rather than fully internalized by the parties. With nearly seventy percent of removals being based on diversity jurisdiction, the typical case raises the potential for imprecise adjudication as a result of a federal court being forced to interpret dynamic matters of state law that might very well have been resolved differently in state court. There also is the potential for duplicative litigation if the state court has invested decisional resources on the case prior to being deprived of jurisdiction, not to mention the fact that some observers believe the act of removal “demonstrates a lack of respect” or manifests a doubt about the competency or impartiality of state judges. Thus, a large number of removals may serve as a powerful

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51. Miller, supra note 7, at 404.
52. See Williams, supra note 32, at 578-79 (discussing the effects of delay upon plaintiffs). Cf. POSNER, supra note 28, at 209-10 (noting that the deterrent value of the legal system is influenced by the availability of interest).
53. See Miller, supra note 7, at 388-89. The typical removal involves a case where an in-state individual plaintiff sues an out-of-state corporation. Id. at 391.
55. Mitchell, supra note 47, at 106. Mitchell states:

Abuse of removal and the accompanying abuse of the state courts is a serious and continuing problem. It demonstrates a lack of respect for the state court judges, a lack of concern over wasted time and resources of both state and federal courts, and a lack of regard for the federal legislation which creates the right to remove.
invitation to Congress to assign more of the nation’s judicial business exclusively to the federal courts, to create causes of action that encroach upon matters formerly left to the states, and to shift the locus of adjudication away from state magistrates and towards unelected, unaccountable federal judges who are unfamiliar with the nuances, customs, and mores of the populace. “This situation,” according to Chief Judge J. Harvie Wilkinson III of the Fourth Circuit, “does not comport with the constitutional design” of limited national government and a healthy division of sovereign judicial power between state and federal courts.  

Moreover, it is arguable that the modern era’s litigation explosion, of which the removal-and-remand process has played no small part, has contributed in several ways to the destabilization of the law. One way is by causing delays in the federal adjudicatory process. Cases are piling up in the federal queue, with the average time between the filing of a case and its final resolution noticeably increasing since 1960, despite the expansion in the number and authority of magistrate judges over the past thirty years. Congestion and delay dilute the law’s deterrent value and induce litigants to shift to arbitration. Assuming that the federal courts should serve as the primary arbiters of federal law, it is preferable that delays occur in state court rather than federal court, where congestion risks depriving the public of an opportunity for federal judges to establish precedents clarifying the law and governing future conduct in similar situations. Unfortunately, to the extent that federal courts continue to be overburdened, the most obvious response to delay—expanding the size of the federal bench—is likely to produce even more litigation rather than less. This is because judges are not fungible; when they exercise their discretion, they are almost certain to treat similarly-situated parties differently in any number of situations. Given that disparate treatment

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56. Wilkinson, supra note 28, at 1165. Judge Wilkinson elaborated upon his views with the following statement:

The federal government was conceived as one of limited and enumerated powers; the great residual power—that of providing for the general health, welfare, safety, and morals of the people—was originally thought to belong to the states. Broadly put then, the federal system exists to safeguard significant national interests and to protect fundamental civil rights and liberties. The state court system has the equally critical role of resolving a huge variety of disputes—criminal, traffic, domestic, juvenile, property, tort, et cetera—whose import can fairly be said to be more local in character.

57. POSNER, supra note 28, at 126 tbl. 5.1.

of cases spawns additional lawsuits as parties attempt to capitalize on the finest of legal distinctions rendered by the ever-increasing number of judges, it is not surprising that proposals to significantly expand the number of federal judges have been defeated in Congress.\(^5\)

On the other hand, experience has shown that it is equally unsound for Congress to limit the number of judges while encouraging them to resolve their cases more quickly through the use of devices such as the Speedy Trial Act\(^6\) or the so-called “six-month-pending” list.\(^6\) Judges are processing more cases more quickly than ever before, but they have stayed atop their dockets primarily by delegating enormous amounts of responsibility to their clerks, who assume important roles in drafting opinions and enjoy all but complete autonomy resolving issues that the judge deems peripheral to the case.\(^6\) Law clerks are excellent scholars, but they lack professional experience, maturity, and wisdom. District court clerks, who are thrust into positions for which law school has not prepared them, lack the confidence or decisiveness to admirably perform tasks of case management on the trial level. Appellate clerks, who are hesitant to effectuate any seismic shift in the legal terrain, prepare opinions that are plagued by timidity, prolixity, and a lack of candor. In all cases, as a general matter, inexperienced clerks are prone to miss legal nuances or overlook parallels cutting across multiple branches of law, and so their narrow decisions often fail to provide a useful precedent for future cases. “This,” according to Judge Richard Posner of the Seventh Circuit, “will reduce the authority of judicial decisions as sources of legal guidance and will increase uncertainty and with it litigation.”\(^6\)

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61. 28 U.S.C. § 476(a) (2000). The statute requires the publication of information such as the number of cases and motions pending on each judge’s docket as well as a list of how long those cases and motions have been pending. See id. By publicizing such information, Congress sought to encourage judges to dispose of their cases in a more timely manner. For a discussion of the history, legislative intent, and efficacy of the six-month-pending list, see Charles Gardner Geyth, Adverse Publicity as a Means of Reducing Judicial Decision-Making Delay: Periodic Disclosure Of Pending Motions, Bench Trials and Cases Under the Civil Justice Reform Act, 41 CLEV. ST. L. REV. 511, 528-36 (1993).

62. See POSNER, supra note 28, at 139-59; Williams, supra note 32, at 592-93.

63. POSNER, supra note 28, at 149. According to Judge Posner, “The more apparent that an opinion is the work of the law clerk, the less attention judges and lawyers will pay to the broad holding. This will reduce the authority of judicial decisions as sources of legal guidance and will increase uncertainty and with it litigation.” Id. at 149. “The less that lawyers and especially other
Commentators have detailed how additional judicial coping mechanisms, other than the decision to place a heavy reliance upon law clerks, have also tended to water down the quality of justice. Trial judges in overburdened districts are farming out cases to visiting judges from neighboring states who, perhaps, are less familiar with local norms, the history of the case, or the law of the circuit. Meanwhile, appellate courts increasingly are disposing of cases on the grounds of res judicata or collateral estoppel while concomitantly adopting more deferential standards of review that threaten to mask all but obvious errors made by the trial court. At the same time, appellate judges increasingly are limiting oral argument and refusing to rehear aberrant cases en banc. In this environment, errors of all kinds—including erroneous removals—are bound to be overlooked, legal rights and entitlements are bound to become less certain, and “because these rules are less stable,” citizens are bound to “refrain from enjoying the full range of their rights, freedoms and entitlements,” writes Judge Gerald B. Tjoflat of the Eleventh Circuit.

This Article, of course, should not be understood as arguing that the removal-and-remand process is responsible for all of the public harms discussed in this subpart. The sheer volume of meritless “strike suits” filed by plaintiffs dwarfs the number of erroneous removals initiated by defendants, and thus, plaintiffs contribute to the preceding harms to an even greater degree than defendants. But this fact does not make this Article’s thesis any less compelling, for an expanded use of the removal statute’s fee-shifting provisions would in no way prevent courts from concurrently making greater use of their authority to use statutes such as 28 U.S.C. § 1927 or Rule 11 of the Federal Rules of Civil Procedure to discourage frivolous lawsuits by plaintiffs.

Nor does this Article suggest that commentators unanimously agree upon the full extent of such harms. Judge Posner, for example, has concluded that the growth in caseload “is evidence not that today’s federal judges are overworked, but that forty years ago the federal court system was operating with enormous excess capacity.” Indeed, while Judge Posner confesses that judges are delegating more responsibility to their underlings, producing conflicting opinions, and devoting fewer resources to each case, he judges regard judicial opinions as authentic expressions of what the judges think, the less they will rely on judicial opinions for guidance and authority.” Id. at 148.

64. See Williams, supra note 32, at 590-91.
65. See POSNER, supra note 28, at 109, 180.
66. See Wilkinson, supra note 28, at 1174.
67. Id. at 1175 (quoting Tjoflat, supra note 59, at 72-73).
68. POSNER, supra note 28, at 85-86.
nonetheless states that he is "not convinced that there has been a net reduction in quality since 1960, despite the formidable caseload growth of this period." Judge Posner's conclusion lacks force, however, in light of his acknowledgment that judges "are stretched to the limit of their capacity" and that the federal system is unlikely to "accommodate continued massive caseload growth in the future." There is no reason to expect that state court will become a more attractive alternative to federal court in the foreseeable future and, thus, there is every reason to credit the views of many commentators, including the U.S. Judicial Conference, who anticipate the steady expansion of federal dockets unless Congress intervenes. Moreover, because Judge Posner's argument focuses entirely on the bottom line and disregards any consideration of the process through which decisions are rendered, it ignores a fundamental point repeatedly stressed by the Supreme Court: "[T]o perform its high function in the best way 'justice must satisfy the appearance of justice.'"

A courthouse is not a sausage factory where the quality of justice is measured with references to costs of production, rates of error, and units of output. A respected judge is expected to do more than rule on cases; she must render decisions in the way that society deems acceptable. In law, the judicial process counts as much as the ultimate product. Commentators have noted that our nation's legal system derives much of its legitimacy from the fact that it aspires to foster in litigants the feeling that they have meaningfully contributed to the judge's deliberations, even if it turns out that those efforts have failed to persuade the decisionmaker. Put another way, according to Professor Joseph Vining, judicial opinions "command our respect and serious attention because and to the extent that we hear a person speaking through them" who has struggled with the case and responded to the parties' arguments in more than a cursory fashion. It is not difficult to suppose that the bar and the public will become disillusioned with a legal regime that routinely dispenses with oral argument, or issues boilerplate orders dismissing without comment claims that may be unpersuasive but cannot be labeled

69. Id. at 172.
70. Id. at 187.
71. See Williams, supra note 32, at 535-36.
74. See id. at 102.
frivolous, or openly permits twenty-five-year-old law clerks to "become players in the decision making process, having first-line contact with attorneys and often conducting informal conferences" while the judge is nowhere to be seen. When confronted with these facts about the effects of judicial overload, it is difficult for reasonable observers to deny that public confidence in the judicial system is being jeopardized and that such pervasive cynicism risks eroding the very foundations of the rule of law itself.

Yet, reason for cautious optimism remains. Federal caseload growth is neither inevitable nor inexorable; indeed, to the extent that fee-shifting provisions can force parties to internalize the costs of their questionable conduct, simple economic theory predicts that a principled use of such statutes can discourage meritless removals and thereby help reduce docket overload. Furthermore, even if we were to question whether it is necessary to reduce judicial dockets in order to improve the administration of justice, the fact remains that a separate goal of Congress, upon enacting § 1447(c), was to reimburse aggrieved plaintiffs when their right to determine the forum of the litigation was mistakenly challenged by their opponents. If a plaintiff has done nothing to cause the meritless violation of his right to litigate in state court, there is no persuasive reason for forcing him to bear the costs of the defendant's legally ineffective removal. As explained in the next subpart, Congress intended for the fee-shifting statute to be routinely applied in a way that will protect plaintiffs against the harms of legally ineffective removals, and judges have no authority to disregard the will of Congress by refusing to shift fees when the defendant's actions are deemed "reasonable" by the court.

C. Legislative History

One of Congress's fundamental purposes in amending the removal

76. Williams, supra note 32, at 593.

77. By ensuring that defendants will routinely be forced to pay fees if they erroneously remove the case, the fee-shifting device will increase the anticipated cost of seeking access to the federal courts and decrease the demand for the same. Cf. Mitchell, supra note 47, at 107 ("Statutory reform and less leniency [sic] by the courts in the cases of meritless removal will resolve many of the problems" caused by such practices.). Indeed, studies regarding the use of Rule 11 sanctions tend to confirm that defendants are less likely to engage in misconduct when they risk internalizing the financial costs of their actions. See Lawrence C. Marshall et al., Public Policy: The Use and Impact of Rule 11, 86 NW. U. L. REV. 943 (1992).

78. See infra Part II.C.

79. See, e.g., McFadden, supra note 73, at 117 ("Courts have no authority to substitute their judgment for that of the legislature."); Martin H. Redish & Karen L. Drizin, Constitutional Federalism and Judicial Review: The Role of Textual Analysis, 62 N.Y.U. L. REV. 1, 17 (1987) ("[T]he judiciary derives no logical or moral authority to invalidate the actions of the majoritarian branches on grounds other than inconsistency with constitutional dictates.").
statutes was to prevent cases from being removed to federal court. Congress shortened the timeframe for removal, enhanced the potential for remand by permitting plaintiffs to join diversity-destroying defendants long after the case was removed, and rewrote the fee-shifting provisions. The former feeshifting statute required defendants to post a removal bond and, by its very language, allowed only for the payment of "costs"—and then only if the judge found that the case was "removed improvidently." By comparison, the present statute provides that: "An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." The amendments also abolished the removal bond and instead stressed, for the first time, that the good-faith provisions of Rule 11 of the Federal Rules of Civil Procedure were applicable to removal petitions signed by defense counsel.

All the amendments discussed in the preceding paragraph are indicative of a congressional intent to discourage removals by insuring that "in every removal there is [a] risk of having to pay the plaintiff's reasonable attorneys fees." First, given that the terms of Rule 11 permit sanctions for unreasonable or bad-faith conduct, the attorney-fees provision of § 1447(c) would be redundant unless Congress intended for such language to extend the statute's fee-shifting provisions to situations beyond those contemplated by Rule 11. Furthermore, while Congress formerly authorized an award only if the case "was removed improvidently"—something that was equated with gross negligence—the amendment deleted this requirement without conditioning payment upon any act of bad faith or unreasonableness. Moreover, it is important to note that in the years prior to the amendments, courts routinely limited their post-remand awards to costs (exclusive of fees) for the simple reason that the statute made no mention of attorney's fees and, in the absence of an express authorization from Congress or a finding of bad faith, such fees are unrecoverable. In light of the fact that costs were...
routinely awarded prior to the amendment and that the statute now provides that attorney’s fees are another subset form of costs, it is not surprising that the courts from the Second, Third, Fourth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits have ruled, as a matter of legislative intent, that district courts may award legal fees—no less than other costs—to plaintiffs whenever a case is removed and remanded.\(^8\)

On the other hand, the Fifth Circuit has reached the opposite result, holding that fee petitions should be denied unless the defendant acted unreasonably.\(^9\) However, for the reasons explained below, the Fifth Circuit’s decision to create a “reasonable basis” exception to the fee-shifting statute and the refusal of an astonishing number of district courts across the nation to exercise their discretion to reimburse plaintiffs who obtained remand of a case that was “reasonably” removed,\(^9\) are fundamentally flawed.

\(^8\) See Citizens for a Better Env’t v. Steel Co., 230 F.3d 923, 927 (7th Cir. 2000); Balcorta v. Twentieth Century-Fox Film Corp., 208 F.3d 1102, 1106 n.6 (9th Cir. 2000); Suder v. Blue Circle Inc., 116 F.3d 1351, 1352-53 (10th Cir. 1997); Mints v. Educ. Testing Serv., 99 F.3d 1253, 1260 (3d Cir. 1996); Morris v. Bridgestone/Firestone, Inc., 985 F.2d 238, 240 (6th Cir. 1993); Morgan, 971 F.2d at 923-24; Gardner, 147 F. Supp. 2d at 1259-60; Watson v. Charleston Hous. Auth., 83 F. Supp. 2d 709, 711 (S.D. W.Va. 2000). But cf. Daleske v. Fairfield Cnty., Inc., 17 F.3d 321, 324 (10th Cir. 1994) (“Even after the statute was amended, the propriety of the defendant’s removal continues to be central in determining whether to impose fees.”(quoting Miranti v. Lee, 3 F.3d 925, 928 (5th Cir. 1993))).


The notion that fees should be taxed only if the defendant acted unreasonably was first expressed by the Fifth Circuit in Miranti v. Lee. The court's holding largely is based on its misinterpretation of relevant case law and the amendment's commentary note written by Professor David D. Siegel. Miranti began by quoting Professor Siegel's statement that:

[S]ubdivision (c) now authorizes the court to add "actual expenses, including attorney fees" should it find that it was improper for the defendant to remove the case. The matter is left to the court's discretion, to be exercised based on the nature of the removal and the nature of the remand.

The court then cited four cases where other appellate courts had upheld fee awards "only after finding some fault with the defendant's tactics." These cases demonstrated that Congress never "intended for routine imposition of attorney's fees," according to the Fifth Circuit, which concluded: "In accordance with Professor Siegel's commentary and the jurisprudence, we hold that the propriety of the defendant's removal continues to be central in determining whether to impose fees." In other words, the court held that Congress intended to prohibit an award of attorney's fees whenever a defendant has "objectively reasonable grounds to believe the removal was legally proper."

Miranti's interpretation of the statute is problematic in several respects. Initially, it is unclear why the Fifth Circuit elected to graft a "reasonableness" requirement upon § 1447(c) when such a standard is not evident from the text of the statute and has not been read into any other fee-shifting provision enacted by Congress. It also is peculiar that in its supposed effort to effectuate Congress's intent, the court elected to rely entirely on a strained reading of Professor Siegel's commentary but ignore all of the other pieces of legislative history supporting the contrary view held by a majority of circuit courts. In any event, even if the court's interpretation of Professor Siegel's statement is entitled to significant weight, Miranti's textualist argument fails.

91. 3 F.3d 925 (5th Cir. 1993).
92. Id. at 928 (quoting Commentary on 1998 Revision by David D. Seigel following 28 U.S.C.A. § 1447 (West Supp. 1993)).
93. Id.
94. Id.
96. Cf. Garbie v. DaimlerChrysler Corp., 211 F.3d 407, 410 (7th Cir. 2000) ("An opponent's bad faith may strengthen the position of a party that obtained a remand, but it is not essential to an award, any more than under the multitude of other fee-shifting statutes.").
97. See supra text accompanying notes 80-87.
on its own terms, for if the central issue is the "propriety of the defendant's removal" it is much more logical to argue that a removal is proper only if it succeeds in establishing federal jurisdiction—not that it is proper except when the defendant's arguments are patently frivolous or vexatious. That is to say, if the defendant is responsible for the removal, and he has prolonged litigation by advancing meritless arguments and inflicting public and private harms in the process, then the removal should be labeled improper and he should be required to pay the plaintiff's fees and costs. On the other hand, when the plaintiff's inequitable conduct effectively causes the erroneous removal, then he should be estopped from recovering fees.

Finally, all of the cases cited by the Miranti court as precedent for its "reasonableness" requirement are inapposite, for they either were decided prior to the 1988 amendments or simply affirmed the district court's decision to deny a fee award when the defendant acted reasonably in the eyes of the district court. For reasons explained throughout this Article, it is preferable as a matter of legislative intent and sound public policy to shift fees without regard to the reasonableness of the defendant's actions. Nevertheless, a district court's decision to shift fees is deferentially reviewed for an abuse of discretion, which means that it must be affirmed unless the decision strikes the reviewing court as "fundamentally wrong" rather than simply unwise. There is a difference, of course, between affirming a court's refusal to shift fees and holding that fees may never be shifted in any future case like the one presented to the court. In other words, the mere mention by an appellate court that a defendant's reasonableness is a sufficient basis to warrant denial of a fee petition does not imply that the court has declared that all future awards must be conditioned upon a finding of unreasonableness. Miranti, thus, is a decision that is shorn of precedent and rests upon nothing more than a foundation of quicksand.

98. See Suder v. Blue Circle, Inc., 116 F.3d 1351, 1353 (10th Cir. 1997) ("A removal is proper only if it is legitimate."); Codner v. Am. Home Prods. Corp., 123 F. Supp. 2d 1272, 1275 (W.D. Okla. 2000) (noting that the issue "is not whether removal was 'colorable' but whether it is legitimate").

99. See infra text accompanying notes 140-53.

100. Miranti v. Lee, 3 F.3d 925, 928 (5th Cir. 1993). Indeed, one of the cases, Vatican Shrimp Co. v. Solis, 820 F.2d 674 (5th Cir. 1987), interpreted the sanctions provisions of Rule 11—not the fee-shifting provisions of 28 U.S.C. § 1447(c). See id. at 680-81.

101. Under the abuse of discretion standard, the court of appeals reviews the district judge's legal conclusions de novo and its factual findings for clear error. See, e.g., Hofler v. Aetna U.S. Healthcare, Inc., 296 F.3d 764, 767 (9th Cir. 2002).

102. Ladieu v. Astrachan, 128 F.3d 1051, 1055 (7th Cir. 1997).

In light of the distinction between fee-shifting statutes and sanctions provisions, it seems logical to suppose that while a defendant's misconduct strengthens the plaintiff's request for fees, such misconduct is not essential to an award. Serious, irreversible harms flow from erroneous removals, regardless of whether they were reasonably undertaken. Once we accept that all ineffective removals are improper, it follows that the Fifth Circuit’s wide-ranging “reasonableness” inquiry should collapse into a straightforward analysis of whether the statute’s remedial purposes are served by allowing the plaintiff to recover the money he paid as a result of the defendant’s removal. Instead of conducting an ill-defined, ubiquitous inquiry into whether the defendant acted reasonably, the only relevant question should be whether the plaintiff has such unclean hands that he should have to forfeit his right to recover fees along with the remand of the case. The next Part proceeds to articulate a straightforward two-step test for determining whether an award is proper in any given case.

III. THE TWO-STEP FEE-SHIFTING INQUIRY

A. The Rule

Under the proposed test, the court should first determine whether the defendant properly established federal subject matter jurisdiction at the time of removal. If so, then the plaintiff’s fee request should be denied. If not, the court should proceed to award fees and costs to the plaintiff except when: (1) the plaintiff caused the erroneous removal by misrepresenting facts that were necessary for the defendant to make an informed decision to remove the case; or (2) the plaintiff caused the case to be remanded by divesting the court of jurisdiction after removal. The first exception to the rule in favor of fee-shifting should be applied narrowly, and the denial of a fee request should be limited to cases in which the plaintiff has made a demonstrable misrepresentation of jurisdictional fact. Litigation is an adversarial process, and plaintiffs have no obligation to help defendants determine whether the case is removable. On the other hand, fees should be denied when the plaintiff actively misleads the defendant about the existence of original jurisdiction or when the plaintiff takes steps to defeat federal jurisdiction after


105. See infra Part III.B.
the case has been properly removed because a fee award would not further any remedial or deterrent purpose in these situations. That is to say, as Part IV.B explains in detail, a plaintiff should be barred from recovering fees if he has invited the defendant's spurious removal or has effectively conceded that the removal was legally supportable in the first instance.

If courts follow the proposed two-step fee-shifting rule, they will advance the numerous public policy interests that have been identified by Congress and discussed throughout this Article. Most significantly, the rule will minimize docket congestion, protect the jurisdictional rights of all parties, and deter needless litigation and meritless removals. Rational defendants will hesitate to remove questionable cases if they know that they will have to pay the plaintiff's expenses, but the proposed rule should not chill any removal that properly invokes the federal court's jurisdiction. By the same token, plaintiffs may take added precautions against removal by choosing their words and drafting their complaints carefully when they know that they cannot recover expenses if they share the blame for the removal. Furthermore, in addition to having docket-clearing effects, the rule promotes efficiency because it can be enforced by judges without too much trouble and it is relatively easy for parties to identify the rule and determine how to comply with it. Given the uniform, predictable and straightforward nature of this Article's two-part test, defendants also will be able to accurately assess the risk of paying fees prior to removing a case. Finally, since any fee award will rest upon the application of neutral principles rather than the judge's subjective sympathies in favor of one party or the other, defendants will face an uphill battle if they resort to collateral litigation on the grounds that any given fee award is arbitrary or unfair. The next subpart provides several examples of the universality of the rule and the simplicity with which it may be applied.

106. See Gardner v. Allstate Indem. Co., 147 F. Supp. 2d 1257, 1265-66 (M.D. Ala. 2001) (awarding fees in order to "deter erroneous removals" and "protect plaintiffs' right to choose their forum"); POSNER, supra note 28, at 84, 182-84 (noting that "caseload growth is not inexorable" and arguing that cost-internalizing statutes can help reduce litigation); Mitchell, supra note 47, at 107-08 (expressing hope that expanded use of fee-shifting provisions will discourage erroneous removals).

107. See Louis Kaplow, Rules Versus Standards: An Economic Analysis, 42 DUKE L.J. 557, 577 (1992) (describing how clear rules minimize the parties' costs in ascertaining and complying with the law); see also Lisa Combs Foster, Note, Section 1447(e)'s Discretionary Joinder and Remand: Speedy Justice or Docket Clearing, 1990 DUKE L.J. 118, 123 (1990) ("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.").

B. Application

1. Compensating Plaintiffs for Seeking Remand

Fees should be routinely shifted in situations when the defendant removes the case and the plaintiff then persuades the district judge to remand the case because the removal was incorrect as a matter of law. When the basis of removal is diversity jurisdiction, many defendants have failed in their attempts to override the plaintiff’s choice of forum by advancing ill-fated arguments with respect to fraudulent joinder,\textsuperscript{109} citizenship,\textsuperscript{110} or the potential damages at stake.\textsuperscript{111} Other defendants have erroneously removed based on federal question grounds either by arguing: (1) that the plaintiff’s tort and contract claims are preempted by almost every federal statute imaginable, ranging from AMPTA,\textsuperscript{112} CTCPCA,\textsuperscript{113} and ERISA\textsuperscript{114} to FIFRA,\textsuperscript{115} SLUSA,\textsuperscript{116} TCPA,\textsuperscript{117} and beyond;\textsuperscript{118} or (2) that the plaintiff’s case depends upon the


resolution of a substantial, disputed issue of federal law that is evident from the face of the complaint even though it has not been explicitly pled.\textsuperscript{119} Finally, in cases involving both federal-question and diversity jurisdiction, cases have been remanded because defendants have botched one of the statute’s various procedural requirements, and thus, the removal was ineffective.\textsuperscript{120}

In typical cases like those cited above, the plaintiff should be reimbursed for the costs and fees spent seeking remand and opposing the erroneous removal.\textsuperscript{121} “When the court ultimately remands, it follows that the removing party’s improper actions, by their very nature, have wrought needless litigation costs upon the other party, upset the sensitive principles of federalism underlying our nation’s dual court system, and frustrated judicial economy.”\textsuperscript{122} If the court refuses to award costs and fees, then it fails to deter erroneous removals initiated by the defendant and fails to protect the plaintiff’s right to choose his forum.\textsuperscript{123}

After deciding to grant a request for fees, the court must then determine the precise amount that should be awarded. In order to restore the plaintiff to his original position, it seems fair to allow recovery of reasonable expenses (finding that Telephone Consumer Protection Act does not pre-empt state law claims).


\textsuperscript{123} See id. There is some risk that a district court might remand a case based on what an appellate court later determines to have been an erroneous finding that the defendant failed to establish jurisdiction. The remand order itself, as opposed to the ancillary order granting fees, may not be reversed on appeal. 28 U.S.C. § 1447(d) (2000). However, if the appellate court is convinced that it was an error to remand the case, then it follows that the district court’s decision to award fees should be reversed. See, e.g., Moore v. Permanente Med. Group Inc., 981 F.2d 443, 447 (9th Cir. 1992) (citing Cooter & Gell v. Hartmax Corp., 496 U.S. 384, 405 (1990)). Reversing the award of fees in such an instance is fully consistent with the two-step framework advocated in this Article.
associated with opposing the removal, seeking remand, and pursuing fees.\textsuperscript{124} Any lesser award would be incomplete, for it would force the plaintiff to internalize some of the costs needlessly imposed upon him. Courts must be careful, however, to award the plaintiff only those expenses incurred "as a result of the removal" rather than those "ordinary litigation expenses that would have been incurred had the action remained in state court."\textsuperscript{125} In some situations, the plaintiff will not notice the jurisdictional defect until long after the case has been removed. The plaintiff’s recovery should not include any costs attributable to merits-based litigation but must be limited to those expenses related to seeking remand, opposing removal, and pursuing a fee award in district court and on appeal.\textsuperscript{126} This is because an erroneously removed case remains on the federal docket until somebody points out that it does not belong there, and plaintiffs who fail to recognize the lack of jurisdiction in a timely manner contribute to the public harms of the removal. Although defendants would, of course, be deterred from removing cases if plaintiffs could recover all of their costs of litigating in the wrong forum, such an award would have the undesirable effects of: (1) discouraging plaintiffs from evaluating the merits of the removal; while (2) failing to discourage strategic delay by plaintiffs, who might wait until the case takes an unfavorable turn before raising the jurisdictional issue themselves.\textsuperscript{127}

2. Compensating Plaintiffs for Opposing Remand

In normal cases, like those discussed in the preceding section, the plaintiff will seek to return to state court and the defendant will desire to remain in federal court. In unusual situations, however, the roles will be reversed, and the plaintiff who originally filed in state court will wish to remain in federal court while the removing defendant will abandon his prior position and seek remand. In these situations, the public policy of protecting the plaintiffs’ rights to choose their forum, minimizing jurisdictional gamesmanship by defendants, and discouraging removal whenever there is any doubt about federal jurisdiction is best served by awarding fees to the plaintiffs even if they unsuccessfully oppose the defendant’s post-removal motion to remand.

\textsuperscript{124} See Garbie v. DaimlerChrysler Corp., 211 F.3d 407, 410 (7th Cir. 2000) (affirming award that included expenses and attorney’s fees on appeal); Gotro v. R&B Realty Group, 69 F.3d 1485, 1486 (9th Cir. 1995) (affirming award that included fees for preparing bill of costs submitted to district court). Most courts have indicated that the attorney’s fees must be reasonable. See, e.g., Marros v. Naperville Family Physicians, Inc., No. 01 C 2297, 2002 WL 370207, at *1 (N.D. Ill. 2002); Novastar Mortgage, Inc. v. Bennett, 173 F. Supp. 2d 1358, 1362 (N.D. Ga. 2001).

\textsuperscript{125} Avitts v. Amoco Prod. Co., 111 F.3d 30, 32 (5th Cir. 1997) (quoting 28 U.S.C. § 1447(c)).

\textsuperscript{126} See Gardner, 147 F. Supp. 2d at 1265.

As noted previously, the decision to award fees turns upon whether the removal was legally flawed in the first instance. Two cases illustrate when fees may properly be awarded to a plaintiff who opposes a defendant’s motion to remand. In the first case, *Morgan Guaranty Trust Co. v. Republic of Palau*, the Republic of Palau removed a breach-of-contract case by asserting that it was a foreign state entitled to original jurisdiction under the Federal Sovereign Immunities Act ("FSIA"), which entitles sovereign parties to litigate certain non-federal claims in federal court. The district court denied the plaintiff’s motion to remand, the case went to trial, and the plaintiff was awarded $46 million. On appeal, the Second Circuit sua sponte raised the question of jurisdiction, noting that the Republic of Palau might not be a state because its voters had not approved a plebiscite. During appellate argument, Morgan Guaranty argued in favor of federal jurisdiction while the Republic of Palau sought remand and conceded that it was not a sovereignty as defined by the FSIA. The Second Circuit remanded the case but awarded the plaintiffs $136,000 in “costs and attorneys fees relating to the foreign state and jurisdictional issues addressed in the supplemental briefings on appeal.” In other words, while the plaintiff eventually had to return to state court, it was reimbursed for what it spent attempting to preserve its right to litigate in its adopted forum—the Southern District of New York.

Similarly, the defendants in *Gardner v. Allstate Indemnity Co.* removed a class action from Alabama state court, asserting that the damages suffered by each individual plaintiff could be aggregated for jurisdictional purposes in order to satisfy the $75,000 amount-in-controversy requirement. Almost three years later, after the district court had ruled against it on various issues, Allstate abandoned its removal theory and now argued that the Middle District of Alabama lacked jurisdiction because “when multiple individuals assert rights arising from individual insurance policies, their claims are separate and distinct, and accordingly, may not be aggregated.” The plaintiffs opposed the motion to remand and also sought to amend their complaint either by bringing a RICO claim on behalf of the class or a claim for infliction of emotional distress on behalf of the named plaintiffs. The

128. 971 F.2d 917 (2d Cir. 1992).
130. *See Morgan*, 971 F.2d at 919.
131. *Id.* at 924.
132. *Id.* at 920.
133. 147 F. Supp. 2d 1257 (M.D. Ala. 2001).
134. *Id.* at 1262 (quoting Morrison v. Allstate Indem. Co., 228 F.3d 1255, 1264 (11th Cir. 2000)).
135. *See id.* at 1261.
court eventually denied the plaintiffs’ motion to amend but awarded them $31,300 in expenses “for developing legal arguments in opposition to Allstate’s motion to remand, and attempting to preserve jurisdiction after Allstate’s motion to dismiss . . . [and] attempting to recover fees under section 1447(c).”\textsuperscript{136}

At first blush, it might seem inequitable to permit plaintiffs to recoup their expenses for unsuccessfully opposing remand while penalizing defendants who make reasonable, yet unsuccessful, attempts to remove a case. After all, since courts must devote substantial resources to an evaluation of the plaintiffs’ failed attempt to preserve federal jurisdiction, it could be argued that a fee award would undermine Congress’s intent to use the fee-shifting statute in order to cut down judicial workloads. Upon closer analysis, however, it is apparent that awards like those in \textit{Gardner} and \textit{Morgan} are needed to preserve a plaintiff’s right to choose his forum and to prevent defendants from improvidently removing cases in the first instance. Although a plaintiff may initially be reluctant to litigate in federal court, he may rationally conclude after the removal that federal and state courts are equally favorable fora for deciding the matters. Thus, it not only is unsurprising that the plaintiff would subsequently seek to remain in federal court by curing the defects that existed at the time of removal, but also “[i]t is reasonably foreseeable that a parity-minded plaintiff, who is reluctant to be whipsawed between state and federal court, will take good faith steps to remain in federal court by resisting a defendant’s motion to remand.”\textsuperscript{137} When the plaintiff takes such steps, all of the resulting expenses attributed to the jurisdictional issue are proximately caused by the defendant’s improper removal, for the case never would have been wrested from state court if not for the defendant’s legally flawed actions.

Courts that refuse to compensate plaintiffs for their expenses encourage defendants to remove cases with impunity while failing to respect plaintiffs’ rights to litigate in state court unless the case properly invokes the federal court’s original jurisdiction. Indeed, in \textit{Gardner}, the defendant insurance company would have succeeded in removing the case, holding the jurisdictional defect in reserve until litigation took an unfavorable turn, and rendering three years of federal proceedings null and void.\textsuperscript{138} It is for this reason, according to Judge DeMent, that “an aggrieved plaintiff is made whole when she is reimbursed for the full expenses of either: (1) seeking to remand the case; or (2) attempting in good faith to preserve federal

\textsuperscript{136} Id. at 1267.

\textsuperscript{137} Id. at 1265.

\textsuperscript{138} See id. at 1260-61.
jurisdiction after it has been challenged."\textsuperscript{139}

3. Refusing to Compensate Plaintiffs for Seeking Remand

Notwithstanding the general presumption in favor of awarding fees, there are two situations when plaintiffs should be estopped from recovering their expenses despite successfully obtaining remand. The first is if the initial removal was legally proper, but the plaintiff subsequently succeeded in defeating federal jurisdiction by dismissing certain claims or parties and remanding the case.\textsuperscript{140} The second is if the initial removal was legally improper, but the plaintiff was responsible for the defendant's error.\textsuperscript{141} Fee awards in these situations would not advance the remedial or deterrent purposes of the statute in any principled respect.

With respect to the first situation, it seems fair to refuse to award fees if the defendant properly removed the case but the court then lost jurisdiction because of some act by the plaintiff. Plaintiffs frequently file complaints in state courts that assert both federal and state law claims; defendants remove the cases, and soon afterwards the plaintiffs petition the court to remand after seeking a voluntary dismissal of their federal claims or all of their claims against a diversity-destroying defendant. In these situations, courts should refuse to award fees because neither the plaintiff nor the defendant has acted objectionably.\textsuperscript{142} In fact, the removal-and-remand process has conferred a valuable benefit upon both parties: The defendant has avoided potential liability with respect to the dismissed claims while the plaintiff is permitted to return to his preferred state forum to resolve the remaining issues of state law. For the same reasons, judges also should decline to award fees in cases if they first render a merits-based decision disposing of certain claims and then remand the case after declining to exercise jurisdiction over the other remaining claims.\textsuperscript{143} If the court was empowered to exercise jurisdiction at the outset, then the parties have had their day in court and any private harms

\textsuperscript{139} \textit{Id.} at 1265. For an example of another case in which the application of the test set forth in this section would have resulted in an award of attorney's fees to the plaintiff, see Fulham v. Allstate Indem. Co., No. 97-123-CIV-FTM-250, 1998 WL 160852 (M.D. Fla. 1998). In Fulham, as in Gardner, Allstate's attorneys erroneously removed a class action lawsuit and then disavowed their removal theory nearly one year afterwards. See \textit{id}. at *1-2. The plaintiff resisted the motion to remand, but the court ultimately agreed that the amount-in-controversy requirement was not satisfied. See \textit{id}. at *4.

\textsuperscript{140} See infra text accompanying notes 142-43.

\textsuperscript{141} See infra text accompanying notes 144-53.


attributable to the removal are minimized by the fact that the plaintiff's claims have been adjudicated and finally resolved.

On the other hand, given that any decisions rendered by a court lacking jurisdiction are null and void, courts should not allow plaintiffs to benefit from distorting or affirmatively misrepresenting the jurisdictional facts that are necessary for the defendant to decide whether to remove the case. Any fee award in this situation would risk encouraging plaintiffs to engage in manipulative tactics and gamesmanship, driving up the litigation costs of their opponents by tricking them into removing the case only to pursue remand once the federal court acquired jurisdiction. In order to discourage such sharp tactics, plaintiffs should be held accountable for any erroneous jurisdictional representations made to opposing counsel and should be estopped from recovering fees if they unambiguously assure the defendant that their case can be litigated in federal court.

Avitts v. Amoco Production Co.\textsuperscript{145} and Barraclough v. ADP Automotive Claims Services, Inc.,\textsuperscript{146} provide instructive illustrations of when it is appropriate to deny the plaintiff's fee request on the basis of his or her jurisdictional misrepresentations. In Avitts, the plaintiff filed a complaint in state court that failed to identify any particular federal law which Amoco might have violated, but instead cryptically stated "that the evidence will reflect that the damages caused by the Defendants are in violation of not only State law but also Federal law."\textsuperscript{147} The defendants removed and the Fifth Circuit ultimately remanded the case for lack of jurisdiction. The court properly declined to tax costs, however, for Avitts's poorly drafted complaint invited the error committed by the defendants.\textsuperscript{148} Similarly, the plaintiff in Barraclough filed a civil action in state court alleging violations of California's human rights laws.\textsuperscript{149} Though the complaint listed no federal cause of action, Barraclough's attorney: (1) explicitly advised defense counsel in a letter that he intended to amend the complaint to raise a claim under the federal Americans with Disabilities Act; and (2) further propounded interrogatories seeking an admission from the defendant that the company

\begin{itemize}
\item 144. See, e.g., Myerson v. Showboat Marina Casino P'ship, 312 F.3d 318, 321 (7th Cir. 2002) (vacating trial court's grant of summary judgment and remanding with instructions to dismiss for lack of subject matter jurisdiction). See also supra text accompanying notes 5-6.
\item 145. 53 F.3d 690 (5th Cir. 1995), appeal after remand, 111 F.3d 30 (5th Cir. 1997) ("Avitts II").
\item 146. 818 F. Supp. 1310 (N.D. Cal. 1993).
\item 147. Avitts, 53 F.3d at 692.
\item 148. Avitts II, 111 F.3d at 33 ("Because appellees bear a substantial share of the responsibility for the case remaining in federal court, we conclude that the district court abused its discretion in awarding fees and costs to appellees under § 1447(e).”).
\item 149. Barraclough, 818 F. Supp. at 1311.
\end{itemize}
violated the Act.\textsuperscript{150} The defendant, relying upon this unambiguous assurance that the plaintiff intended to assert a federal question, removed the case. Barralough thereafter refused to amend her complaint and moved to remand for lack of jurisdiction. The district judge remanded the case but did not grant the plaintiff any fees under \textsection 1447(c).\textsuperscript{151}

Both \textit{Avitts} and \textit{Barralough} are cases in which the plaintiff clearly, definitively, and unambiguously misrepresented the relevant jurisdictional facts that were necessary to determine whether the case was removable.\textsuperscript{152} These cases must be distinguished from the vast majority of occasions in which the defendant has simply misread the complaint or tried to stretch the boundaries of federal jurisdiction, thus failing to meet his burden of removal through no fault of the plaintiff's.\textsuperscript{153} While some complaints will be inartfully drafted, it does not follow that the plaintiff should be estopped from recovering fees. Cases do not belong in federal court if there is any doubt about subject matter jurisdiction, and if the fee-shifting statute is to play any role in deterring the erroneous removal of borderline cases, then fee awards must be the norm rather than the exception.

\textsuperscript{150} See id.

\textsuperscript{151} See id. at 1312.


\textsuperscript{153} As a general rule, a plaintiff's complaint must be liberally construed, and questions about jurisdiction attributable to "merely inartful, ambiguous, or technically defective pleadings" should be resolved in the plaintiff's favor. Lewis v. Time Inc., 83 F.R.D. 455, 460 (E.D. Cal. 1979). Some courts have applied the fee-shifting statute consistently with the model proposed in this Article and awarded fees when the plaintiff's jurisdiction-related averments were inartful but did not misrepresent the facts. See McLain v. Am. Int'l Recovery, Inc., 1 F. Supp. 2d 628, 631 (S.D. Miss. 1998) (awarding fees when plaintiff failed to respond to request for stipulation regarding amount in controversy); DeGruise v. NPC Int'l, Inc., 950 F. Supp. 168, 169 (N.D. Miss. 1997) (awarding fees when removal was based entirely on plaintiff's request of right-to-sue letter and vague representation to magistrate judge that client might amend complaint to assert civil rights claim); Arnold v. Nat'l Travelers Life Co., No. 3:96-CV-1009-D, 1997 WL 22829, at *2 (N.D. Tex. 1997) (awarding fees when plaintiff's ambiguous complaint could reasonably be perceived as pleading causes of action under state law); Burrell v. Norfolk & W. Ry., No. 2-94-CV-0089 CAS, 1994 WL 904000, at *1 (E.D. Mo. 1994) (awarding fees when defendant misconstrued several allegations in complaint); cf. Total Marine Servs., Inc. v. W. Jefferson Levee Dist., No. CIV.A. 02-544, 2002 WL 826719, at *4 (E.D. La. 2002) (declining to award fees when plaintiff's statements "tend[ed] to cloud the issue" of jurisdiction and "subsequent removal might be in order" depending on facts that develop post-remand).
4. Compensating Defendants who Obtain Remand

The preceding sections discussed whether defendants should reimburse plaintiffs for the costs incurred as the result of an erroneous removal. The remaining issue is whether courts should go one step further and force plaintiffs to reimburse defendants for the costs of unsuccessfully removing a case and attempting to litigate in federal court. Some courts have awarded fees to the defendant upon finding that the plaintiff was responsible for the removal, concluding that fee-shifting was necessary to discourage jurisdictional gamesmanship.\(^{154}\) The rationale for these decisions appears to be that if the plaintiff faces a credible threat of having to pay attorney’s fees, he will: (1) take all possible care to make accurate jurisdictional representations; and (2) be deterred from engaging in manipulative tactics, such as recognizing the lack of jurisdiction but remaining content to litigate in federal court until he perceives some disadvantage with the forum, at which time he will file a motion to remand.\(^{155}\) Furthermore, it seems intuitively unfair to tax defendants but not plaintiffs when the plaintiff shares responsibility for the erroneous removal. Thus, it could be claimed that a two-way fee-shifting rule furthers the compensatory and deterrent purposes envisioned by Congress in enacting 28 U.S.C. § 1447(c).

Upon closer review, however, it is unsound to compensate defendants for advancing any meritless argument designed to invoke the court’s jurisdiction. A primary justification for shifting fees to plaintiffs who engage in fruitless post-removal attempts to remain in federal court—that plaintiffs are masters of their complaints—is unavailable to removing defendants. It seems safe to say that the very act of filing a complaint in state court is powerful evidence that the plaintiff desired to litigate in that forum. Courts have noted that a defendant’s right to remove a case to federal court and a plaintiff’s right to choose his forum "are not on equal footing";\(^{156}\) the societal interest in discouraging efforts to upset the plaintiff’s original choice of forum outweighs the defendant’s interest in insuring that he may exercise his removal right free of cost. Furthermore, notwithstanding any jurisdictional representations made by the plaintiff, the defendant always has an obligation to undertake an independent investigation and assure himself of the propriety of the removal.\(^{157}\) A few interrogatories or some initial jurisdictional discovery


\(^{155}\) See Brooks, 153 F. Supp. at 1302.

\(^{156}\) Burns v. Windsor Ins. Co., 31 F.3d 1092, 1095 (11th Cir. 1995).

\(^{157}\) Cf. Myerson v. Showboat Marina Casino P’ship, 312 F.3d 318, 321 (7th Cir. 2002) (admonishing defense counsel that "all members of our bar must assist the court in enforcing the
should relatively easily reveal facts demonstrating the absence of federal jurisdiction despite any representations by the plaintiff to the contrary, thus negating the need to remove.

It is important to note that the defendant bears some degree of fault in every situation when a case is erroneously removed. Because defendants are the only parties afforded the right to remove a case, a defendant is at least partially responsible for every defective removal. By contrast, fees are awarded to plaintiffs only when they bear no responsibility for the erroneous removal. Thus, it is inappropriate to subsidize the defendant for any meritless jurisdictional sally, for even if he has detrimentally relied upon the plaintiff's jurisdictional statements, all of his costs could have been avoided if he had not removed the case in the first instance. A case need not be removed simply because it appears to be removable, and there is no indication that Congress intended for the fee-shifting provisions of § 1447(c) to be used in a manner that will benefit defendants who are responsible, in any way, for the erroneous removal of a case.

IV. THE FLAWS WITH ALTERNATIVE MODELS

Having set forth a two-prong test for determining whether to award fees under 28 U.S.C. § 1447(c), this Part points out the flaws with alternative tests that have been applied by the courts in recent years. Courts have advanced three basic tests: (1) the "reasonableness" test; (2) the "qualified immunity" test; and (3) the "merits-of-the-removal" test. While each of these models offer some superficial appeal, a more careful examination reveals that they all are seriously flawed, primarily because they fail to advance any of the legitimate public policy interests identified throughout this Article.

A. The "Reasonableness Test"

The overriding reason why courts deny a plaintiff's request for fees is that they find there were "reasonable" grounds for the defendant to believe the case was removable. Courts have found the removing defendant's actions reasonable in virtually any situation absent a showing of bad faith, frivolousness, or the lack of any colorable basis for the removal. Indeed, in
some districts, the reasonableness standard has been so watered down that it is impossible for a plaintiff to recover fees unless subject matter jurisdiction was "patently lacking" at the time of the removal. Thus, in at least one case, a judge applying the reasonableness standard excoriated defense counsel for his "blatant mischaracterizations" of the relevant law but nonetheless declined to award fees because, according to the court, counsel "acted reasonably in removing this case on the basis of the information available at the time of removal."6

There are numerous problems with the "reasonableness test," many of which have been implicitly and explicitly discussed throughout this Article. Initially, it is important to note that fee-shifting statutes, unlike punitive sanctions provisions, are equitable provisions designed to return the aggrieved party to the position he would have occupied if the opponent had respected his legal rights in the first place. No other fee-shifting statute enacted by Congress has been construed to apply only when the losing party acts unreasonably, and neither the text of § 1447(c) nor its legislative history suggests that Congress intended for fee awards to turn upon the so-called "reasonableness" of the errant defendant's removal. Indeed, in analogous situations (such as when a defendant is shown to have materially breached a contract or encroached upon the plaintiff's property) the defendant is obligated to compensate the plaintiff for her loss regardless of whether the defendant offered sympathetic, but ultimately meritless, reasons for his conduct. As a matter common sense, it is illogical to insist that a plaintiff internalize the costs of the defendant's spurious removal even after the plaintiff has successfully rebutted the basis for the act of removal itself. Quite simply, neither the plaintiff, the judiciary, nor the general public should be forced to bear the burdens heaped upon them by the defendant whose removal was colorable yet legally ineffective.


63. See Hofler v. Aetna U.S. Healthcare Inc., 296 F.3d 764, 770 (9th Cir. 2002) ("A fee award rendered under such circumstances is not punitive; it simply reimburses plaintiffs for 'wholly unnecessary litigation costs' inflicted by the defendants."); Garbie v. DaimlerChrysler Corp., 211 F.3d 407, 410 (7th Cir. 2000) (Section 1447(c) "is not a sanctions rule; it is a fee-shifting statute, entitling the district court to make whole the victorious party."); Novastar Mortgage., Inc. v. Bennett, 173 F. Supp. 2d 1358, 1362 (N.D. Ga. 2001) ("[T]he imposition of costs is not intended to punish the defendants or enrich the plaintiff. Rather, the purpose is to compensate the plaintiff for the actual and reasonable expenses incurred in order to obtain a remand of an improperly removed case.").

64. See supra text accompanying notes 24-26, 80-102.
Another flaw with the reasonableness standard, wholly apart from the issue of congressional intent, is that it invites unpredictable or arbitrary results. Because the test fails to generate any concrete rules to govern the behavior of litigants, courts in different circuits often render inconsistent decisions when presented with substantially similar fee petitions. Even more troublingly, it is not uncommon for similarly situated parties to receive inconsistent rulings from the same judge in materially indistinguishable cases. Such widespread confusion about the governing legal principles, in turn, effectively deprives defendants of the fair notice that is essential to making a rational decision whether to remove the case and encourages still further litigation over the merits of fee awards. Once again, the intended docket-clearing effects of the statute are undermined.

Another indictment of the reasonableness test lies in the utter weakness of the leading rationale advanced by the courts applying it—namely, that when the complaint potentially implicates complex issues of federal jurisdiction, fees should be denied because the defendant is entitled to have those issues resolved in federal court. This is an illogical proposition. While federal courts should be allowed to police the boundaries of their jurisdiction, the fee-shifting statute should also be given the broadest possible application in complex cases, given that the public and private harms of the removal are the highest in such cases. In fact, under the relevant law, the two most complex types of removals—those involving preemption and fraudulent joinder—are also the least likely to succeed. Well-settled law teaches that the removal statutes must be strictly construed, and at the same time, preemption

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167. See supra text accompanying notes 77, 106-07.


169. See supra text accompanying notes 1-6.
depends upon a "clear and manifest" showing of congressional intent, while fraudulent joinder can occur only when there is "no possibility" of recovery against the resident defendant. No serious observer can maintain that federal jurisdiction is clear in situations where, among other things, a removing defendant must distinguish closely related cases, rely upon Byzantine legislative history, argue strained inferences from the lack of directly applicable precedent, or advance detailed public policy arguments as the primary basis in support of his removal petition. However, by adopting a rule that fee requests must be denied if the defendant's arguments are complex or novel, the courts have insured that fees may not be shifted in cases of alleged fraudulent joinder or preemption. It follows, therefore, that the courts have effectively gutted the statute and left plaintiffs vulnerable to jurisdictional gamesmanship in all but the most simple of cases.

Even more disturbing is that courts applying the reasonableness test today appear to be just as reluctant to shift fees as they were prior to the enactment of the docket-clearing Judicial Improvements Act. As noted previously, the Act was designed to expand the judiciary's fee-shifting authority and jettison the former rule that limited recovery to situations where the removing party acted in "bad faith." Bad faith was difficult to prove; it was found most often in situations where the party persisted in removing cases despite the presence of directly applicable, well-settled law cutting against their removal petition. Nevertheless, a review of the reported cases suggests that courts decline to shift fees in an astonishing number of cases, occasionally relying on decisions rendered prior to the Judicial Improvements Act. As a result, defendants have avoided paying fees despite showing egregious disregard of fundamental jurisdictional principles, including instances such as where the defendant: (1) initially claimed that it was a foreign state under the FSIA before recognizing its own mistake; (2) disregarded case law that "clearly

170. Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) ("[W]e start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.").


172. See supra text accompanying notes 80-87.

173. See, e.g., Peltier v. Peltier, 548 F.2d 1083 (1st Cir. 1977); Smith v. Student Non-Violent Coordinating Comm., 421 F.2d 522 (5th Cir. 1969).

174. See supra note 89, 159-61 and sources cited therein.


illustrate[d]" the fallacy of the removal theory being advanced;\textsuperscript{177} (3) breached the terms of a forum selection clause mandating litigation in state court;\textsuperscript{178} or (4) continued to remove cases even after judges in the district or in other courts had issued orders remanding cases that pled the same causes of action against the same defendants.\textsuperscript{179} Prior to the Judicial Improvements Act, it may have been proper for courts to refuse to penalize defendants acting in good faith even if their gross incompetence bordered on legal malpractice. But unless courts intend for the current fee-shifting statute to confer no independent source of deterrence besides that already provided by Rule 11 or other sanctions provisions, it is difficult to see how courts could seriously maintain that the defendant’s actions in situations like those described above are “reasonable.”

A careful observer of the fee-shifting cases might very well observe that the reasonableness standard is, in reality, a subterfuge through which certain notions of judicial fairness are often effectuated to the plaintiff’s detriment. Judges’ opinions convey an implicit yet unarticulated message that they believe plaintiffs manipulate the system by bringing claims that cannot be defeated on the grounds of preemption or fraudulent joinder but nonetheless will be dismissed on the merits soon after the case returns to state court.\textsuperscript{180} In such cases, when it is likely that the tenuous claims will be dismissed soon after the case is remanded, federal judges seem to sympathize with the remaining defendants who will be permanently prevented from returning to federal court, even though the case would have been removable had the dismissal occurred prior to the removal attempt. It could be argued that the judiciary’s reluctance to tax fees might be the product of judicial rationalization that the plaintiff has achieved a sufficient measure of victory simply by obtaining remand and that a further award would be some type of ill-gotten windfall.

\textsuperscript{1998) (declining to award fees despite defendant’s misrepresentation of national citizenship).}


Yet, it remains unclear in these situations why a fee award is improper. Congress has determined that the fee-shifting provisions should be interpreted in a way that will protect the plaintiff's right to choose his forum—even if that means the case must proceed in state court. There has never been a rule that a defendant may disregard another defendant's citizenship or ignore certain allegations in the plaintiff's complaint merely because there are strategic advantages to doing so. To the extent that the difficult burden faced by defendants seeking to establish preemption or fraudulent joinder is a direct result of congressional edict, it is inappropriate for the judiciary to subsidize defendants' efforts to remove cases simply because certain judges are dissatisfied with the judgment of Congress.\textsuperscript{181} Moreover, the principle of parity—that is, the concept that state and federal courts are equally competent at deciding matters before them—is essential to the concepts of equity, comity, and federalism that are central to our nation's dual court system.\textsuperscript{182}

Defendants, of course, are entitled to remove cases by raising reasonable arguments to support their positions with respect to fraudulent joinder, preemption, or other issues. But it does not follow that the judiciary and the plaintiff should have to bear the costs of the defendants' arguments when they are rejected.

The reasonableness test fails to recognize or accommodate the compensatory and deterrent purposes of § 1447(c). The test also fails to discourage erroneous removals, protect the plaintiff's right to choose his forum, or reimburse plaintiffs for their costs of responding to meritless jurisdictional arguments raised by the defendant. The public and private harms of thousands of legally ineffective removals will continue to accrue each year, and the administration of justice will continue to suffer as long as the reasonableness test is followed.

\textbf{B. The "Qualified Immunity" Test}

The second test often employed by courts, which might be called the "qualified immunity" test, can be dismissed in short order. Courts following this model refrain from awarding fees except in situations in which the defendant removes the case on the basis of an argument that has previously

\textsuperscript{181} See McFadden, supra note 73, at 117; Redish & Drizin, supra note 79, at 17.

\textsuperscript{182} Although scholars have debated whether the parity principle is accurate, it remains embedded in American jurisprudence. See, e.g., Martin H. Redish, Reassessing the Allocation of Judicial Business Between State and Federal Courts: Federal Jurisdiction and "The Martian Chronicles," 78 VA. L. REV. 1769, 1825 (1992) (criticizing notions of parity but acknowledging that "the modern Supreme Court has long premised its structuring of federal and state judicial relations on the assumptions that state and federal courts are fungible"); see also Huffman v. Pursue, Ltd., 420 U.S. 592, 604 (1975); Steffel v. Thompson, 415 U.S. 452, 460-61 (1974).
been rejected, especially by a court within that circuit, not long before the defendant’s actions. The logic supporting this test, as explained in Gray v. New York Life Insurance Co., is that “[a] removing defendant who tries something that failed yesterday and the day before can hardly be said to have been ‘objectively reasonable’ in his decision to remove,” while a defendant should be shielded from any fee award if the removal arguably was supported by then-existing case law or raised an issue of first impression in that jurisdiction.

The Gray court defended its position by drawing an implicit parallel between fee-shifting and the doctrine of qualified immunity, which is often raised as an affirmative defense in cases involving lawsuits against public officials who allegedly have violated a citizen’s civil rights. Qualified immunity protects public officials from civil liability and the threat of paying money damages, unless their conduct: (1) was contrary to clearly established law as interpreted by federal courts in situations closely analogous to the case at bar; or (2) was so egregious that any reasonably competent official would have known that it was illegal. Likewise, to the extent that Gray requires plaintiffs to establish an entitlement to fees by producing prior precedent dictating that the defendant’s removal is without merit, the court’s analysis is analogous to the qualified-immunity rule that “all but the plainly incompetent or those who knowingly violate the law” are free from the risk of civil penalty. Such logic, as explained below, is patently flawed.

The goals of the fee-shifting statute and the defense of qualified immunity are completely at war with each other. Qualified immunity, which is based on the assumption that public officials will be reluctant to take almost any type of action if the threat of paying legal damages is constantly looming overhead, exists to give public officials the zone of comfort that is essential to the efficient operation of government. By contrast, the threat of paying

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185. Id. at 635.


187. Malley v. Briggs, 475 U.S. 335, 341 (1986) (“As the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law.”).

damages in cases of an erroneous removal is an essential component of the congressional reforms effectuated as part of the Judicial Improvements Act. With respect to removals, Congress intended for § 1447(c) to deter defendants from erroneously removing cases, compensate aggrieved plaintiffs for the harms of the removal, and protect plaintiffs’ rights to choose their forum.\textsuperscript{189} Thus, although Congress intended to grant immunity to public officials who are arguably performing their duties in a lawful manner, Congress also intended to penalize those defendants who seek jurisdictional entitlements beyond those provided by the removal statutes. It is difficult to see how the well-established presumption in favor of a strict construction of the removal statutes\textsuperscript{190} is advanced by granting defendants immunity from the risk of fee-shifting in all but the most blatant of circumstances.

Moreover, the \textit{Gray} court’s refusal to award fees unless the defendant’s removal theory has already been rejected in a closely analogous case does nothing to prevent abuse in the removal process. Since no two complaints are identical and every motion to remand involves a highly fact-specific analysis of the operative facts in light of the relevant law, it is doubtful that application of the “qualified immunity” test will dictate a fee award except in a tiny number of cases. Given the small number of district court opinions that are published each year, it also is unclear whether an appreciable body of case law would be accessible for purposes of determining whether there is “clearly established” law counseling against removal. Thus, there is a significant risk that courts purporting to apply the “qualified immunity” test will fail to realize that a defendant’s arguments had been previously rejected. As a result, even aside from the fact that the rationale for the “qualified immunity” model in no way comports with the justifications for fee-shifting under § 1447(c), the model cannot be applied with any degree of precision or confidence.

Quite simply, the “qualified immunity” test fails to advance any legitimate policy interests articulated by Congress. It should be abandoned in favor of the two-part test set forth in this Article, which establishes a fair, uniform, and predictable means for protecting the rights of plaintiffs and defendants alike.

\textbf{C. The “Merits of the Removal” Test}

The final test, which was advanced by the court in \textit{Gray v. New York Life Insurance Co.}\textsuperscript{191} as an alternative to the “qualified immunity” test discussed in

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\item \textsuperscript{189} See supra text accompanying notes 24-44, 80-103.
\item \textsuperscript{190} See \textit{Shamrock Oil & Gas Corp. v. Sheets}, 313 U.S. 100, 108-09 (1941) (noting that removal statutes are to be strictly construed).
\item \textsuperscript{191} 906 F. Supp. 628 (N.D. Ala. 1995).
\end{itemize}
Part IV.B, is the "merits of the removal" test. Under this test, the courts should distinguish between arguably meritorious removals and clearly meritless removals, awarding fees to plaintiffs in the latter cases but not the former. According to the court, "the decision as to whether to award fees under § 1447(c) turns primarily, if not solely, on the merit of the removal."192

The court attempted to elaborate upon this standard by stating that:

The core question must be: "Was the removal 'improvident,' in contrast to being merely 'mistaken'; and if 'mistaken,' how badly 'mistaken' was it?" As long as there is discretion to be exercised, Congress must have intended a distinction between removals which can be justified as presenting a serious or close question, and/or which are only technically defective, and those which are improvident in the sense that they present no credible statutory basis for jurisdiction in the federal court.193

This portion of Gray has been expressly or implicitly followed by several courts,194 but for the reasons explained below, it is unclear how it is functionally different from the poorly conceived "reasonableness" test.

The primary flaw with the "merits" test is that, unlike this Article's two-part test, it fails to articulate any standard for determining when to award fees if a case is remanded. How is a court supposed to distinguish consistently between removals that present "a serious or close question" from those that "present no credible statutory basis for jurisdiction?"195 Most likely, the analysis would be similar to the "reasonableness" analysis that was criticized in Part IV.A. Or perhaps, as with the "qualified immunity" model, the court would base its decision upon whether the defendant disregarded clearly established law when removing the case. But at this level of analysis, there is an intolerable potential for imprecise adjudication, because there are no real standards for courts to follow, in the absence of clearly established law, when they attempt to discern whether the defendant's removal theory was so patently flawed that it was utterly meritless.196 Each judge's view of "merit"

192. Id. at 637.
193. Id. at 634.
194. For cases citing Gray as persuasive authority, see Seminole County v. Pinter Enterprises, Inc., 184 F. Supp. 2d 1203, 1210 (M.D. Fla. 2000); Brown v. Prudential Insurance Co. of America, 954 F. Supp. 1582, 1585 (S.D. Ga. 1997); see also Dead Kennedys v. Biafra, 46 F. Supp. 2d 1028, 1031 (N.D. Cal. 1999) ("Thus the Court finds some consideration of the merits of defendant's decision to remove the action to federal court is required.").
is likely to fluctuate widely, with the potential for any fee award depending upon the judge’s individual whim. Because it is unclear whether fees will be awarded, defendants will be suboptimally deterred from removing cases and, as this Article repeatedly has observed, the fundamental purposes of the fee-shifting statute will remain unrealized.197

Another problem with the “merits” test is its implication that fees should be taxed only if the removing defendants’ actions are “improvident in the sense that they present no credible statutory basis for jurisdiction.”198 Such a definition comes perilously close to stating that fees should be withheld unless the defendant acts in bad faith—at least if we believe that the defendant’s subjective intent may be judged by the visible manifestations of his conduct. Although the Gray court recognized that Congress intended for judges to exercise discretion when they determine whether to award fees, it is unclear why the court went on to suggest that only an “improvident” removal should justify such an award. When Congress amended the fee-shifting statute, it expressly deleted references to whether the case was “removed improvidently”199 and instead stated that “[a]n order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal.”200 Furthermore, as explained previously, if the central issue is whether there was a “credible statutory basis” for the removal, fees should be routinely awarded in view of the fact that an ineffective removal, by definition, lacks such a basis in law. Cases may be removed if there is a statutory basis for jurisdiction and they must be remanded if there is not. Any attempt to distinguish between legally flawed removals that are “credible” or “incredible” is an exercise in futility.

Indeed, a close review of the Gray court’s attempt to give some content to its “merits” test serves only to underscore the test’s arbitrariness. The court listed several examples of situations in which it would refrain from awarding fees, including situations in which the defendant: (1) erroneously argues that a co-defendant was fraudulently joined; (2) exercises due diligence but nevertheless fails to remove the case within the thirty-day limit prescribed by the statute; and (3) erroneously asserts but fails to prove that he is a resident

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197. See supra text accompanying notes 77, 105-08.
of a different state from that which has been alleged by the plaintiff. According to the court, none of these situations would "trigger § 1447(c) liability for attorneys fees because this court could readily find the odds of a good removal sufficient to justify the attempt." It is possible, however, to argue that the defendant's conduct was utterly unreasonable in each of the situations listed above. The exceeding difficulty of establishing jurisdiction on the basis of fraudulent joinder, for example, is well known, and thus, it is fair to say that it is unreasonable to remove a case whenever there is conceivable doubt about the joinder's validity. It is also fair to assess fees against any defendant who seeks to establish federal jurisdiction on the basis of spurious claims about his own state of residence. Moreover, many courts have awarded fees in cases where the defendant failed to comply with the removal statute's procedural requirements, recognizing that tardiness is not an appropriate excuse for inflicting costs upon an innocent plaintiff. Furthermore, it is by no means clear why a court should deny plaintiffs the ability to recover fees in any number of situations when they successfully oppose a remand. Irrespective of whether a defendant believes it has solid grounds for removing a case, the fact remains that the public and private harms of the erroneous removal accrue and are borne by the judiciary and the opposing party whenever a removal is legally ineffective.

In the final analysis, the "merits" test is really not a test at all; it is simply a vehicle for effectuating the preferences of individual judges in certain cases brought before them. Unlike this Article's two-part test, which accommodates the bedrock principles of federal jurisdiction and the will of Congress in a uniform manner, the "merits" test is an equally flawed yet less complete version of the "reasonableness" test that has been embraced by only one federal appellate court. Too much is at stake for courts to continue tinkering with the "merits" test, which, like the "reasonableness" and "qualified immunity" tests, is structurally flawed and ill-tailored to serve any legitimate societal interest. Only by rejecting such tests and embracing the two-part test articulated in this Article can courts hope to deter erroneous

202. Id. at 635.
203. See Mayes v. Rapoport, 198 F.3d 457, 464 (4th Cir. 1999); Crowe v. Coleman, 113 F.3d 1536, 1538 (11th Cir. 1997); Poulos v. Naas Foods, Inc., 959 F.2d 69, 73 (7th Cir. 1992).
205. See supra note 120 and accompanying text.
removals, compensate aggrieved plaintiffs, protect the rights of plaintiffs to choose the forum of the litigation, and conserve the resources of the judges who are embroiled in the removal-and-remand process every day.

V. CONCLUSION

The removal statute, 28 U.S.C. § 1447(c), contains a fee-shifting provision which states, in pertinent part, that any “order remanding [a] case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal.” The statute was amended largely because of Congress’s belief that the administration of justice was being jeopardized by the rising caseloads faced by many federal district courts. Legally flawed removals play no small part in today’s caseload crisis: Approximately fifteen percent of the 30,000 cases removed to federal court annually are remanded for lack of subject matter jurisdiction, and these ineffective removals result in delays and inefficiencies in the administration of justice while further imposing steep costs upon the opposing party and creating needless friction between the federal and state courts.

This Article has proposed that judges, upon remanding a case, should proceed to award attorney’s fees and costs to the plaintiff unless: (1) the plaintiff caused the erroneous removal by misrepresenting facts that were necessary for the defendant to make an informed decision to remove the case; or (2) the plaintiff caused the case to be remanded by divesting the court of jurisdiction after the removal. By routinely shifting fees when a case is remanded, courts can deter erroneous removals, protect the rights of plaintiffs to choose the forum of the litigation, and compensate aggrieved plaintiffs for their costs of responding to the defendant’s jurisdictional arguments. Because this Article’s test advances numerous public policy interests and furthers the will of Congress in enacting the statute, this test should be adopted to the exclusion of alternative standards that have been developed over the past several years.