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NOTE

A Confusing Clarification: How the Bad-Faith Exception in 28 U.S.C. § 1446(c) Costs More Than It Is Worth

Tate Cooper[*]

I. INTRODUCTION

It matters where a case is heard.[1] Venue and jurisdiction are not solely dry, esoteric matters—they impact the course of litigation and litigants' rights. In general, plaintiffs prefer to litigate in state court,[2] while defendants prefer federal court.[3] Unfortunately for defendants, federal courts have limited jurisdiction.[4] To remove an action from state to federal court, defendants must plausibly characterize an action as fitting within a particular jurisdictional grant. As attentive civil procedure students

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[1] *See* Stewart Org. v. Ricoh Corp., 487 U.S. 22, 39 (1988) (Scalia, J., dissenting) ("Venue is often a vitally important matter, as is shown by the frequency with which parties contractually provide for and litigate the issue."); *see also* Joe Winebrenner, *The Role of Equity and Fairness in Determining The Propriety of Removal*, AM. BAR. ASS'N (Apr. 4, 2022), https://www.americanbar.org/groups/litigation/committees/mass-torts/articles/2022/spring2022-the-role-of-equity-and-fairness-in-determining-the-propriety-of-removal/ [https://perma.cc/TU8K-FGMH] ("[C]ases can be won or lost, and exposure can rise or fall, based on whether the case is litigated in a state or federal forum.").

[2] Alison Frankel, *State Court Will Be Next Frontier for Consumer Class Actions Under Federal Law*, REUTERS NEWS (June 28, 2021, 4:05 PM), https://www.reuters.com/legal/litigation/state-court-will-be-next-frontier-consumer-class-actions-under-federal-law-2021-06-28/ [https://perma.cc/3NYY-94LY] (one plaintiffs' attorney quipped: "We're happy as pigs in slop in state court.").

[3] *See, e.g.*, *id.*

[4] Home Depot U.S.A., Inc. v. Jackson, 139 S. Ct. 1743, 1746 (2019) (quoting Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994)).

remember from *World-Wide Volkswagen Corp. v. Woodson*,[5] defendants go to extraordinary lengths to avoid plaintiff-friendly jurisdictions.[6]

Congress recently gave defendants a new arrow in their quiver: 28 U.S.C. § 1446(c)(1)'s bad-faith exception to the one-year bar on diversity removals.[7] This exception allows defendants to remove an action for diversity more than one year after commencement if the district court finds that the plaintiff "acted in bad faith in order to prevent" removal.[8] In a typical bad-faith removal, a plaintiff brings state claims against diverse and non-diverse defendants in state court, and dismisses non-diverse defendants after one year has passed.[9] The diverse defendants then remove the case to federal district court, alleging that the plaintiffs acted in bad faith to prevent earlier removal.[10] In most cases, the district court does not find bad faith and remands the case to state court.[11] This Comment examines how this avenue to federal jurisdiction has been used by litigants and understood by courts.

U.S. District Courts apply the bad-faith exception with almost no binding case law because U.S. Courts of Appeals lack jurisdiction over district court orders remanding cases.[12] Additionally, there is very little academic research about how district courts apply the bad-faith exception.[13] This Comment reviews decisions involving the bad-faith exception from June 30, 2018, through November 20, 2022 to provide a

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[5] 444 U.S. 286 (1980) (defendants argued that Oklahoma lacked personal jurisdiction over non-diverse defendants that prevented removal to federal court).

[6] *See generally* Charles Adams, World-Wide Volkswagen v. Woodson-*The Rest of the Story*, 72 NEB. L. REV. 1122, 1128–29 (1993) (if the Oklahoma courts lacked personal jurisdiction over the dealer and importer, who shared residency with the plaintiffs, then the case could be removed on the basis of diversity from plaintiff-friendly Creek County, Oklahoma).

[7] *See* 28 U.S.C. § 1446(c)(1).

[8] *Id.*

[9] *See, e.g.*, Torres v. Honeywell, Inc., No. 2:20-cv-10879-RGK-KS, 2021 WL 259439, at *1 (C.D. Cal. Jan. 25, 2021).

[10] *See, e.g.*, *id.*

[11] *See, e.g.*, *id.* at *3.

[12] 28 U.S.C. § 1447(d). Circuit courts, however, do have jurisdiction over cases that are not remanded—i.e., cases where bad faith is found—because they must also consider whether federal courts have subject-matter jurisdiction. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006) ("[C]ourts, including this Court, have an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party."); *see, e.g.*, *Hoyt v. Lane Constr. Corp.*, 927 F.3d 287, 292–93 (5th Cir. 2019) (reviewing bad-faith finding).

[13] The most substantial contribution comes from Professor Percy, who surveyed case law involving the bad-faith exception from 2012 through June 2018. *See* E. Farrish Percy, *Inefficient Litigation Over Forum: The Unintended Consequences of the JVCA's "Bad Faith" Exception to the Bar on Removal of Diversity Cases After One Year,* 71 OKLA. L. REV. 595, 622–23 (2019).

new survey of evolving judicial interpretations of this provision. District courts have applied five distinct standards in interpreting "bad faith" under 28 U.S.C. § 1446(c)(1).[14] While these standards overlap, there are fine-grained distinctions that demonstrate the pseudo-common-law process that district courts have followed to interpret and apply the bad-faith exception.

The bad-faith exception provides opportunities for defendants to delay resolution and increases litigation costs for plaintiffs (and courts).[15] These costs could be justified if the bad-faith exception protected defendants' rights to proceed in federal court under diversity jurisdiction, but the exception fails to do that. First, findings of bad faith are rare and largely confined to a small subset of plaintiffs' conduct.[16] Further, plaintiffs can easily avoid a determination of bad faith, generally by engaging in token litigation activities and hiding their motivation for decisions, or by providing any plausible explanation for decisions beyond thwarting removal.[17] Thus, the exception fails to protect defendants' right to remove against all plaintiffs that act in bad faith to prevent removal. Rather, it punishes only those unfortunate plaintiffs who hired incompetent, and perhaps unlucky, attorneys. In the past decade, hundreds of removals have relied on this snippet of statute, but a little less than ninety percent of these cases were remanded to state court.[18]

The bad-faith exception is costly to both plaintiffs and courts and fails to achieve its main objective—protecting defendants' right to remove. Courts, however, have a mechanism to discourage frivolous removals:

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[14] *See infra* Parts III–IV. (1) Intentional conduct finds that a plaintiff acts in bad faith by intentionally engaging in an action specifically to prevent a defendant from removing the action. (2) The *Aguayo* test asks first if a plaintiff actively litigated against the non-diverse defendant; if so, then there is a rebuttable presumption of good faith that can only be overcome by direct evidence of bad faith. (3) The *Heacock* test first asks whether the plaintiff actively litigated against the non-diverse defendant but, if the plaintiff did litigate against the defendant, turns to three factors to determine if the plaintiff acted in bad faith. (4) *Heacock + Aguayo* is a recent standard that looks to four factors, including active litigation and the other factors from *Heacock*. (5) In *Hoyt*, the Fifth Circuit applied four factors related to evidence against the non-diverse defendant, timing, consideration received for dismissal, and the manner in which plaintiffs pursued claims against non-diverse defendants.

[15] *See* E. Farrish Percy, *Inefficient Litigation Over Forum: The Unintended Consequences of the JVCA's "Bad Faith" Exception to the Bar on Removal of Diversity Cases After One Year,* 71 OKLA. L. REV. 595, 622–23 (2019); *see also* Steven Plitt & Joshua D. Rogers, *Delay, Manipulation, and Controversy: The Impact of the 2012 Amendments to 28 U.S.C. § 1446 on the Battles for Removal of Cases to Federal Court*, 6 PHOENIX L. REV. 633, 634 (2013) ("For plaintiffs, litigation in federal court can be more expensive and time consuming.").

[16] *See infra* Part IV.B.

[17] *See infra* Part IV.C.

[18] *See infra* Part IV.D.

district courts may impose costs upon defendants who unsuccessfully remove their cases.[19] Imposing costs more frequently on removing defendants deters frivolous removals but still protects defendants' right to remove when appropriate. Courts infrequently impose costs, however, largely because they refuse to conclude that defendants acted unreasonably in removing an action, considering the ill-defined nature of the bad-faith exception.[20] Congress could easily amend the statute to presumptively award costs to plaintiffs for diversity removals after one year, absent a showing of good cause by defendants. In the absence of congressional action, courts could more frequently impose costs on unsuccessful removing defendants, but this requires some form of coordinated action in the absence of precedent.

II. LEGAL BACKGROUND

Federal district courts are courts of limited jurisdiction and may hear cases only if granted jurisdiction by a statute.[21] Cases satisfy this "subject-matter" jurisdiction requirement if they present a "federal question,"[22] or if a party establishes "diversity jurisdiction."[23] Diversity jurisdiction occurs when the amount in controversy exceeds $75,000 and no plaintiff shares state citizenship with any defendant.[24] The requirements of diversity jurisdiction represent a balance between preserving access to federal forums in cases where defendants may have an unfair disadvantage in state court and limiting that access to avoid overburdening the federal judiciary.[25]

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[19] 28 U.S.C. § 1447(c).

[20] *See, e.g.*, Rantz v. Shield Coat, Inc., No. 2:17-cv-03338-LMA-JVM, 2017 WL 3188415, at *7 (E.D. La. July 26, 2017) ("Congress codified the bad faith exception to the § 1332 one-year removal window in 2011 and courts are only beginning to grapple with the exception's contours. The court finds it inappropriate to award plaintiffs the costs and fees associated with removal." (footnote omitted)).

[21] *See* Home Depot U.S.A., Inc. v. Jackson, 139 S. Ct. 1743, 1746 (2019).

[22] *Id.* (citing 28 U.S.C. § 1331). Federal question jurisdiction is present if a claim "arises under" federal law. Merrell Dow Pharms., Inc. v. Thompson, 478 U.S. 804, 808 (1986); *see also* Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149, 152–53 (1908) (establishing the "well-pleaded complaint" standard). In general, a cause of action created by federal law presents a federal question. *Thompson*, 478 U.S. at 808.

[23] *Home Depot U.S.A., Inc.*, 139 S. Ct. at 1746 (2019) (citing 28 U.S.C. § 1332(a)).

[24] 28 U.S.C. § 1332(a); *see also* Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267, 267 (1806) (establishing complete diversity requirement for diversity jurisdiction).

[25] *See* Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 552 (2005) (Congress created diversity jurisdiction to provide a neutral forum for citizens of different states but imposed the amount in controversy requirement "to ensure that diversity jurisdiction does not flood the federal courts with minor disputes").

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A. Origins of the One-Year Bar and Bad-Faith Exception

28 U.S.C. § 1446 provides the procedural requirements for defendants removing a case to federal court. Generally, a defendant must remove an action within thirty days of receiving the initial pleading.[26] If the case is not initially removeable, however, the defendant must remove within thirty days of receiving any filing that provides notice that the case is or has become removeable.[27] In general, diversity cases cannot be removed more than one year after commencement.[28] This one-year bar was added in 1988 by the Judicial Improvements and Access to Justice Act.[29] According to scholars, Congress intended to lighten federal courts' caseloads even if doing so inevitably invited forum manipulation by plaintiffs aiming to remain in state court.[30]

District courts adopted different applications of the statute. Some recognized an equitable exception to the one-year bar on diversity removals when a plaintiff engaged in forum manipulation.[31] In *Tedford v. Warner-Lambert Co.*, the Fifth Circuit became the first court of appeals to address the issue.[32] The *Tedford* court held that the one-year bar on removal was procedural, rather than jurisdictional,[33] and was therefore

[26] 28 U.S.C. § 1446(b)(1).

[27] 28 U.S.C. § 1446(b)(3). A case becomes removeable if it now satisfies criteria for federal jurisdiction that were lacking at the outset–for instance, if a non-diverse defendant is voluntarily dismissed. For further explanation of how plaintiffs may engage in forum manipulation (and how cases may become removeable after commencement), see *infra* Parts II.B. and III.

[28] 28 U.S.C. § 1446(c)(1).

[29] Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, 102 Stat. 4642 (1988).

[30] *See* E. Farrish Percy, *Inefficient Litigation Over Forum: The Unintended Consequences of the JVCA's "Bad Faith" Exception to the Bar on Removal of Diversity Cases After One Year*, 71 OKLA. L. REV. 595, 601–02 (2019).

[31] *See* Kinabrew v. Emco-Wheaton, Inc., 936 F. Supp. 351, 352 nn. 1–2 (M.D. La. 1996) (collecting cases).

[32] 327 F.3d 423, 425–26 (5th Cir. 2003). Tedford, along with a co-plaintiff, sued Warner-Lambert and one nondiverse defendant, a physician. *Id.* at 424. The in-state physician, however, never treated Tedford, and her claims were severed from her co-plaintiff's. *Id.* at 424–25. Tedford then amended her petition to also name her treating physician as a defendant. *Id.* at 425. Before one year had expired, and without taking any discovery from him, Tedford dismissed her treating physician, but she did not notify Warner-Lambert until after one year had passed since commencement. *Id.* Warner-Lambert removed, and the trial court denied Tedford's remand motion and certified an interlocutory appeal. *Id.*

[33] As its name suggests, a jurisdictional rule dictates a federal court's power—specifically its subject-matter jurisdiction—to hear a case. *See* Henderson *ex rel.* Henderson v. Shineski, 562 U.S. 428, 434–35 (2011). If a rule is jurisdictional, then a court has an independent obligation to determine its own jurisdiction, and it cannot waive or excuse noncompliance with the rule because it has no power to adjudicate

subject to an equitable exception when a plaintiff engaged in forum manipulation to prevent removal.[34] The opinion, however, "did not define the exception's scope or suggest relevant factors to its application."[35] The vast majority of courts interpreted the one-year bar as jurisdictional and did not recognize any equitable exceptions in its application.[36]

Nonetheless, in 2004, the American Law Institute ("ALI") proposed removing the one-year bar,[37] and, in its place, authorizing district courts to remand diversity cases removed more than one year after commencement "in the interest of justice."[38] ALI reasoned that this new formulation "substitutes for the currently overbroad and easily abused one-year time limit on diversity removal a more flexible yet limited provision allowing remand."[39] ALI also viewed this proposal as aligning with the *Tedford* exception.[40] The House Judiciary Subcommittee on Courts, the Internet, and Intellectual Property heard testimony on proposed changes in 2005, and legislation was introduced in subsequent Congresses.[41] In 2011, Congress passed the Jurisdiction and Venue Clarification Act ("JVCA"), which provided:

> (1) A case may not be removed under subsection (b)(3) on the basis of jurisdiction conferred by section 1332 more than 1 year after commencement of the action, unless the district court finds that the

the case. *Id.* at 434. While some procedural or "claim-processing" rules may be strict and inflexible, courts may generally excuse noncompliance or modify such requirements for equitable concerns. Kwai Fun Wong v. Beebe, 732 F.3d 1030, 1035 (9th Cir. 2013) ("While courts '[have] no authority to create equitable exceptions to jurisdictional requirements,' nonjurisdictional claim-processing requirements remain 'subject to [*Irwin*'s] rebuttable presumption in *favor* of equitable tolling.'" (quoting Bowles v. Russell, 551 U.S. 205, 214 (2007) then Holland v. Florida, 560 U.S. 631, 648 (2010)).

[34] *Tedford*, 327 F.3d at 427 ("[F]orum manipulation justifies application of an equitable exception in the form of estoppel.").

[35] Aguayo v. AMCO Ins. Co., 59 F. Supp. 3d 1225, 1270 (D.N.M. 2014).

[36] *Id.* ("The Fifth Circuit remained the only Circuit to endorse the equitable exception, and only three district courts outside the Fifth Circuit applied the exception and refused to remand a case on bad-faith grounds."); E. Farrish Percy, *The* Tedford *Equitable Exception Permitting Removal of Diversity Cases After One Year: A Welcome Development or the Opening of Pandora's Box?*, 63 BAYLOR L. REV. 146, 150–51, 160 (2011).

[37] *See* AM. L. INST., FEDERAL JUDICIAL CODE REVISION PROJECT 435–37 (2004).

[38] *Id.* at 463.

[39] *Id.* at 466.

[40] *See id.* at 467 n.106.

[41] Percy, *supra* note 13 at 607–08 (citing *Federal Courts Jurisdiction Clarification Act: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 109th Cong. (2005)).

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plaintiff has acted in bad faith in order to prevent a defendant from removing the action.[42]

The House Report noted that some courts interpreted the one-year bar as an absolute jurisdictional limit, while others approached it as a procedural requirement subject to equitable tolling and concluded that "inclusion of statutory language to resolve the conflict is appropriate."[43] The JVCA took effect in January 2012.[44]

B. Standards

There are several forms of gamesmanship that plaintiffs may employ in joining parties.[45] The bad-faith exception is generally seen as addressing strategic joinder, or cases in which a plaintiff brings non-frivolous claims against a non-diverse defendant, without any intention of meaningfully pursuing those claims, for the sole purpose of defeating diversity jurisdiction.[46] This is distinct from fraudulent joinder, where a plaintiff pursues *frivolous* claims against an in-state defendant.[47] Similarly, strategic joinder is distinct from "fraudulent procedural misjoinder," which entails pursuing non-frivolous claims against a non-diverse defendant but in an improper fashion under state joinder rules.[48] The following standards generally focus on rooting out strategic joinder.

The statute sets out one form of bad-faith conduct for plaintiffs: "deliberately fail[ing] to disclose the actual amount in controversy to prevent removal."[49] Most commentators identify two standards that district courts have applied to other actions:[50] (a) "intentional conduct,"

[42] Jurisdiction and Venue Clarification Act, Pub. L. 112–63, 125 Stat. 758, 760 (2011) (codified at 28 U.S.C. § 1446(c)(1)).

[43] H.R. REP. NO. 112-10 at 15 (2011).

[44] Pub. L. No. 112–63, 125 Stat. 758, 762.

[45] *See generally*, Percy, *supra* note 13 at 615–20, (discussing strategic joinder, fraudulent joinder, and fraudulent procedural misjoinder); Katherine L. Floyd, Note, *The One-Year Limit on Removal: An Ace Up the Sleeve of the Unscrupulous Litigant?*, 54 GA. STATE U. L. REV. 1073, 1080–82 (2008) (describing permissive joinder, compulsory joinder, fraudulent joinder, and strategic joinder).

[46] Percy, *supra* note 13 at 615–16; Floyd, Note, *supra* note 45, at 1082.

[47] Percy, *supra* note 13, at 616.

[48] *Id.* at 619. Percy notes that fraudulent procedural misjoinder may constitute bad faith under the JVCA but would not need to be if fraudulent procedural misjoinder were recognized as a separate doctrine, like fraudulent joinder. *Id.* at 621–22.

[49] 28 U.S.C. § 1446(c)(3)(B).

[50] *See, e.g.*, Williams v. 3M Co., No. 7:18-CV-63-KKC, 2018 WL 3084710, at *3 (E.D. Ky. June 22, 2018) ("[T]wo prevailing standards have emerged."); Anne K. Guillory, *Good Strategy or Forum Manipulation? The Continuing Evolution of the Bad Faith exception to the One-Year Time Limit on Removal*, 86 DEF. COUNS. J. 1, 4, 7 (2019); Percy, *supra* note 13, at 626–28.

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which finds bad faith if a plaintiff intentionally engages in an action specifically to prevent a defendant from removing the action;[51] and (b) a two-part test from *Aguayo v. AMCO Insurance Co.* based on whether a plaintiff actively litigated against a non-diverse defendant or if there is direct evidence of bad faith.[52] In reviewing district court decisions from over the past four years, however, three further standards emerge: (a) *Heacock v. Rolling Frito-Lay Sales, LP*,[53] which requires active litigation to avoid bad faith and considers the timing of naming and dismissing a non-diverse defendant and the explanation for dismissal; (b) a combination of *Heacock* and *Aguayo*, which operates as a four-factor test—the three *Heacock* factors plus "active litigation";[54] and (c) factors from *Hoyt v. Lane Construction Corp.*, which include evidence against the non-diverse defendant, timing of dismissal, consideration for dismissal, and the manner of litigation against the non-diverse defendant.[55]

1. Intentional Conduct

The first courts to interpret "bad faith in order to prevent removal" under § 1446(c)(1) developed the intentional conduct standard.[56] Under the standard, a plaintiff acts in bad faith if the court finds that the plaintiff "engaged in intentional action or inaction that prevented [the defendant] from otherwise properly filing for removal before the expiration of the one-year period."[57] Courts have further elaborated that, to act in bad faith, plaintiffs must have acted "specifically to prevent removal."[58]

In application, courts appear to require fairly direct evidence of intent. In one case, for instance, the court found that the plaintiff acted in bad faith when, at the advice of his lawyer, he named a local truck dealership as a defendant merely "to keep the suit in Ohio instead of Federal Court" and told the dealership as much.[59] Another court concluded that plaintiffs acted in bad faith to prevent removal when they

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[51] *See, e.g.*, Keller Logistics Grp., Inc. v. Navistar, Inc., 391 F. Supp. 3d 774, 778 (N.D. Ohio 2019).

[52] 59 F. Supp. 3d 1225, 1274–77 (D.N.M. 2014).

[53] No. C16-0829-JCC, 2016 WL 4009849, at *3 (W.D. Wash. July 27, 2016).

[54] *See, e.g.*, Torres v. Honeywell, Inc., No. 2:20-cv-10879-RGK-KS, 2021 WL 259439, at *3 (C.D. Cal. Jan. 25, 2021).

[55] 927 F.3d 287, 292 (5th Cir. 2019).

[56] *See* Guillory, *supra* note 49 at 4 (citing Taylor v. King, No. 5:12-CV-1, 2012 WL 3257528, at *5 (W.D. Ky. Aug. 8, 2012)).

[57] Comer v. Schmitt, No. 2:15-cv-2599, 2015 WL 5954589, at *4 (S.D. Ohio Oct. 14, 2015).

[58] Hiser v. Seay, No. 5:14-CV-170, 2014 WL 6885433, at *4 (W.D. Ky. Dec. 5, 2014).

[59] Keller Logistics Grp., Inc. v. Navistar, Inc., 391 F. Supp. 3d 774, 779 (N.D. Ohio 2019).

admitted in their reply brief that they retained the non-diverse parties until the one-year time limit passed to keep the case in state court and due to the "likelihood of attempted removal."[60] A court also found bad faith under the intentional conduct standard when, after one year had passed, a plaintiff reneged on a stipulation in her initial complaint that she would not seek damages in excess of $75,000.[61]

District courts within the Sixth Circuit apply the intentional conduct standard,[62] and these courts have not applied another standard within the last four years. Several other courts have also applied the intentional conduct standard, or a substantially similar standard over the same period.[63]

2. *Aguayo*

"[T]he signature federal case on removal,"[64] began with a brutal murder.[65] Trujillo was incensed that Aguayo was talking to Trujillo's girlfriend.[66] Trujillo took the service pistol issued to his mother's domestic partner, a New Mexico State Police officer, arranged a meeting with Aguayo, and shot him several times.[67] Aguayo died.[68] The Aguayo family submitted an insurance claim to AMCO Insurance under their uninsured motorist coverage because Trujillo used a vehicle to carry out the crime, but the claim was denied.[69] The family later filed suit in New Mexico state court against Trujillo, Trujillo's mother's domestic partner, the state department of public safety, and the state itself.[70] Approximately six

[60] *Hiser,* 2015 WL 5954589, at *4.

[61] Brogan-Johnson v. Navient Sols., Inc., No. 5:21-CV-155, 2021 WL 4597661, at *4–5 (N.D. W. Va. Oct. 6, 2021). Oddly, *Brogan-Johnson* does not cite 28 U.S.C. § 1446(c)(3).

[62] *See* Becker v. Ford Motor Co., No. 1:20-CV-281-TAV-CHS, 2021 WL 4221618, at *7 (E.D. Tenn. Sept. 15, 2021) (collecting cases).

[63] *See Brogan-Johnson,* 2021 WL 4597661, at *3; Valderramos v. Giti Tire Ltd., No. 20-CV-62676-RAR, 2021 WL 1121004, at *2 (S.D. Fla. Mar. 24, 2021); Bolus v. IAT Ins. Grp., No. 19-1712, 2019 WL 3001628, at *3 (E.D. Pa. July 9, 2019); In re Zofran (Ondanestron) Prods. Liab. Litig., MDL No. 1:15-md-2657-FDS, 2019 WL 2491587, at *4 (D. Mass. June 13, 2019); Sloss v. Tyson Fresh Meats, No. 4:18-cv-00286, 2018 WL 9815609, at *3–4 (S.D. Iowa Dec. 17, 2018); Hopkins v. Nationwide Agribusiness Ins. Co., No. 4:18-cv-00315-KOB, 2018 WL 3428610, at *4 (N.D. Ala. July 16, 2018).

[64] Mullins v. Rish Equip. Co., No. 2:21-cv-00347, 2021 WL 4448296, at *3 (S.D. W. Va. Sept. 28, 2021).

[65] Aguayo v. Amco Ins. Co., 59 F. Supp. 3d 1225, 1230 (D.N.M. 2014).

[66] *Id.*

[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] *Id.* at 1231.

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months later, AMCO was added.[71] The plaintiffs dismissed all entities besides AMCO and Trujillo, and then, six days before trial, dismissed Trujillo.[72] AMCO removed the case two days before the state court trial was set to begin.[73]

To determine whether the plaintiffs acted in bad faith to prevent removal, the court developed a two-step framework based on (a) active litigation and (b) direct evidence that the non-diverse defendant was joined for the "*sole* reason" of defeating removal.[74] In the first step, a court must determine whether a plaintiff actively litigated her claims against the non-diverse defendant in state court.[75] Courts should adopt a "wide-open view of what constitutes active litigation," including—but not limited to—discovery, seeking a default judgment, and settling for more than nominal damages.[76] If the plaintiff did not actively litigate in state court, she acted in bad faith.[77] If she actively litigated against the non-diverse defendant, however, there is a "rebuttable presumption of good faith."[78]

Aguayo's second step allows the removing defendant to overcome the presumption of good faith through direct evidence that the plaintiff acted solely to prevent removal: "The Court wants a smoking gun or close to it."[79] The search for direct evidence, however, creates a conflict between the bad-faith exception's apparently subjective focus,[80] and general policies that restrict judicial access to a parties' litigation strategy, such as attorney-client privilege,[81] work-product doctrine,[82] and ethical requirements of confidentiality.[83] *Aguayo* favored the latter policies, limiting a defendant to evidence within its possession at the time of removal—a defendant cannot obtain relevant evidence through discovery

[71] *Id*.

[72] *Id.*

[73] *Id.*

[74] *See id*. at 1274–77.

[75] *Id.* at 1274.

[76] *Id.* at 1275.

[77] *Id*.

[78] *Id*.

[79] *Id.* at 1227.

[80] *See id* at 1266 ("That the inquiry focuses on the plaintiff's subjective intent can be gleaned from the statutory text . . . ."); *accord* Russo v. Stillwater Ins. Co., No. CV-19-04896-PHX-SMB, 2019 WL 4409971, at *2 (D. Ariz. Sept. 16, 2019) (citing Heller v. Am. States Ins. Co., No. CV 15-9771 DMG (JPRx), 2016 WL 1170891, at *2 (C.D. Cal. Mar. 25, 2016)).

[81] *See* Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) ("The attorney–client privilege is the oldest of the privileges for confidential communications known to the common law.").

[82] *See* FED. R. CIV. P. 26(b)(3); Hickman v. Taylor, 329 U.S. 495, 510–11 (1947).

[83] *See, e.g.*, MODEL RULES OF PRO. CONDUCT r. 1.6 (AM. BAR ASS'N 2022).

or an evidentiary hearing after removal.[84] The court adopted this limit to avoid intrusions into attorney strategy.[85] Permitting only direct evidence contradicts general evidentiary principles that draw no distinction between direct and circumstantial evidence.[86] The *Aguayo* court justified this limitation based on efficiency concerns, acknowledging that direct evidence of subjective intent will not exist in most cases.[87] Facially, and in application, this second step of the *Aguayo* framework closely resembles the intentional conduct standard that other courts have applied.[88]

In *Aguayo*, the court held that the plaintiffs had not acted in bad faith and remanded the case.[89] The court reasoned that the plaintiffs actively litigated against Trujillo by conducting discovery and against the state defendants by negotiating a monetary settlement.[90] AMCO also argued that the plaintiffs obscured the true amount in controversy, but this argument failed because the parties were not completely diverse when the amount in controversy was established (Trujillo was still in the case), and AMCO had reason to know from commencement that the case satisfied the amount in controversy requirement.[91]

Several district courts have applied *Aguayo*, and a few districts have applied it routinely, including the Eastern District of Missouri,[92] the District of New Mexico,[93] all three district courts in Oklahoma,[94] and the

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[84] *Aguayo*, 59 F. Supp. 3d at 1263.

[85] *Id.* at 1276 ("[I]f Congress had intended to open up plaintiffs' attorneys to mind-probing depositions on their strategies and overrule the common-law work-product doctrine, then it likely would have said so in clearer terms.").

[86] *See, e.g.*, Lucas v. Duncan, 574 F.3d 772, 777 (D.C. Cir. 2009) (citing Desert Palace, Inc. v. Costa, 539 U.S. 90, 100 (2003)) (explaining that direct evidence and circumstantial evidence are weighed equally).

[87] *Aguayo*, 59 F. Supp. at 1276 ("[T]he Court does not want to expend any more judicial or litigation resources on these issues than necessary.").

[88] *See supra* Part II.B.1. It does not appear that courts applying the intentional conduct standard have articulated the same evidentiary limitation; however, the cases where bad faith has been found have included direct evidence of bad faith, such as a direct statement by a plaintiff or plaintiff's counsel that the motivation in retaining a non-diverse defendant in the action was to remain in state court. *See, e.g.*, *Keller Logistics Grp., Inc. v. Navistar, Inc.*, 391 F. Supp. 3d 774, 779 (N.D. Ohio 2019).

[89] *Aguayo*, 59 F. Supp. 3d at 1285.

[90] *Id.* at 1282–83.

[91] *Id.* at 1283–84.

[92] *See* Thompson v. GM LLC, No. 4:21-cv-00183-SEP, 2021 WL 3186587, at *3 (E.D. Mo. July 28, 2021); Northern *ex rel* E.H.S. v. BNSF Ry. Co., No. 1:19-CV-00141-JAR, 2019 WL 3934472, at *2 (E.D. Mo. Aug. 20, 2019); Bristol v. Ford Motor Co., No. 4:16–cv–01649–JAR, 2016 WL 6277198, at *3–4 (E.D. Mo. Nov. 27, 2016).

[93] *See, e.g.*, Edison Ranch, Inc. v. Mosaic Potash Carlsbad, Inc., No. CIV 17-0970 JB/CG, 2018 WL 582578, at *17–18 (D.N.M. Jan. 26, 2018).

[94] *See* Klintworth v. Valley Forge Ins. Co., No. 20-CV-0178-CVE-FHM, 2020 WL 3497468, at *3–4 (N.D. Okla. June 29, 2020); Graham v. CSAA Fire & Cas. Ins. Co., No. CIV-19-00793-PRW, 2020 WL 1699554, at *1 (W.D. Okla. Apr. 8, 2020);

Southern District of West Virginia.[95] Other district courts have applied *Aguayo* in at least one case.[96] The Middle and Southern Districts of Florida, however, have applied *Aguayo* in an opinion before later relying on the intentional conduct standard.[97]

3. *Heacock*

A separate standard has emerged from the Western District of Washington. In *Heacock v. Rolling Frito-Lay Sales, LP*, the court articulated a test similar in structure to *Aguayo* but with a broader, multifactored analysis for its second step.[98] First, it noted that other courts within the Ninth Circuit "applied a strict standard," finding bad faith when

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Stevens v. Winston Hosp., Inc., No. , 2020 WL 1285923, at *1–2 (E.D. Okla. Mar. 18, 2020); Rowan v. State Farm Fire & Cas. Ins. Co., No. CIV-19-00205-PRW, 2019 WL 4166697, at *5 (W.D. Okla. Sept. 3, 2019); Holman v. Coventry Health & Life Ins. Co., No. CIV-17-0886-HE, 2017 WL 5514177, at * 2 (W.D. Okla. Nov. 17, 2017).

[95] *See* Mullins v. Rish Equip. Co., No. 2:21-cv-00347, 2021 WL 4448296, at *3 (S.D. W. Va. Sept. 28, 2021); Holland v. CSX Transp., Inc., No. , 2021 WL 4448305, at *3 (S.D. W. Va. Sept. 28, 2021); Massey v. 21st Century Centennial Ins. Co., No. , 2017 WL 3261419, at *2 (S.D. W. Va. July 31, 2017).

[96] *See, e.g.*, Russo v. Stillwater Ins. Co., No. CV-19-04896-PHX-SMB, 2019 WL 4409971, at *2 (D. Ariz. Sept. 16, 2019); Parkview Gardens Bldg. Owners Ass'n v. Owners Ins. Co., No. 16-cv-2673-WJM-CBS, 2017 WL 3288313, at *6–7 (D. Colo. May 3, 2017).

[97] *Compare* Kamal-Hashmat v. Loews Miami Beach Hotel Operating Co., No. 16-cv-24864-GAYLES, 2017 WL 433209, at *4 (S.D. Fla. Jan. 27, 2017) (applying *Aguayo*), *and* NPV Realty, LLC v. Nash, No. 8:17–cv–636–T–30AEP, 2017 WL 1735101, at *2 (M.D. Fla. May 4, 2017) (applying *Aguayo*), *with* Valderramos v. Giti Tire Ltd., No. 20-CV-62676-RAR, 2021 WL 1121004, at *1 (S.D. Fla. Mar. 24, 2021) ("[A]pplication of the *Aguayo* test is unnecessary here where a statute—28 U.S.C. § 1446(c)(1)—clearly governs."), *and* Hajdasz v. Magic Burgers, LLC, No. 18-CV-1755, 2018 WL 7436133, at *2 (M.D. Fla. Dec. 10, 2018) (applying intentional conduct standard). Facially, the reasoning in *Valderramos* is deficient—*Aguayo* does not supplant § 1446(c)(1) but merely interprets it. *Aguayo*, 59 F. Supp. 3d at 1228. Further, the Magistrate Judge in *Valderramos* declined to apply *Aguayo* because settlement with the non-diverse defendant occurred more than four months before one year expired—thus, active litigation with the non-diverse defendant was irrelevant and what mattered was whether the plaintiff acted in bad faith *after* the settlement. Valderramos v. Giti Tire (USA) Ltd., No. 20-CV-62676-RUIZ/STRAUSS, 2021 WL 1520700, at *3 (Mar. 8), *aff'd and adopted by* Valderramos v. Giti Tire Ltd., No. 20-CV-62676-RAR, 2021 WL 1121004 (S.D. Fla. Mar. 24, 2021). But the *Aguayo* test still applies, even when active litigation (such as a settlement) is present—the Defendant must simply show direct evidence of bad faith, *Aguayo* 59 F. Supp. 3d at 1276, which, as discussed, is substantially similar to the intentional conduct test that the Court applied anyway.

[98] *See* No. C16-0829-JCC, 2016 WL 4009849, at *3 (W.D. Wash. July 27, 2016).

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a plaintiff failed to actively litigate a claim "*in any capacity*."[99] Second, the court outlined three factors that courts consider in determining whether a plaintiff acted in bad faith: (1) the timing of naming a non-diverse defendant to the case; (2) the timing of dismissing the non-diverse defendant (closer to the one-year mark is more suspicious); and (3) the explanation for dismissing the non-diverse defendant.[100]

Heacock alleged injuries after a Frito Lay delivery truck backed into him.[101] He sued both Frito Lay and the employee driving the truck, who was a non-diverse defendant and thus defeated federal subject matter jurisdiction.[102] Approximately nineteen months after commencement and just eighteen days before trial, Heacock voluntarily dismissed the employee.[103] The court found that Heacock did not act in bad faith because he had actively litigated against the employee by serving two discovery requests and deposing her.[104] Additionally, Heacock joined the employee at the start of the suit, dismissed her more than seven months after the one-year mark had passed, and provided a consistent explanation for the dismissal: he wanted to "spare her the entry of a large judgment against her."[105]

Other cases in the Western District of Washington have applied *Heacock* as well.[106]

III. RECENT DEVELOPMENTS

In recent years, courts have built upon the existing judicial standards of bad faith in preventing removal. In this way, the development of the bad-faith exception resembles an iterative process, not unlike how courts apply and modify common law precedents in new contexts. In some cases, however, it is not clear that courts are aware of the modifications they are imposing on interpretations of the bad-faith exception.

A. New Standards

An extensive case survey revealed two primary new standards in the past three years. Additionally, the Eleventh Circuit became the first circuit

[99] *Id.*
[100] *Id.*
[101] *Id.* at 1.
[102] *Id.*
[103] *Id.*
[104] *Id.* at 4.
[105] *Id.*
[106] *See* Scott v. Monroe, No. C20-1550-RSM-MAT, 2021 WL 373173, at *3 (Jan. 11), *recommendation adopted*, 2021 WL 366204 (W.D. Wash. Feb. 3, 2021); Kolova v. Allstate, 438 F. Supp. 3d 1192, 1196–97 (W.D. Wash. 2020).

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court to review a remand order finding no bad faith when it affirmed Rule 11 sanctions against a removing defendant's attorney.[107]

1. *Heacock* + *Aguayo*

Several courts in California and one court in Washington have applied *Heacock* alongside *Aguayo*.[108] While *Heacock* and *Aguayo* share some basic characteristics—both approaches conclude that a failure to actively litigate is bad faith but also acknowledge that other factors may show bad faith *even with* active litigation—*Heacock* appears to differ from *Aguayo* in at least two material regards.[109] First, there is no rebuttable presumption of good faith created by active litigation—it is simply necessary to avoid a finding of bad faith.[110] Second, bad faith may be shown through circumstantial evidence, i.e., the three *Heacock* factors,[111] rather than only by the "smoking gun" of direct evidence.[112]

In applying these standards alongside each other, however, courts seem to misconstrue both analyses. In one case, for instance, the court noted that "courts have considered the timing of naming and dismissing the non-diverse defendant, the explanation given for dismissal, and whether the plaintiff actively litigated the case in 'any capacity' against a non-diverse defendant before dismissal."[113] This analysis reduces active litigation to just one of several factors, a position at odds with both *Aguayo* and *Heacock*, which recognize a failure to actively litigate as bad faith.[114]

This conceptual shift manifested in a later case's analysis. In *Kalfsbeek Charter v. FCA US, LLC*, the plaintiff sued FCA and a local car dealership under California state law.[115] About eight months later, the dealership moved to compel arbitration, and the plaintiff dismissed the dealership one year and five days after the action commenced.[116] The

[107] *See* Hajdasz v. Magic Burgers, LLC, 805 F. App'x 884, 889–90 (11th Cir. 2020).

[108] *See, e.g.*, Torres v. Honeywell, Inc., No. 2:20-cv-10879-RGK-KS, 2021 WL 259439, at *3 (C.D. Cal. Jan. 25, 2021); Christian v. Regence Bluecross Blueshield of Ore., No. C20-5445-RJB-MAT, 2020 WL 5045157 (Aug. 3), *recommendation adopted*, 2020 WL 5038733 (W.D. Wash. Aug. 25, 2020)

[109] *See Heacock,* 2016 WL 4009849, at *3 (W.D. Wash. July 27, 2016); Aguayo v. AMCO Ins. Co., 59 F. Supp. 3d 1225, 1275 (D.N.M. 2014).

[110] *Compare Aguayo,* 59 F. Supp. 3d at 1275 *with Heacock,* 2016 WL 4009849 at *3.

[111] *Heacock*, 2016 WL 4009849, at *3.

[112] *Aguayo*, 59 F. Supp. 3d at 1277.

[113] *Torres*, 2021 WL 259439, at *3 (quoting *Heacock*, 2016 WL 4009849, at *3) (citing *Aguayo*, 59 F. Supp. 3d at 1263).

[114] *Heacock*, 2016 WL 4009849 at *3; *Aguayo,* 59 F. Supp. 3d at 1275.

[115] 540 F. Supp. 3d 939, 942 (C.D. Cal. 2021).

[116] *Id.* at 942, 944.

court found that two "factors" supported a finding of bad faith: the timing of dismissal and failure to serve any discovery on the dealership.[117] Nonetheless, the court remanded, finding that five "factors" weighed against bad faith: (1) the dealership was named at the outset of the case; (2) the plaintiff indicated that it intended to depose the dealership; (3) there was a legally viable basis for the claims against the dealership; (4) the plaintiff provided a valid reason for dismissal—to avoid arbitration of the entire case; and (5) the plaintiff offered a valid explanation for timing—the dismissal occurred on the same day that the memorandum in opposition to the dealership's motion to compel arbitration was due.[118] Notably, the court did not consider active litigation as a separate issue but simply a factor balanced with several others.[119] Under the *Aguayo* or *Heacock* standard, it seems highly likely that the plaintiff's decisions to name and retain the local defendant constituted bad faith based solely on the failure to actively litigate against the dealership.[120]

Because this relatively new test diminishes the significance of active litigation compared to *Aguayo* and *Heacock*, it should be viewed as a legally distinct standard of bad faith.[121] One could imagine, for example, a case in which a plaintiff did not actively litigate against a non-diverse defendant but provided a valid reason and sufficiently satisfied the other factors, like *Kalfsbeek Charter*. Under *Aguayo* and *Heacock*, failure to actively litigate is bad faith *per se*.[122] But this is not the case under this new combined approach.

[117] *Id*. at 943–44.

[118] *Id*. at 943–45.

[119] *Id.* at 944.

[120] *See* Aguayo v. AMCO Ins. Co., 59 F. Supp. 3d 1225, 1275 (D.N.M. 2014). The *Kalfsbeek Charter* court suggested that the intention to depose the dealership could satisfy *Aguayo*'s active litigation prong. 540 F. Supp. 3d at 944 ("[T]he plaintiff can satisfy the standard even if he or she did not take discovery if he or she engaged in any other form of active litigation." (quoting *Aguayo*, 59 F. Supp. 3d at 1275)). It stretches *Aguayo* past its breaking point, however, to argue that the intention to depose another party qualifies as "active" litigation. "Active" implies some form of actual conduct, not the mere ambition to litigate later. Further, if a plaintiff can defeat a bad-faith allegation by simply arguing that she "*still* intends to depose" the defendant, Pl.'s Reply in Supp. of Mot. to Remand at 3, *Kalfsbeek Charter* (No. CV 21-2799 DSF (AGR)), then the bad-faith exception would have virtually no deterrent effect against plaintiff forum manipulation.

[121] It does not appear that the Central District of California was aware that it was modifying these tests or that it set out to fashion a new test in the way that *Aguayo* very self-consciously did. *Torres v. Honeywell*, for instance, cites only *Aguayo* and *Heacock* but fails to consider the bifurcated approach that both those cases took toward active litigation, instead noting merely that active litigation was considered. No. 2:20-cv-10879-RGK-RS, 2021 WL 259439, at *3 (C.D. Cal. Jan. 25, 2021).

[122] *See Aguayo,* 59 F. Supp. 3d at 1274–75; *Heacock v. Rolling Frito-Lay Sales, LP*, No. C16-0829-JCC, 2016 WL 4009849, at *3 (W.D. Wash. July 27, 2016).

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2. *Hoyt* Factors

The Fifth Circuit foreshadowed the JVCA's bad-faith exception by developing the *Tedford* exception to the one-year bar on diversity removal. Many authorities, in fact, recognized the 2011 amendments to the removal statute as a codification of *Tedford*,[123] and many district courts within the Fifth Circuit continued to apply *Tedford* even after the JVCA was enacted.[124] In 2019, however, the Fifth Circuit concluded in *Hoyt v. Lane Construction Corp.* that the bad faith standard under § 1446(c)(1) is distinct from the *Tedford* standard for an equitable exception under the prior version of § 1446.[125]

Hoyt's vehicle slid on ice, flipped, and landed in a pool of water next to a culvert beside a Texas farm road that was under construction.[126] Hoyt drowned, and his administrator and other surviving family members filed suit in state court on September 20, 2016.[127] The petition alleged premises liability claims against a diverse defendant, Lane Construction (the general contractor for the state), and two other non-diverse contractors, Storm Water Management, and C.E.N. Concrete Construction.[128] The court granted summary judgment in favor of C.E.N. in May 2017, and plaintiffs voluntarily dismissed Storm on September 22, 2017, two days after the one-year limit had passed.[129] Lane removed, arguing that the one-year bar did not apply because plaintiffs acted in bad faith by delaying their dismissal of Storm.[130] The district court denied plaintiffs' motion to remand, concluding that they had acted in bad faith to prevent removal because (1) they provided no explanation for the timing of dismissal, (2) they failed to introduce evidence of discussions with Storm, and (3) Lane

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[123] *See, e.g.*, Nathan A. Lennon, Note, *Two Steps Forward, One Step Back: Congress Has Codified the* Tedford *Equitable Exception, but Will Inconsistent Applications of "Bad Faith" Swallow the Rules?*, 40 N. KY. L. REV. 233, 242 ("As Congress explained, the intent behind § 1446(c)(1) was to codify the "Tedford Exception" and clarify ambiguity in the case law concerning whether the one-year limitation in § 1446 was jurisdictional or procedural."); *see also* E. Farrish Percy, *Inefficient Litigation Over Forum: The Unintended Consequences of the JVCA's "Bad Faith" Exception to the Bar on Removal of Diversity Cases After One Year*, 71 OKLA. L. REV. 595, 622 (2019); *Aguayo*, 59 F. Supp. 3d at 1272.

[124] *See* Jones v. Ramos Trinidad, 380 F. Supp. 3d 516, 521 n.49 (E.D. La. 2019) (collecting cases).

[125] *See* 927 F.3d 287, 293–94 (5th Cir. 2019).

[126] *Id.* at 291.

[127] *Id*.

[128] *Id*.

[129] *Id*. at 291–92.

[130] Hoyt v. Lane Constr. Corp., No. 4:17-CV-780-A, 2017 WL 4481168, at *1 (N.D. Tex. Oct. 5, 2017).

introduced evidence that plaintiffs knew several months before dismissing Storm that the evidence did not support a claim against it.[131]

The Fifth Circuit treated the finding of bad faith as a factual determination, reviewed for clear error, and affirmed.[132] The court, however, then rejected the view that *Tedford* governs an analysis of bad faith:

> If Congress had wanted to resolve the conflict by adopting the *Tedford* standard, it could have done so. But it did not. Congress instead chose to replace *Tedford*'s equitable-estoppel principle with a 'bad faith' standard. And we presume that choice of different text carries with it a choice of different meaning. We therefore no longer apply the old § 1446 and the *Tedford* exception we created. We now apply the new § 1446 and the bad-faith exception Congress created.[133]

The court did not clearly articulate a new standard, but it affirmed because plaintiffs knew for several months that their claims against Storm were not supported by evidence, dismissed those claims two days after the one-year mark, and received no consideration for dismissal.[134] Additionally, the plaintiffs included no fact witnesses against Storm, and their expert witness made no "serious efforts" to demonstrate Storm's liability.[135] Subsequently, several courts have identified relevant factors from *Hoyt*, including: (1) whether a plaintiff knows of evidence that supports a claim against the non-diverse defendant, (2) timing of dismissal of the non-diverse defendant, (3) whether the plaintiff received consideration for dismissal, and (4) "the way the plaintiffs pursued their claims against the non-diverse defendant."[136]

This test shares features with the *Heacock + Aguayo* test that some courts in California and Washington have applied.[137] The fourth *Hoyt* factor closely resembles active litigation, but it appears to encompass more behavior within its standard for bad faith. In *Hoyt*, for instance, the court considered that the plaintiffs "seem[ed] to have pursued their claim against

[131] *Id.* at *2.

[132] *Hoyt*, 927 F.3d at 292–93 (5th Cir. 2019) ("The district court found as a matter of fact the Hoyts acted in bad faith. The Hoyts failed to carry their burden to prove that finding was clearly erroneous."). The court also held that the voluntary-involuntary rule did not apply to prevent removal because C.E.N. was improperly joined. *Id.* at 295–96.

[133] *Id*. at 293–94.

[134] *Id*. at 292.

[135] *Id*.

[136] *See, e.g.*, Roberson v. Respironics, Inc., No. 4:20-CV-174-DMB-JMV, 2021 WL 2179265, at *3 (N.D. Miss. May 28, 2021).

[137] *See supra* notes 109–23. Curiously, *Hoyt* cites neither *Aguayo* nor *Heacock*.

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Storm only half-heartedly."[138] This contrasts with *Aguayo*'s "wide-open view" of active litigation, which is satisfied by "any one form" of litigation, regardless of plaintiff's vigor.[139]

3. *Hajdasz*

The Eleventh Circuit also recently addressed the bad-faith exception, affirming sanctions against a removing defendant's counsel.[140] Hajdasz alleged that he slipped on the bathroom floor in a franchised Burger King restaurant and sued the franchisee, Magic Burgers, for premises liability in Florida state court.[141] Approximately nineteen months later, as the trial was nearly finished and the case was about to be presented to the jury, Magic Burgers removed the case to federal court.[142] Magic Burgers claimed that Hajdasz acted in bad faith to obscure the true amount in controversy.[143] Hajdasz requested approximately $88,000 in damages in his motion for a partial directed verdict but previously listed specific medical expenses as only $24,000.[144]

The district court found that Hajdasz had not acted in bad faith because he (1) honestly answered questions regarding damages in his deposition, (2) failed to respond only to questions that were successfully objected to by his attorney, and (3) provided a full list of medical providers to Magic Burgers.[145] Accordingly, it was Magic Burgers's lack of diligence, *not* the plaintiff's bad faith, that prevented timely removal.[146] The district court awarded the plaintiff attorney's fees for the removal, finding the removal was objectively unreasonable.[147] Magic Burgers had no witnesses or exhibits at trial, and "[w]hen Magic Burgers decided it did not want to risk the outcome of the jury's verdict, it decided, immediately

[138] *Hoyt,* 927 F.3d at 292; *accord* Flores v. Intex Recreation Corp., No. 2:20-CV-73, 2020 WL 6385679, at *3 (S.D. Tex. July 2, 2020) (finding bad faith under *Hoyt* factors and concluding that plaintiff "half-heartedly" pursued claims by including only one line requesting information in the original complaint, not serving additional discovery, and not seeking a default judgment).

[139] Aguayo v. AMCO Ins. Co., 59 F. Supp. 3d 1225, 1275 (D.N.M. 2014).

[140] *See* Hajdasz v. Magic Burgers, LLC, 805 F. App'x 884, 889–90 (11th Cir.), *cert. denied*, 141 S. Ct. 372 (2020).

[141] Hajdasz v. Magic Burgers, LLC, No. 6:18-cv-1755-Orl-22KRS, 2018 WL 7436133, at *1 (M.D. Fla. Dec. 10, 2018).

[142] *Id*. at *5, *13.

[143] *Id*. at *1, *6.

[144] *See Hajdasz*, 805 F. App'x at 886–87. The complaint did not list a specific amount, merely specifying that damages exceeded $15,000 and requesting damages in an unspecified amount. *See* Complaint at 1–2, *Hajdasz*, 2018 WL 7436133.

[145] *Hajdasz*, 2018 WL 7436133 at *7–8.

[146] *Id.* at *8.

[147] *Id.* at *12.

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before closing arguments to the jury were to begin, to remove the case to this Court for a 'do-over.'"[148] The district court went a step further, imposing Rule 11 sanctions on Magic Burgers's attorney because his removal—without any argument that an exception to the one-year bar applied—"resulted in a tremendous waste of judicial, witness, and juror resources."[149]

The Eleventh Circuit affirmed the Rule 11 sanctions, reasoning that one year passed without removal because of the defendant's lack of diligence, the removal was "arguably frivolous," and the district court did not abuse its discretion by awarding sanctions.[150]

IV. Discussion

The bad-faith exception creates significant tension within federal procedure because there are many legitimate actions that litigants may take with the aim of litigating in a more desirable forum.[151] Perhaps this is why courts have found bad faith in a relatively limited set of circumstances.[152] Intriguingly, the facts that lead to a bad-faith finding are rather stable across the various standards used. This narrow definition, however, allows plaintiffs to easily structure their conduct to avoid running afoul of the bad-faith exception.[153] Indeed, the narrow interpretation of bad faith, combined with the relative ease in avoiding the statute, seems to lead to very few findings of bad faith. The vast majority of cases removed for bad faith are remanded to state court.[154]

A. Inherent Tensions in the Bad-Faith Exception

A defendant's right to remove a case inherently conflicts with a court's desire for judicial efficiency. Put simply, removal duplicates

[148] *Id.*

[149] *Id.* at *14. In its notice of removal, Magic Burgers made no reference to the one-year bar on diversity removal, the bad-faith exception, or 28 U.S.C. § 1446(c)(1). *See* Notice of Removal, Hajdasz v. Magic Burgers, LLC, 2018 WL 7436133 (No. 6:18-cv-1755-Orl-22KRS).

[150] *See Hajdasz*, 805 F. App'x 889–90. This appears to be the only circuit court case reviewing a district court decision which found no bad faith, and it is possible only because defense counsel appealed the Rule 11 sanctions. Notably, however, the opinion is unpublished and thus does not carry precedential weight. *See* 11th Cir. R. 36-2.

[151] *See, e.g.*, Aguayo v. AMCO Ins. Co., 59 F. Supp. 3d 1225, 1273 (D.N.M. 2014) (there is not anything "inherently . . . 'bad faith' about using deliberate tactics to defeat federal jurisdiction").

[152] *See infra* Part IV.B.

[153] *See infra* Part IV.C.

[154] *See infra* Part IV.D.

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processes at the state and federal levels and requires litigation over the removal itself.[155] In *Aguayo*, for instance, the case was before the state trial court for nearly two years and was two days away from trial when it was removed.[156] It was then before the District of New Mexico for six months before it was remanded in an order that occupies over sixty pages of the Federal Supplement.[157] Presumably, the state trial court prepared for a trial that never occurred. Further, state and federal courts spent time learning and analyzing the case when it was filed, when it was removed, and again when it was remanded. In exercising their removal rights, defendants necessarily increase costs for courts and plaintiffs.[158]

In 1988, Congress initially enacted the one-year bar in favor of efficiency.[159] In 2011, however, it redrew the line somewhere in the middle.[160] Thus, while there is a general presumption against removal and in favor of remand,[161] federal courts should nonetheless "be equally vigilant" in protecting the right of defendants to proceed in federal court when the jurisdictional requirements are met.[162]

If the purpose of the one-year bar is to protect federal judicial resources, then the bad-faith exception undermines that purpose by requiring district courts to routinely consider removals for alleged bad faith.[163] While removal followed by remand may require fewer federal resources than adjudicating an entire case, it also delays litigation in state courts and frustrates Congress's apparent intent for the one-year bar to limit the "substantial delay and disruption" of removal.[164] While *Hajdasz* perhaps represents an extreme case of abusive delay (midtrial removal that

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[155] *See* 28 U.S.C. § 1447(c) (requiring motions to remand to be filed within thirty days of removal); *see also* H.R. REP. NO. 100-889, at 72 (1988) (noting that late removals cause "substantial delay and disruption").

[156] *Aguayo*, 59 F. Supp. at 1231.

[157] *Id*. at 1286.

[158] *See* Percy, *supra* note 13, at 622–23 (noting that defendants "have every incentive to remove . . . because removing delays eventual resolution, forces the plaintiff to expend resources litigating the issue of proper forum, and creates only minimal exposure to sanctions").

[159] *See* Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 1016(b)(2)(B), 102 Stat. 4642, 4679 (1988) (adding one-year bar to removal).

[160] *See* Jurisdiction and Venue Clarification Act, Pub. L. 112–63, 125 Stat. 758, 760 (2011) (codified at 28 U.S.C. § 1446(c)(1)).

[161] *See, e.g.*, Hansen v. Grp. Health Coop., 902 F.3d 1051, 1057 (9th Cir. 2018) (referring to the "strong presumption against removal jurisdiction" (quotation omitted)).

[162] Morris v. Nuzzo, 718 F.3d 660, 670 (7th Cir. 2013) (quoting Wecker v. Nat'l Enameling & Stamping Co., 204 U.S. 176, 186 (1907)).

[163] *See* H.R. REP. NO. 100-889, at 45 (1988) (Congress aimed to "reduce Federal jurisdiction").

[164] *Id*. at 72.

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forced the state court to declare a mistrial),[165] other substantial delays have occurred without any sanction on the unsuccessful removing party.[166]

Similarly, there is an inherent tension between the plaintiff's status as "master of her complaint" and in-depth inquiries into litigation decisions regarding forum. [167] As *Aguayo* put it, "[b]ad faith should not refer simply to a desire to stay in state court . . . . There is nothing wrong with plaintiffs having a preference for state court, nor is there anything inherently invidious or 'bad faith' about using deliberate tactics to defeat federal jurisdiction."[168] This appears to motivate the requirement that a plaintiff acts in bad faith only if frustrating removal was the but-for cause for retaining a non-diverse defendant past the one-year mark.[169] Additionally, "there is a certain amount of procedural jockeying and strategy in any given litigation."[170] This requires courts to draw the line between "legitimate" litigation strategy, such as foregoing federal causes of action to avoid federal question jurisdiction and remain in state court, and "bad faith" forum manipulation. Interestingly, the conduct that is considered bad faith is relatively consistent across the several different analytical frameworks courts have adopted.

B. Bad Faith Is Relatively Limited

Even with the diversity of standards that courts have applied, bad faith is consistently found in similar situations. These scenarios include: (a) obscuring the amount in controversy,[171] (b) admitting that the sole purpose of an action is to remain in state court,[172] (c) premising dismissal

[165] *See* Hajdasz v. Magic Burgers, LLC, No. 6:18-cv-1755-Orl-22KRS, 2018 WL 7436133, at *14 (M.D. Fla. Dec. 10, 2018).

[166] *See, e.g.*, Aguayo v. AMCO Ins. Co., 59 F. Supp. 3d 1225, 1285 (D.N.M. 2014) (declining to impose costs even though "when all is said and done in this case, AMCO Insurance removing the case six days before trail will probably ultimately set the case's resolution back by a year, burden the dockets and disturb the calendars of both the state and federal court, and exact an unknown number of dollars of litigation costs").

[167] Mapes v. FCA US LLC, No. 3:21-cv-00870-BEN-DEB, 2021 WL 3561245, at *2 (S.D. Cal. Aug. 12, 2021) (quotation omitted).

[168] *Aguayo*, 59 F. Supp. at 1273.

[169] *See, e.g.*, Keller Logistics Grp., Inc. v. Navistar, Inc., 391 F. Supp. 3d 774, 778 (N.D. Ohio 2019); Heacock v. Rolling Frito-Lay Sales, LP, No. C16-0829-JCC, 2016 WL 4009849, at *4 (W.D. Wash. July 27, 2016); *Aguayo*, 59 F. Supp. 3d at 1273.

[170] Campbell v. UPS, No. 19-12211, 2019 WL 5587349, at *4 (D.N.J. Oct. 30, 2019).

[171] *See, e.g.*, O'Connor v. Wal-Mart Stores E., LP, No. 20-CV-01781 (LJV)(JJM), 2021 WL 681874, at *2 (W.D.N.Y. Jan. 26, 2021).

[172] *See, e.g.*, *Keller Logistics Grp., Inc.*, 391 F. Supp. 3d at 779.

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of a non-diverse defendant on an agreement with the diverse defendant to not dismiss,[173] and (d) failing to actively litigate.[174]

The statute itself defines only one form of bad faith: "If the notice of removal is filed more than 1 year after commencement of the action and the district court finds that the plaintiff deliberately failed to disclose the actual amount in controversy to prevent removal, that finding shall be deemed bad faith under paragraph (1)."[175] For example, a court found that a plaintiff deliberately attempted to avoid removal by failing to respond to repeated requests from the defendant to provide the amount in controversy until approximately two weeks after one year had passed since commencement.[176] Similarly, bad faith was found when a plaintiff sought damages in excess of $75,000 *after* one year elapsed, despite stipulating to seek less than $75,000 in the initial complaint.[177]

When the plaintiff admits, either to other parties or the court, that he acted solely to keep the case in state court, courts find bad faith.[178] Similarly, an offer to settle with a non-diverse defendant in exchange for a promise by the diverse defendant to not remove may constitute bad faith.[179] In one case, a plaintiff's attorney withdrew an offer to dismiss the sole non-diverse defendant "because [the plaintiff's attorney] had remembered that it had not been one year since the filing of the complaint."[180] The plaintiff then asked the diverse defendant to agree not to remove in exchange for dismissal of the non-diverse defendant.[181] The diverse defendant declined, and the plaintiff dismissed the non-diverse defendant two days after one year had passed.[182] The court found bad faith.[183] In another case, the plaintiff offered early in the course of litigation to dismiss the non-diverse defendant if the diverse defendant

[173] *See, e.g*, Berrios v. Hertz Corp., No. 2:18-cv-03171-MCE-DB, 2019 WL 1753995, at *2 (E.D. Cal. Apr. 19, 2019).

[174] *See, e.g.*, O'Brien v. HII Ins. Sols., No. 2:20-cv-02115-KJM-AC, 2021 WL 1060398, at *3–4 (E.D. Cal. Mar. 19, 2021).

[175] 28 U.S.C. § 1446(c)(3)(B).

[176] *See O'Connor*, 2021 WL 681874, at *2.

[177] *See* Brogan-Johnson v. Navient Sols., Inc., No. 5:21-CV-155, 2021 WL 4597661, at *4–5 (N.D. W. Va. Oct. 6, 2021).

[178] *See* Keller Logistics Grp., Inc. v. Navistar, Inc., 391 F. Supp. 3d 774, 779 (N.D. Ohio 2019); Hiser v. Seay, No. 5:14-CV-170, 2014 WL 6885433, at *4 (W.D. Ky. Dec. 5, 2014).

[179] *See, e.g.*, Mullins v. Rish Equip. Co., No. 2:21-cv-00347, 2021 WL 4448296, at *5 (S.D. W. Va. Sept. 28, 2021); Berrios v. Hertz Corp., No. 2:18-cv-03171-MCE-DB, 2019 WL 1753995, at * 2 (E.D. Cal. Apr. 19, 2019).

[180] *Mullins*, 2021 WL 4448296, at *5.

[181] *Id.*

[182] *Id.*

[183] *Id.* at *6.

agreed to not remove the case.[184] When the diverse defendant refused, the plaintiff delayed settlement negotiations with the non-diverse defendant, eventually dismissing that defendant shortly after one year had passed.[185] Again, the court found bad faith.[186]

Finally, courts frequently find bad faith for failure to actively litigate.[187] This is not surprising, considering that failure to actively litigate is per se bad faith under *Aguayo* or *Heacock*.[188] Similarly, both the *Heacock + Aguayo* and *Hoyt* approaches account for active litigation as a factor.[189]

C. Loopholes

While there are occasional cases that do not fit one of those categories,[190] the relative uniformity of cases allows plaintiffs to structure strategic conduct to evade § 1446(c)(1). The *Aguayo* test provides a rather straightforward path for plaintiffs to do so—and the court acknowledged as much.[191] First, a plaintiff need only pursue bare-bones litigation against a non-diverse defendant. Propounding a few discovery requests and engaging in settlement discussions would almost certainly entitle a plaintiff to a presumption of good faith.[192] At this point, all the plaintiff and her attorney have to do is shut-up: the *Aguayo* test relies on direct evidence but refuses to allow any discovery or evidentiary gathering in federal court.[193] Such silence should also avoid bad faith under the

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[184] *Berrios*, 2019 WL 1753995, at *2.

[185] *Id*.

[186] *Id*.

[187] *See* O'Brien v. HII Ins. Sols., No. 2:20-cv-02115-KJM-AC, 2021 WL 1060398, at *3 (E.D. Cal. Mar. 19, 2021); Klintworth v. Valley Forge Ins. Co., No. 20-CV-0178-CVE-FHM, 2020 WL 3497468, at *4 (N.D. Okla. June 29, 2020), *and reconsideration denied*, 2020 WL 5577875, at *2 (N.D. Okla., Sept. 17, 2020).

[188] *See, e.g.*, Holland v. CSX Transp., Inc., No. 2:21-cv-00377, 2021 WL 4448305, at *3 (S.D. W. Va. Sept. 28, 2021) (applying *Aguayo*).

[189] *See, e.g.*, Flores v. Intex Recreation Corp., No. 2:20-CV-73, 2020 WL 6385679, at *3 (S.D. Tex. July 2, 2020) (applying *Hoyt*).

[190] *See, e.g.*, Manuel v. Patterson, No. CV 21-1590, 2021 WL 4452800, at *3 (E.D. La. Sept. 29, 2021) (finding plaintiff acted in bad faith by never serving a diverse defendant until after one year had passed, even though the case became removeable nine months after commencement).

[191] *See* Aguayo v. AMCO Ins. Co., 59 F. Supp. 3d 1225, 1279 (D.N.M. 2014) ("Plaintiffs will jump through hoops to avoid a federal forum, and the more expansive and mysterious that federal courts construe the bad-faith exception to be, the more silliness in which plaintiffs will engage to demonstrate that their-removal spoiling joinder is good faith.").

[192] *See id.* at 1275.

[193] *Id*. at 1276 (most plaintiffs could avoid providing direct evidence "by simply keeping quiet about their bad faith").

intentional conduct standard because a court could not determine if the plaintiff acted intentionally and specifically to thwart removal.[194]

Plaintiffs may also join and retain non-diverse defendants for the sole purpose of defeating federal jurisdiction, but "they must now simply keep the removal spoiler on board through trial to avoid the bad-faith exception."[195] In one case in which a court found bad faith, for example, plaintiffs admitted that they retained the non-diverse parties until the one-year time limit passed to keep the case in state court.[196] Presumably, the defendants could not have removed for fraudulent joinder, otherwise they would have removed before one year expired. In other words, there were colorable (or at least non-frivolous) claims against the non-diverse defendant. The only way that a defendant can argue bad faith, however, is *after* removing a case to federal court.[197] In this case, the diverse defendants could not remove so long as the non-diverse defendants remained a party.[198] If plaintiffs had simply retained the non-diverse defendants through a merits judgment, the diverse defendants never could have removed the action and argued bad faith.

Further, even if the non-diverse defendants are dismissed, a plaintiff may be able to rely on the gap between fraudulent joinder and the voluntary-involuntary rule.[199] An action may be removed if the plaintiff voluntarily dismisses all non-diverse defendants but not if the non-diverse defendants were dismissed following a ruling on the merits—i.e., if the non-diverse defendants were involuntarily dismissed.[200] This creates an opening for claims that are not so frivolous as to constitute fraudulent joinder but are dismissible by state courts. In such a case, the diverse defendant could not remove for fraudulent joinder but would also be prohibited by the voluntary-involuntary rule from removing the action after the non-diverse defendant was dismissed.[201]

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[194] *See* Comer v. Schmitt, No. 2:15-CV-2599, 2015 WL 5954589, at *4 (S.D. Ohio Oct. 14, 2015) (discussing intentional conduct standard); Hiser v. Seay, No. 5:14-CV-170, 2014 WL 6885433, at *4 (W.D. Ky. Dec. 5, 2014) (intentional conduct must be pursued "specifically to prevent removal").

[195] *Aguayo*, 59 F. Supp. 3d at 1273.

[196] *See Hiser*, 2014 WL 6885433, at *4.

[197] *See* 28 U.S.C. § 1446(c)(1).

[198] Even if the defendants did remove, a district court would remand for failure to satisfy the diversity of citizenship requirement, either not reaching the bad faith analysis or rendering it moot. *See, e.g.*, Towner v. Silver, No. 2:20-CV-00695-KJD-NJK, 2020 WL 8084973, at *1 n.1 (June 29, 2020) (court only cursorily discusses bad faith because removing defendant failed to establish diversity or federal question jurisdiction), *recommendation adopted*, 2021 WL 66388 (D. Nev. Jan. 6, 2021).

[199] *Aguayo*, 59 F. Supp. 3d at 1268.

[200] *See* DeBry v. Transamerica Corp., 601 F.2d 480, 487 (10th Cir. 1979) (citing Whitcomb v. Smithson, 175 U.S. 635 (1900)).

[201] *Aguayo*, 59 F. Supp. 3d at 1268.

None of the standards are immune from this sort of gamesmanship. For instance, under the *Heacock* factors, an astute plaintiff would name the non-diverse defendant at the outset, propound even minimal discovery to satisfy active litigation, and dismiss the non-diverse defendant several months after one year has expired (or not at all). This would satisfy the active litigation prong and ensure that at least two factors, the timing of naming and dismissing the defendant, weigh against bad faith.[202] Perhaps *Hoyt*'s requirement to avoid "half-hearted" litigation imposes a higher standard, but this seemingly could be overcome through more discovery requests, deposition requests, resistance to dispositive motions, and the like. Further, to the extent that *Hoyt* encourages *more* wasteful litigation—or litigation efforts not aimed toward any ruling on the merits—that could be viewed as a weakness rather than a strength of those factors.

Thus, the lone scholar to have studied the subject in depth advocates for the end of the bad-faith exception and a return to a strict one-year bar.[203] The exception encourages plaintiffs to engage in costly, unnecessary litigation just to meet the "actively litigating threshold,"[204] and it has only marginally protected defendants' right to remove.[205] It is difficult to argue with this conclusion, particularly considering the dearth of successful removals under the bad-faith exception. Intriguingly, however, the success rate for removals has remained relatively steady, suggesting that plaintiffs have not learned how to properly modify their behavior.

D. A Losing Proposition

Approximately eighty-five percent of all cases removed under the exception between 2012 and 2018 were remanded.[206] A similar search of cases between June 30, 2018, and November 20, 2022, reveals that about eighty-seven percent were remanded.[207] In total, 386 district court cases mentioned both "1446(c)" and "bad faith," 142 made a finding on the bad faith issue, and nineteen found bad-faith conduct by the plaintiff under § 1446(c)(1).[208]

If plaintiffs were learning to exploit the loopholes in bad-faith removal standards and case law, the success rate for removals should have

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[202] *See supra* notes 99–107 and accompanying text.

[203] *See* Percy, *supra* note 13, at 640, 641.

[204] *See id.*

[205] *See id.* at 637.

[206] *Id*. at 600.

[207] I applied the same search terms as Professor Percy ("1446(c)" AND "bad faith") in a Westlaw search of district court opinions. *See id.* at 599 n.17 (describing research methodology).

[208] *See infra* Part VI.

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declined; in other words, a larger proportion of cases should have been remanded.[209] That has not occurred, however. In part, this may be due to the somewhat obscure nature of the bad-faith exception: there is largely no binding precedent, few secondary sources address the topic, and many district courts appear to have not yet confronted it. This same ignorance, though, would also seem to weaken the efficacy of the exception as a deterrent measure. Whatever the causes, successful removals under the bad-faith exception remain rare. It should also be noted that the sample size is rather small. For example, a small shift of five more cases that found bad faith out of the 142 would equate to a 3.6 percent increase in the remand rate.

When courts do not find bad faith and remand, they rarely award costs and fees to the plaintiff. Costs were awarded in fifteen of 123 cases where the court did not find bad faith, or approximately twelve percent.[210] Many opinions, however, never explicitly considered the question of fees.[211] In opinions that do consider fees, they are awarded to the plaintiff about a quarter of the time (fifteen out of fifty-six cases).[212] In some cases, it appears that plaintiffs do not request that the removing defendant cover costs or fees.[213]

E. Possible Solutions

The proper approach to § 1446(c)(1), and diversity jurisdiction more broadly, must balance efficiency, clarity, fairness, and other competing aims. There are inherent tensions embodied in these decisions that cannot be fully reconciled,[214] and consequently, there is no panacea to address the problems presented by the bad-faith exception. Section 1446(c)(1), however, fails to strike an appropriate balance because it is inefficient, unclear, and often unfair. Any fairness gains through deterrence of "bad faith" conduct are offset by the costs of removal litigation and actions to satisfy the "active litigation" threshold in the first place. Further, because there is largely no binding precedent, any deterrent effect is attenuated at best.

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[209] Intriguingly, for the cases decided between January 1, 2022 and November 20, 2022, approximately twenty-five percent (five out of twenty) found bad-faith conduct. *See infra* Part VI. While the sample size is too small to conclude that any trend is occurring, especially since the success rate is so stable across the prior decade, it certainly suggests that plaintiffs are not learning to exploit loopholes.

[210] *See infra* Part VI.

[211] *See, e.g.*, James v. Whitney, No. 02-0203, 2021 WL 3044149 (W.D. La. July 19, 2021).

[212] *See infra* Part VI.

[213] *See, e.g.*, Memorandum in Support of Motion to Remand, Jones v. Ramos Trinidad, 380 F. Supp. 3d 516 (E.D. La. 2019) (No. 2:18-cv-13950-NJB-MBN).

[214] *See supra* Part IV.A.

The most straightforward solution is congressional amendment of the statute to reform the incentive structure by clarifying what constitutes bad faith or increasing removal costs for defendants. It seems highly unlikely that there is the political appetite for this type of reform, however. Binding precedent would be a relatively simple solution that would provide clarity. But district courts generally lack the power to bind themselves, and there are efficiency concerns against expanding appellate jurisdiction. Finally, in the absence of a statutory amendment or binding precedent from higher courts, lower courts may change the incentives of removal by shifting costs to unsuccessful removing defendants. While many federal courts may not believe there is sufficient clarity to impose fees in many cases, there is a substantial body of case law that converges on a limited subset of conduct as bad faith, and appellate court review of decisions awarding fees may generate greater clarity.

1. Congressional Amendment

Legislatures are best suited to make difficult policy decisions that balance competing interests.[215] Section 1446(c)(1) is Congress's creation, so it stands to reason that Congress is the proper actor to amend the removal requirements, as it first did in 1988,[216] and again in 2011.[217] There are several potential amendments that Congress could pursue, including: (1) reverting to an absolute one-year bar on diversity removals, (2) removing the one-year bar entirely, (3) providing a "safe harbor" for plaintiffs under certain circumstances, or (4) presumptively imposing costs on unsuccessful removing defendants.

Reverting to an absolute one-year bar on diversity removals invites the return of the issue that the JVCA sought to address in the first place: the division over equitable exceptions to the one-year bar.[218] Similarly, removing the one-year bar entirely invites far more cases into federal

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[215] *See* Chicago, Burlington, & Quincy R.R. Co. v. McGuire, 219 U.S. 549, 565 (1911) ("The legislature, provided it acts within its constitutional authority, is the arbiter of the public policy of the state.").

[216] *See* Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, 102 Stat. 4642 (1988).

[217] *See* Jurisdiction and Venue Clarification Act, Pub. L. 112-63, 125 Stat. 758 (2011).

[218] *Compare* Tedford v. Warner-Lambert Co., 327 F.3d 423, 427 (5th Cir. 2003) (finding equitable exception) *with* Scafer v. Bayer Cropscience LP, No. 4:10-CV-00167-BSM, 2010 WL 1038518, at *2 (E.D. Ark. Mar. 19, 2010) ("[T]he district courts in the Eighth Circuit have held that even where there is strong evidence of forum manipulation, the one-year limitation is absolute and cannot be equitably tolled." (quotations omitted)); *see also* H.R. REP. NO. 112-10 at 15 (2011) (describing purpose of JVCA to resolve split in courts on whether one-year bar was subject to equitable tolling).

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courts and would greatly *increase* federal courts' caseload—the exact opposite of Congress's apparent design in adding the one-year bar in 1988.[219]

Aguayo proposed another solution—a "single spoiler safe harbor" provision that would find per se good faith when a plaintiff kept the same non-diverse defendant within the case for a full year.[220] This could be achieved rather simply by adding a subparagraph to § 1446(c)(1) providing, for example: "In no case shall bad faith be found if one single non-diverse defendant was retained as a party for a full year or longer following commencement of the action." The safe harbor approach differs from a complete one-year bar on diversity removals because, as the *Aguayo* court frames it, the same non-diverse defendant must be kept in the case for the first full year.[221] Thus, the safe harbor provision would not apply to a case where one non-diverse defendant was dismissed but another was added before one-year expired.[222]

The safe harbor rule provides several advantages. First, it is easily administrable and objective. Rather than engaging in a highly subjective and fact-dependent bad-faith inquiry, the contours of which are rarely defined by precedent,[223] this standard would create a bright-line rule easily understood by courts and litigants alike. This would reduce the number of non-meritorious removals, ease the burden on district courts in evaluating removals, and allow district courts to impose costs more readily on non-meritorious removing defendants.[224] Further, there is no substantial cost. The current bad-faith exception poorly guards defendants' right to remove because it mainly punishes incompetent plaintiffs' counsel,[225] and defendants could still protect themselves against illegitimate gamesmanship by removing for fraudulent joinder within the first year of

[219] *See* H.R. REP. NO. 100-889 at 45, 72 (1988) (noting that diversity jurisdiction is often amended to solve "caseload problems" and predicting that the one-year bar would result in "a modest curtailment in access to diversity jurisdiction"); *see also* Percy, *supra* note 13, at 601–02.

[220] Aguayo v. AMCO Ins. Co., 59 F. Supp. 3d 1225, 1280 (D.N.M. 2014). A "spoiler" refers to the non-diverse defendant that prevents removal.

[221] *Aguayo*, 59 F. Supp. 3d at 1280.

[222] *Id*. at 1281. ("[T]his construction of the bad-faith exception would prohibit . . . the sequential naming and dropping of different removal-spoiling parties against whom the plaintiff has no intention of actually litigating."); *see, e.g.*, Tedford v. Warner-Lambert Co., 327 F.3d 423, 424–25 (5th Cir. 2003) (plaintiff named a new non-diverse defendant hours after being informed that the defendant would remove, arguing that the initial non-diverse defendant was fraudulently joined).

[223] *See supra* Part II.B., Part III.A.

[224] *See infra* Part IV.E.3.; *see also* Martin v. Franklin Cap. Corp., 546 U.S. 132, 166 (2005) (costs and fees may be awarded only when defendants lack a reasonable basis for removal).

[225] *See supra* Part IV.C, Part IV.D.

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litigation.[226] Additionally, the safe harbor would allow plaintiffs to make strategic, venue-motivated litigation decisions without requiring wasteful practices to either establish active litigation or maintain a non-diverse defendant as a party through trial.[227]

The benefits of a safe harbor provision may be somewhat limited because, in cases where a party did not qualify for the safe harbor, courts must perform the same bad-faith analysis that they otherwise would.[228] Perhaps more importantly, there is no discussion of a safe-harbor construction of § 1446(c), or the inclusion of a safe-harbor provision outside of *Aguayo*. It appears highly unlikely then that a policy proposal suggested in a district court opinion and cited nowhere else would be the impetus for congressional amendment of the removal statutes.

Another potential solution is to presumptively impose costs on defendants that unsuccessfully remove under § 1446(c)(1). In other words, a plaintiff would presumptively be entitled to costs and fees for remanded cases that were removed after one year, unless the defendant could convince the court that costs were not appropriate. Currently, district courts may award "just costs and any actual expenses" when actions are remanded.[229] Courts may not, however, *presumptively* award costs and may only do so if there was no reasonable basis for removal.[230]

This general prohibition on presumptively awarding costs comes from the so-called "American Rule," which requires parties to pay their own litigation costs.[231] The "American Rule" largely follows from an 1853 statute which specified the types of costs federal courts could award.[232] Congress, however, is free to authorize courts to award costs in

[226] *Aguayo*, 59 F. Supp. 3d at, 1280–81. *Aguayo* also notes that defendants could more easily development fraudulent joinder arguments over a one-year period if there were only a single non-diverse defendant at issue, rather than a rotating cast of diversity-defeating defendants. *Id.*

[227] *See* Percy, *supra* note 13, at 640, 641 (critiquing active litigation prong for leading to wasteful practices); *Aguayo*, 59 F. Supp. 3d at 1273 (noting that a plaintiff can avoid 28 U.S.C. § 1446(c)(1) by retaining a non-diverse defendant through adjudication).

[228] *Id.* at 1281.

[229] 28 U.S.C. § 1447(c).

[230] *Aguayo*, 59 F. Supp. 3d at 1282 (citing Martin v. Franklin Cap. Corp., 546 U.S. 132, 136 (2005)).

[231] *See, e.g.*, Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247 (1975) ("In the United States, the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser."). By contrast, under the "English Rule," the loser is generally required to pay the litigation costs of the prevailing party. *See* Theodore Eisenberg & Geoffrey P. Miller, *The English Versus the American Rule on Attorney Fees: An Empirical Study of Public Company Contracts*, 98 CORNELL L. REV. 327, 328–29 (2013).

[232] Act of Feb. 26, 1853, 10 Stat. 161–69; *see*, *Alyeska Pipeline Serv. Co.*, 421 U.S. at 251–53; *see also* Arcambel v. Wiseman, 3 U.S. (3 Dall.) 306, 306 (1796)

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specific circumstances.[233] Indeed, in a wide array of fields, including antitrust, patent, and civil rights litigation, Congress has crafted exceptions to the American Rule.[234] While many statutes are crafted as permissive grants, i.e., courts *may grant* attorneys' fees,[235] some statutes presumptively impose costs on the losing party.[236]

Under the current discretionary standard in § 1447(c), costs are awarded in approximately twelve percent of cases that are remanded following removal under the bad-faith exception.[237] Presumptively imposing costs would result in cost awards in far more remands and, consequently, deter defendants from removing, reducing the number of overall removals. Congress could craft the provision, however, to preserve some protection for defendants to remove. For instance, a subparagraph could be added to § 1447(c), providing that "for cases removed more than one year after commencement and subsequently remanded, the court shall require payment of just costs and any actual expenses, including attorneys' fees, incurred as a result of removal, unless the court finds that the defendant's removal had an objectively reasonable basis." While this would maintain the standard of an "objectively reasonable basis,"[238] it also would make clear to district courts that the burden of proof lies with the defendant to rebut an award of fees and costs.

These proposals can be viewed on a spectrum between the poles of "right to removal" and "judicial efficiency" as policy aims, since these two values appear to be the fundamental policy concerns that Congress weighed in its revisions of § 1446. Closest toward the efficiency pole is a total one-year bar on diversity removals with no exceptions; conversely, closest toward the right-to-removal pole is removing the one-year bar entirely and allowing diversity removals at any time. Congress expressly

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(reversing an award of attorney's fees to the prevailing party because "[t]he general practice of the United States is in opposition to it").

[233] *Alyeska Pipeline Serv. Co.*, 421 U.S. at 262 ("[T]he circumstances under which attorneys' fees are to be awarded and the range of discretion of the courts in making those awards are matters for Congress to determine.").

[234] *Id.* at 261–262 (collecting statutes); *see also* Henry Cohen, Cong. Rsch. Serv., 94-970, Awards of Attorneys' Fees by Federal Courts and Federal Agencies 57 (2009) (collecting statutes).

[235] *See, e.g.*, 35 U.S.C. § 285 ("The court in exceptional cases may award reasonable attorney fees to the prevailing party.").

[236] *See, e.g.*, 20 U.S.C. § 1095a(a)(8) ("[A]n employee may not discharge from employment . . . an individual subject to wage withholding in accordance with this section . . . . The court shall award attorneys' fees to a prevailing employee."); 5 U.S.C. § 504(a)(1) ("An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party . . . .").

[237] *See supra*, Part IV.D.

[238] Martin v. Franklin Cap. Corp., 546 U.S. 132, 141 (2005).

rejected both alternatives, however, first by imposing the one-year bar,[239] then by creating the bad-faith exception to its operation.[240]

By contrast, the current bad-faith exception, safe harbor provision, and presumptive imposition of costs would all fall between the two poles. Of these, the safe harbor provision probably prioritizes efficiency the most—so long as one non-diverse defendant is retained for a full year, § 1446(c) would act as a complete bar. While plaintiffs could easily avoid the bad-faith exception by relying on the safe harbor, they can largely do that under the existing bad-faith exception. The safe-harbor provision would simply provide further efficiency and certainty. The presumptive imposition of costs merely alters the incentives facing removing defendants. In other words, it would not change the *content* of the bad-faith exception in any way. Nonetheless, because defendants so rarely prevail on § 1446(c) removals, it would likely reduce the number of removals.

Presumptively imposing costs appears to be the ideal solution because it maintains the content of the rule that Congress drafted in the JVCA but would deter non-meritorious removals, thus promoting judicial efficiency.

Realistically, however, none of these proposals appear politically feasible. There is currently no legislation before Congress that includes § 1446(c), nor was any such legislation introduced in the 117th Congress. There also does not appear to be any momentum toward modifying removal. There are no current projects from the American Law Institute addressing removal procedure (as there were before the addition of the bad-faith exception).[241] Crucially, it does not appear that any interest group would be sufficiently motivated to push for change. For defendants, the bad-faith exception is the next-best-thing to lifting the one-year bar entirely because it allows defendants to remove after one year, stalling litigation and driving up plaintiffs' costs, without significant exposure for attorneys' fees or other repercussions. Similarly, for plaintiffs, § 1446(c)(1) is easily avoided, so there is little incentive to lobby Congress. Additionally, there is no circuit split in applying § 1446(c)(1), as there was with the *Tedford* exception, because circuits rarely review the provision.

Finally, any congressional amendment to impose costs would still be somewhat limited by the lack of precedential authority. Even if the attorney's fees against non-meritorious removing defendants were

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[239] *See* Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, 102 Stat. 4642 (1988).

[240] *See* Jurisdiction and Venue Clarification Act, Pub. L. No. 112-63, 125 Stat. 758, 760 (2011).

[241] *See Current Projects*, AM. L. INST., https://www.ali.org/projects/ [https://perma.cc/35J6-PW9S] (last visited Apr. 4, 2022).

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presumed, courts may still be hesitant to award costs in the absence of a settled meaning of the bad-faith exception.[242]

2. Binding Precedent

As discussed above, appellate courts rarely review district courts' application of the bad-faith exception.[243] It appears only four circuit courts have considered the bad-faith exception under § 1446(c)(1),[244] and only one of those opinions is published.[245] At the current rate of one precedential decision per decade, it will likely be quite some time before any stable body of law develops.

It is briefly worth explaining the operation of precedent within federal courts. The Supreme Court binds all lower courts on questions of federal law.[246] Similarly, circuit courts bind both themselves (through the prior panel rule) and all district courts within their circuit.[247] District court opinions, however, have no precedential effect—they are merely persuasive authority.[248] Thus, a statutory provision that is interpreted almost wholly at the district court level will have little settled content.

Section 1446(c), however, seems to suggest the need for courts to define key terms. Its broad phrasing of "bad faith" resembles other statutes that courts have interpreted as granting a broad, common-law authority to

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[242] *See, e.g.*, Aguayo v. AMCO Ins. Co., 59 F. Supp. 3d 1225, 1285 (D.N.M. 2014) (refusing to award costs to the plaintiff, noting that "[n]o court has yet attempted to define the bad-faith exception").

[243] *See supra* note 12 and accompanying text.

[244] *See* Hajdasz v. Magic Burgers, LLC, 805 F. App'x 884, 889 (11th Cir. 2020); Hoyt v. Lane Constr. Corp., 927 F.3d 287, 292 (5th Cir. 2019); Chavez v. Time Warner Cable, LLC, 728 F. App'x 645, 647 (9th Cir. 2018); Hill v. Alianz Life Ins. Co., 693 F. App'x 855 (11th Cir. 2017).

[245] *See Hoyt,* 927 F.3d at 292.

[246] Rivers v. Roadway Express, 511 U.S. 298, 312 (1994) ("[O]nce the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law.").

[247] *See, e.g.*, United States v. Archer, 531 F.3d 1347, 1352 (11th Cir. 2008) ("[A] prior panel's holding is binding on all subsequent panels unless or until it is overruled or undermined to the point of abrogation by the Supreme Court or by this court sitting *en banc*."); United States v. AMC Ent., 549 F.3d 760, 771 (9th Cir. 2008) ("[W]hen the Ninth Circuit or any of its coequal circuit courts issue an opinion, the pronouncements become the law of that geographical area.").

[248] *See, e.g.*, Threadgill v. Armstrong World Indus., Inc., 928 F.2d 1366, 1371 (3d Cir. 1991) ("[I]t is clear that there is no such thing as the 'law of the district.' . . . The doctrine of *stare decisis* does not compel one district court judge to follow the decision of another." (quotation omitted)); *see also* Joseph W. Mead, *Stare Decisis in the Inferior Courts of the United States*, 12 NEV. L. J. 787, 800–02 (2012) (summarizing district courts' approaches to intradistrict decisions and the modern trend away from deference).

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federal courts.[249] Under Section 1 of the Sherman Act, for instance, the Supreme Court reasoned that Congress "expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition."[250] Courts have also read the Labor Management Relations Act as "vesting in the courts the power to develop a common law of labor-management relations."[251] In broadly interpreting 29 U.S.C. § 185(a)'s jurisdictional grant as authorizing substantive law, the Supreme Court noted that "[i]t is not uncommon for federal courts to fashion federal law where federal rights are concerned."[252]

Here, Congress created a federal procedural right: defendants may remove after one year if a plaintiff, in bad faith, prevented removal.[253] It also seems entirely logical that Congress expected federal courts to draw upon their experience applying equitable principles in applying the exception. The content of the bad-faith exception is underdefined by the statutory text. Even relying on legislative history, the most one can find is a parenthetical reference to *Tedford* and the desire to "resolve the conflict" between courts treating the one-year bar as jurisdictional or procedural.[254] Ordinarily, such provisions are interpreted by courts, those interpretations are reviewed by appellate courts generating precedent, and courts then apply that precedent in new cases or controversies. Here, however, the ordinary progression is severed after the first step: courts interpret the text, but there is little to no review and, consequently, virtually no precedent. Though federal common law is generally disfavored, and 28 U.S.C. § 1446(c) likely would not be interpreted as authorizing judges to create federal common law,[255] the lack of precedent leads to repeated interpretations of "bad faith" in different factual contexts, not unlike the development of common law.

Some scholars argue that a form of *stare decisis* should apply within district courts.[256] District courts have also, at times, acknowledged or advocated for some form of horizontal *stare decisis* within the district.[257]

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[249] *See, e.g.*, Sherman Antitrust Act of 1890, 15 U.S.C § 1; Labor Management Relations Act, 29 U.S.C. § 185(a).

[250] Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 688 (1978).

[251] Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 642–43 (1981) (citing 29 U.S.C. § 185(a)).

[252] Textile Workers Union of Am. v. Lincoln Mills of Ala., 353 U.S. 448, 457 (1957).

[253] 28 U.S.C. § 1446(c)(1).

[254] H.R. REP. NO. 112-10, at 15 (2011).

[255] *See, e.g.*, *Rodriguez v. FDIC*, 140 S. Ct. 713, 717 (2020) ("But before federal judges may claim a new area for common lawmaking, strict conditions must be satisfied.").

[256] Mead, *supra* note 242, at 829.

[257] *See, e.g.*, Alexander v. Davis, 282 F. Supp. 2d 609, 611 (W.D. Mich. 2003) (arguing that *stare decisis* should be understood similarly in district courts as in circuit

Intriguingly, when it comes to the bad-faith exception, it appears that district courts in many cases are doing exactly this—relying on earlier decisions of other courts within the district or even within the same circuit. Several districts have applied one standard consistently. Courts within the Sixth Circuit, for example, apply almost exclusively the intentional conduct standard,[258] and several other districts have exclusively applied *Aguayo*.[259] Perhaps most importantly, a number of courts rely heavily on prior, intra-district decisions in their orders.[260] This suggests that district courts are, in some ways, following a form of *stare decisis*. At the same time, however, other district courts apply different standards at different times,[261] apply no clear standard but apply various principles from a variety of different jurisdictions,[262] or apply two standards without adopting either one.[263]

Even in district courts with relatively stable approaches, quasi-precedential decisions have no recognized controlling effect. Thus, a

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courts); *see also* Dan-Harry v. PNC Bank, N.A., No. 17-136 WES, 2018 WL 1083581, at *4 n.5 (D.R.I. Feb. 27, 2018) (on a question of state law not addressed by state courts, "some deference remains appropriate" to prior district court decisions interpreting the issue).

[258] *See supra* note 62 and accompanying text.

[259] *See supra* notes 92–96 and accompanying text.

[260] *See* Becker v. Ford Motor Co., No. 1:20-CV-281-TAV-CHS, 2021 WL 4221618, at *7 (E.D. Tenn. Sept. 15, 2021) ("It is sufficient in light of *stare decisis* to follow the overwhelming consensus of the Sixth Circuit district courts and apply the intentional conduct standard rather than the *Aguayo* standard."); Graham v. CSAA Fire & Cas. Ins. Co., No. CIV-19-00739-PRW, 2020 WL 1699554, at *1 (W.D. Okla. Apr. 8, 2020) ("But some courts—including this one—have adopted a two-step analysis from *Aguayo*."); Heacock v. Rolling Frito-Lay Sales, LP, No. C16-0829-JCC, 2016 WL 4009849, at *3 (W.D. Wash. July 27, 2016) (noting prior rulings by other district courts within the Ninth Circuit); Shorraw v. Bell, No. 4:15-cv-03998-JMC, 2016 WL 3586675, at *5 (D.S.C. July 5, 2016) ("This court follows its fellow district courts. . . .").

[261] *Compare* NPV Realty, LLC v. Nash, No. 8:17–cv–636–T–30AEP, 2017 WL 1735101, at *2 (M.D. Fla. May 4, 2017) (applying *Aguayo*), *with* Hajdasz v. Magic Burgers, LLC, No. 18-CV-1755, 2018 WL 7436133, at *2 (M.D. Fla. Dec. 10, 2018) (applying intentional conduct standard).

[262] *See, e.g.*, Ramirez v. Samsung Elecs. Am., Inc., No. CV-19-5305 FMO (RAOx), 2019 WL 4033935, at *2–3 (C.D. Cal. Aug. 26, 2019) (finding no bad faith because plaintiff explained that discovery revealed the spoilers were not liable, the spoilers were not sham defendants, spoilers' wrongdoing was extensively discussed in the complaint, and the plaintiff "diligently litigated").

[263] *See* Williams v. 3M Co., No. 7:18-CV-63-KKC, 2018 WL 3084710, at *4–5 (E.D. Ky. June 22, 2018) (applying both *Aguayo* and the intentional conduct standard). This case, in particular, seems to undermine any nascent intradistrict *stare decisis* claims, since other district courts within the Sixth Circuit apply the intentional conduct standard virtually uniformly. *See supra* notes 62, 258.

litigant in the District of New Mexico, where *Aguayo* is firmly rooted,[264] could still plausibly argue for removal under another bad-faith standard, or a proposed new standard, because an individual district judge remains free to buck the trend. Under the standard that fees are appropriate on remand only when the defendant lacked a reasonable basis,[265] defendants can essentially provide any plausible justification, regardless of the judicial history within a particular district or circuit.[266]

District courts can also sit en banc.[267] An en banc district court decision, however, has no more precedential weight than a decision by a single judge on that court.[268] En banc decisions may nonetheless encourage greater convergence among judges of a particular district through coordination and professional pressure.[269] An en banc decision on the bad-faith exception, then, provides little advantage—it would require a great deal of judicial resources, and, at most, it creates a more stable, but still not binding, interpretation.

An apparently easy solution to this is to permit appellate review of these cases by the circuit courts. This probably harms the efficiency concerns that motivated the one-year bar in the first place, however. Section 1447(d) prohibits appellate review of remand orders and promotes finality and efficiency.[270] Somewhat circularly, perhaps the clearest path toward binding precedent—which would allow courts to award fees to plaintiffs more frequently—is to award fees to plaintiffs more frequently under the current standards.

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[264] *See, e.g.*, Edison Ranch, Inc. v. Mosaic Potash Carlsbad, Inc., No. CIV 17-0790 JB/CG, 2018 WL 582578, at *17 (D.N.M. Jan. 26, 2018) ("[I]n answering this question—what constitutes 'bad faith' vis-à-vis improperly joining, or keeping joined, nondiverse parties of forum-citizen defendants—the Court has staked out its own definition.").

[265] *See* Martin v. Franklin Cap. Corp., 546 U.S. 132, 141 (2005).

[266] *See, e.g.*, Aegis Def. Servs., LLC v. Chenega-Patriot Grp., LLC, 141 F. Supp. 3d 479, 489 (E.D. Va. 2015) ("[R]eliance on non-controlling caselaw in the absence of controlling Fourth Circuit precedent is generally sufficient to form an objectively reasonable basis for removal.").

[267] *See, e.g.*, Banks v. Gonzalez, 415 F. Supp. 2d 1248 (N.D. Okla. 2006) (en banc), *aff'd* sub nom. Banks v. United States, 490 F.3d 1178, 1182, 1194 (10th Cir. 2007) (referring to the en banc district court judgment as "impressive and convincing").

[268] Maggie Gardner, *District Court En Bancs*, 90 FORDHAM L. REV. 1541, 1555 (2022).

[269] *Id.* at 1556.

[270] Gould v. Mutual Life Ins. Co. of N.Y., 790 F.2d 769, 774 (9th Cir. 1986).

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3. Imposing Fees and Costs Under § 1447(c)

Even in the absence of binding precedent, district courts should impose fees on non-meritorious removing defendants far more often.[271] The diversity of standards applied by district courts is problematic because it allows defendants to claim uncertainty. In application, however, the standards converge to a significant degree.[272] Though there is only one precedential decision applying the bad-faith standard, district courts have applied the statute hundreds of times in the past decade of its operation. Under no standard, for instance, would a plaintiff act in bad faith by joining a non-diverse defendant at the outset, serving that defendant with discovery requests, and dismissing that defendant several months after the one-year mark without any admission by the plaintiff of an intent to defeat diversity jurisdiction. In that scenario, a district court should award fees upon remand. District courts should recognize the weight of judicial experience in applying the bad-faith exception and award fees based on the accumulating body of law.

Awarding fees more frequently has another salutary effect: it facilitates circuit court review which could lead to actual binding precedent.[273]

V. CONCLUSION

As it is currently stands, the bad-faith exception to the one-year bar on diversity removal is little more than an ineffectual stumbling block on the long and winding path to a judgment on the merits. Plaintiffs and courts are saddled with costs, and defendants gain little more than a stall tactic. While courts apply separate standards, all are susceptible to strategic avoidance by plaintiffs. Plaintiffs are not punished for acting in bad faith to prevent removal but only for being incompetent enough to do it in the narrow ways that run afoul of the statute. The only tool provided to district courts to stem unsuccessful removals is the ability to award costs and fees against unsuccessful defendants. While district courts must interpret § 1446(c) without binding precedent, a substantial body of case law has developed that should guide courts and litigants. The type of conduct that constitutes a bad-faith attempt to prevent removal is relatively

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[271] *See* 28 U.S.C. § 1447(c); *see also* Aguayo v. Amco Ins. Co., 59 F. Supp. 3d 1225, 1285 (D.N.M. 2014) ("[A]s the bad-faith exception develops some much-needed clarity and standardization, the Court may be inclined to grant costs and expenses[.]").

[272] *See supra* Part IV.B.

[273] *See* Gibson v. Chrysler Corp., 261 F.3d 927, 932 (9th Cir. 2001) ("[I]n evaluating the propriety of an award of attorneys' fees, we must give 'some consideration' to the merits of a remand order, and . . . this kind of evaluation does not violate the command of § 1447(d).").

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consistent. In the absence of allegations by removing defendants that closely resemble the situations where bad faith is found, courts should be far more willing to impose costs and fees on non-meritorious defendants. In addition to deterring frivolous removals and promoting efficiency, this would also create more opportunities for circuit courts to review the bad-faith exception and issue binding precedent.

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VI. APPENDIX

The cases below are all the cases from June 30, 2018 to November 20, 2022, available on Westlaw, including the terms "1446(c)" and "bad faith", and making a direct finding as to whether a plaintiff acted in bad faith to prevent removal under § 1446(c)(1). Empirical research requires careful classification, and challenges inevitably arise that go beyond the seemingly straightforward nature of the question. For instance, what should be done with cases where the district court makes a one-sentence finding as to the bad faith issue despite neither party arguing it?[274] The lists below contain every case that made a finding, regardless of the depth of analysis. Similarly, they include cases where the bad-faith finding was arguably dicta but supported the court's conclusion.[275] However, two cases are excluded where the district court's order is not supported by its conclusion regarding bad faith—i.e., where the district court remanded despite concluding that bad faith existed.[276]

[274] *See, e.g.*, Ariz. Pub. Serv. Co. v. Michael, No. CV-22-00610-PHX-SMB, 2022 WL 2056402, at *1 n.1 (D. Ariz. May 16, 2022) ("The Court finds no such bad faith here.").

[275] *See, e.g.*, *Lundquist v. Seattle Sch. Dist. No. 1*, No. C20-1550-RSM-MAT, 2021 WL 373173, at *3–4 (W.D. Wash. Feb. 9, 2021) (complete diversity was not present when claims against non-diverse defendants were merely "separated" but not severed, and the defendant presented no evidence of bad faith).

[276] *See* Castanon v. UPS, Inc., No. 1:22-cv-11679, 2022 WL 3716037 (E.D. Mich. Aug. 26, 2022) (plaintiff acted in bad faith by obscuring the amount in controversy, but the case was remanded with fees awarded to the plaintiff because complete diversity did not exist); Ford-Smith v. HMS Host Corp., No. 1:19-CV-0947 (GTS/ML), 2020 WL 1242394 (N.D.N.Y. Mar. 16, 2020) (plaintiff acted in bad faith by never providing a statement of damages and failing to respond to defendant's phone calls and discovery requests, but case was remanded because it was not removed within thirty days of receiving a document showing diversity, as required by § 1446(b)(3)).

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A. District Court Cases Finding Bad Faith

1. Bilbeisi v. Safeway, Inc., No. C22-0876-JCC, 2022 WL 4733345 (W.D. Wash. Oct. 3, 2022).
2. Schwartzben v. Nat'l Fire & Marine Ins. Co., No. 22-20755-CIV-MARTINEZ-BECERRA, 2022 WL 4102799 (S.D. Fla. Sept. 8, 2022).
3. Anders v. Hohm Tech., Inc., No. 5:22-cv-00979-SPG-KK, 2022 WL 3573140 (C.D. Cal. Aug. 19, 2022).
4. McNeal v. Found. Radiology Grp., P.C., No. 1:22-cv-10645, 2022 WL 3010694 (E.D. Mich. July 29, 2022).
5. Levias v. State Farm Mut. Auto. Ins. Co., No. 2:21-CV-02628, 2022 WL 3081199 (June 29), *recommendation adopted*, 2022 WL 3081199 (W.D. La. Aug. 2, 2022).
6. De Zarraga v. Scottsdale Ins. Co., No. 21-23064-Civ-Scola, 2021 WL 5979359 (S.D. Fla. Dec. 17, 2021).
7. Brogan-Johnson v. Navient Sols., Inc., No. 5:21-CV-155, 2021 WL 4597661 (N.D. W. Va. Oct. 6, 2021).
8. Manuel v. Patterson, No. 21-1590, 2021 WL 4452800 (E.D. La. Sept. 29, 2021).
9. Holland v. CSX Transp., Inc., No. 2:21-cv-00377, 2021 WL 4448305 (S.D. W. Va. Sept. 28, 2021).
10. Mullins v. Rish Equip. Co., No. 2:21-cv-00347, 2021 WL 4448296 (S.D. W. Va. Sept. 28, 2021).
11. Dyer v. Cap. One N.A., No. 4:20-CV-4230, 2021 WL 3813367 (S.D. Tex. Aug. 23, 2021).
12. O'Brien v. Hii Ins. Sols., No. 2:20-cv-02115-KJM-AC, 2021 WL 1060398 (E.D. Cal. Mar. 19, 2021).
13. O'Connor v. Wal-Mart Stores E., LP, 20-CV-01781(LJV)(JJM), 2021 WL 681874 (W.D.N.Y. Jan. 26), *recommendation adopted*, 2021 WL 681311 (W.D.N.Y. Feb. 22, 2021).
14. Flores v. Intex Recreation Corp., No. 2:20-CV-73, 2020 WL 6385679 (S.D. Tex. July 2, 2020).
15. Klintworth v. Valley Forge Ins. Co., No. 20-CV-0178-CVE-FHM, 2020 WL 3497468 (June 29), *reconsideration denied*, 2020 WL 557875 (N.D. Okla. Sept. 17, 2020).
16. Keller Logistics Grp., Inc. v. Navistar, Inc., 391 F. Supp. 3d 774 (N.D. Ohio Aug. 6, 2019).
17. In re Volkswagen "Clean Diesel" Mktg., Sales Pracs., and Prods. Liab. Litig., MDL No. 2672 CRB (JSC), 2019 WL 2106074 (N.D. Cal. May 14, 2019).
18. Berrios v. Hertz Corp., No. 2:18-cv-03171-MCE-DB, 2019 WL 1753995 (E.D. Cal. Apr. 19, 2019).
19. Auto. Consulting Res., Inc. v. Interstate Nat'l Dealer Servs., Inc., No. 17-CV-225-JED-FHM, 2018 WL 3240962 (N.D. Okla. July 3, 2018).

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B. District Court Cases Not Finding Bad Faith

1. McCown v. Samsung SDI Co., Ltd., No. 5:22-cv-00976-SPG-KK, 2022 WL 17077492 (C.D. Cal. Nov. 17, 2022).
2. Pope v. 3M Co., No. 2:22-cv-00408, 2022 WL 16964772 (S.D. W. Va. Nov. 16, 2022).
3. Jarvis v. Allstate Prop. & Cas. Ins. Co., No. 3:22-CV-71 (CDL), 2022 WL 5241843 (M.D. Ga. Oct. 6, 2022).
4. Christian Life Ctr., Inc. v. Ford Motor Co., No. 2:22-cv-00812-JAM-JDP, 2022 WL 4534219 (E.D. Cal. Sept. 28, 2022).
5. Boyd v. Wolchok, No. 2:22-cv-00716, 2022 WL 4483165 (D. Nev. Sept. 27, 2022).
6. Doe I v. Certiphi Screening, Inc., No. 1:21-cv-2620-RLM-DLP, 2022 WL 4235334 (S.D. Ind. Sept. 14, 2022).
7. Woods v. Peters, No. 5:22-cv-05164, 2022 WL 4095767 (W.D. Ark. Sept. 7, 2022).
8. New York v. Vidal-Bey ex rel. Jones-Rogers, No. 22-CV-3529 (PKC) (MMH), 2022 WL 3867751 (E.D.N.Y. Aug. 30, 2022).
9. Espinoza v. Huntsman Tree Supplier, Inc., No. 9:22-cv-1744, 2022 WL 3273700 (D.S.C. Aug. 11, 2022).
10. Alvarez v. FCA US, LLC, No. 2:22-cv-02539, 2022 WL 2188386 (C.D. Cal. June 17, 2022).
11. Hunt v. Siegel Grp. Nev., Inc., No. 22-00278 WJ-JFR, 2022 WL 1987726 (D.N.M. June 6, 2022).
12. Daneberg-Jones v. Walmart Inc., No. 4:22-cv-00240-NKL, 2022 WL 1983987 (W.D. Mo. June 6, 2022).
13. Ariz. Pub. Serv. Co. v. Michael, No. CV-22-00610-PHX-SMB, 2022 WL 2056402 (D. Ariz. May 16, 2022).
14. Swihart v. Gen. Motors, LLC, No. CIV-21-1141-R, 2022 WL 229901 (W.D. Okla. Jan. 25, 2022).
15. Fiala v. RMLS Hop Ill., LLC, No. 21-C-4095, 2022 WL 159560 (N.D. Ill. Jan. 18, 2022).
16. HSBC Bank USA v. Lariviere, No. 21-62246-CIV-ALTONAGA, 2021 WL 9316301 (S.D. Fla. Dec. 28, 2021).
17. Henning v. Barranco, No. 21-cv-1657, 2021 WL 5578767 (N.D. Ill. Nov. 30, 2021).
18. Elome v. SVA Trucking LLC, No. 21-cv-05241 (BMC), 2021 WL 4480456 (E.D.N.Y. Sept. 30, 2021).
19. Kozlova v. Whole Foods Mkt. Grp., Inc., No. 20-CV-6025 (RPK) (RLM), 2021 WL 4398234 (E.D.N.Y. Sept. 26, 2021).
20. Pollock v. D.R. Horton Inc. Gulf Coast, No. 6:21-CV-01006, 2021 WL 4396051 (Sept. 9), *recommendation adopted*, 2021 WL 4395904 (W.D. La. Sept. 24, 2021).
21. Kleiner v. Johnson & Johnson, No. 21-3366, 2021 WL 3476184 (E.D. Pa. Sept. 6, 2021).

22. Mapes v. FCA US LLC, No. 3:21-cv-00870-BEN-DEB, 2021 WL 3561245 (S.D. Cal. Aug. 12, 2021).
23. Antie v. McBain, No. 6:21-CV-01460, 2021 WL 4244554 (Aug. 11), *recommendation adopted*, 2021 WL 4239303 (W.D. La. Sept. 16, 2021).
24. Becker v. Ford Motor Co., No. 1:20-CV-281-TAV-CHS, 2021 WL 4206411 (July 28), *recommendation adopted*, 2021 WL 4221618 (E.D. Tenn. Sept. 15, 2021).
25. Thompson v. Gen. Motors LLC, No. 4:21-cv-00183-SEP, 2021 WL 3186587 (E.D. Mo. July 28, 2021).
26. Hudson v. Allstate Ins. Co., No. 4:21-cv-00310-LPR, 2021 WL 3081565 (E.D. Ark. July 21, 2021).
27. James v. Whitney, No. 20-0203, 2021 WL 3044149 (W.D. La. July 19, 2021).
28. Anderson v. FCA US LLC, No. CV 21-3125 PSG (JPRx), 2021 WL 2822398 (C.D. Cal. July 6, 2021).
29. Fagan v. Wal-Mart Stores, Inc., No. 21-10363 (KM) (MAH), 2021 WL 3056620 (June 29), *recommendation adopted*, 2021 WL 3056497 (D.N.J. July 20, 2021).
30. Falsafi v. House of Imports, Inc., No. SACV 21-00901-CJC(DFMx), 2021 WL 2633157 (C.D. Cal. June 25, 2021).
31. CMR Constr. & Roofing LLC v. Hartford Ins. Co. of the Midwest, No. 2:20-cv-695-JLB-NPM, 2021 WL 2632374 (M.D. Fla. June 25, 2021).
32. Renovato v. FCA US LLC, No. CV 21-3803 PA (PVCx), 2021 WL 2910507 (C.D. Cal. June 15, 2021).
33. Klimaszewska v. Target Corp., No. 21-CV-374 (LDH) (LB), 2021 WL 2877416 (June 4), *recommendation adopted*, 2021 WL 3044149 (W.D. La. July 8, 2021).
34. Roberson v. Respironics, Inc., No. 4:20-CV-174-DMB-JMV, 2021 WL 2179265 (N.D. Miss. May 28, 2021).
35. Kalfsbeek Charter v. FCA US, LLC, 540 F. Supp. 3d 939 (C.D. Cal. 2021).
36. Estate of Tolmakov v. Freedom Holding Corp., No. 2:21-CV-201 TS, 2021 WL 1688541 (D. Utah Apr. 29, 2021).
37. Smith v. Wal-Mart Stores Tex., LLC, No. H-21-179, 2021 WL 4228902 (S.D. Tex. Apr. 9, 2021).
38. Daligcon v. Bank of Am., N.A., No. 21-00020 JAO-RT, 2021 WL 1329450 (D. Haw. Apr. 9, 2021).
39. Miller v. Target Corp. of Minn., No. 20-2508, 2021 WL 1311267 (E.D. La. Apr. 8, 2021).
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D. District Court Cases Awarding Fees to the Plaintiff

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4. Imperial Fund I, LLC v. Orukotan, No. 21-CV-60162-RAR, 2021 WL 752577 (S.D. Fla. Feb. 25, 2021).
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