Good Strategy or Forum Manipulation? The Continuing Evolution of the Bad Faith Exception to the One-Year Time Limit on Removal

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IN 2011, Congress codified an "equitable exception" to the one-year time period for removing cases to federal court based upon diversity jurisdiction.[1] The new "bad faith" exception was intended to discourage forum manipulation by plaintiffs while maintaining a temporal limitation on removals. In the nearly seven years since the amendment took effect, there is little consensus on how to apply the exception.

The resulting patchwork of interpretation is due largely to the limited opportunities to appeal removal decisions. A decision remanding a case to state court is not generally appealable, so defendants cannot challenge the standard applied by the district court.[2] On the other hand, a plaintiff cannot appeal a decision finding bad faith and retaining jurisdiction until the case concludes by trial or dispositive ruling.[3] As a result, we

[1] *See* 28 U.S.C. §1446(c)(1).
[2] 28 U.S.C. §1447(d).
[3] *See, e.g.*, Walker v. Philip Morris USA, Inc., 443 Fed. Appx. 946 (6th Cir. 2011)

have yet to see guidance from the appellate level where perhaps the contours of §1446(c)(1) could be considered from the "10,000 foot view." The practical effect is uncertainty and frustrating inconsistency for practitioners on both sides. Conduct sufficient to qualify as bad faith in one district court might be insufficient in another – even among district courts in the same state or the same circuit.

Parsing through the difference between good faith strategy and bad faith gamesmanship in any given case is a complex, fact-driven calculus. It is easy to identify a blazing house fire, but much harder to determine whether flames are smoldering covertly within the walls. The two most commonly-used frameworks originate from the *Hiser* and *Aguayo* opinions. These opinions are often presented to represent mutually exclusive approaches. This appears to be the result of subsequent interpretation since the root consideration of both decisions is the same: is there sufficient evidence of a plaintiff's intentional action or inaction to deprive a defendant of the opportunity to remove within the one-year time period. This article argues that because these approaches suffer from analytical blind spots, a third approach based upon the totality of the circumstances provides a more flexible framework for balancing the limited nature of diversity jurisdiction with the Congressional intent behind §1446(c)(1).

I. A Brief History of §1446(c)(1)

Prior to 1988, 28 U.S.C. §1446 did not impose a time limit for removal in cases that were not initially removable on grounds of diversity:

> If the case stated by the initial pleading is not removable, a petition for removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.[4]

The lack of an "end date" left defendants free to remove a case to federal court if it became diverse at any time – even during trial in state court. In 1988, Congress added the one-year time limit intended "as a means of reducing opportunity for removal after substantial progress

(considering propriety of removal as part of appeal after motion to dismiss was granted).

[4] Text of 28 U.S.C. §1446(b) prior to 1988 Amendments.

has been made in state court."[5] This was viewed as "a modest curtailment in access to diversity jurisdiction."[6] In reality, however, it encouraged "plaintiffs to circumvent it altogether" by joining "nondiverse defendants for 366 days simply to avoid federal court, thereby undermining the very purpose of diversity jurisdiction."[7]

In reaction to the unintended consequence of forum manipulation, federal courts began to disagree on whether the one-year removal period was procedural or jurisdictional.[8] The Fifth Circuit, in particular, found that the time period was procedural and subject to an equitable exception "[w]here a plaintiff has attempted to manipulate the statutory rules for determining federal removal jurisdiction, thereby preventing the defendant" from removing the case within the one-year period.[9] While no other United States Court of Appeals formally recognized an equitable exception for forum manipulation, federal district courts in several states did.[10]

In 2011, an amendment to Section 1446 added an explicit exception to the one-year deadline for removal based upon diversity jurisdiction:

> A case may not be removed under subsection (b)(3) on the basis of jurisdiction conferred by section 1332 more than one year after commencement of the

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[5] H.R. Rep. No. 889, at 72 (1988), reprinted in 1988 U.S.C.C.A.N. 5982, 6032.

[6] *Id*.

[7] Tedford v. Warner Lambert Co., 327 F.3d 423, 427 (5th Cir. 2003); *see also* E. Farish 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, 147, 148-149 (2011).

[8] *Compare*, *e.g.*, Barnes v. Westinghouse, 962 F.2d 513 (5th Cir. 1992); Music v. Arrowood Indem. Co., 632 F.3d 284 (6th Cir. 2011); Jackson v. Wal-Mart Stores, Inc., 588 F. Supp. 2d 1085 (N.D. Cal. 2008) (finding the time limit was procedural) *with*, *e.g.*, Foiles v. Merrell Nat'l Laboratories, Div. of Richardson-Merrell, Inc., 730 F. Supp. 108 (N.D. Ill., 1989); Price v. Messer, 872 F. Supp. 317 (S.D. W.Va. 1995) (finding it was jurisdictional).

[9] *Tedford*, 327 F.3d at 428-429.

[10] *See*, *e.g.*, Kite v. Richard Wolf Med. Instruments Corp., 761 F. Supp. 597, 600-601 (S.D. Ind. 1989) ("If the Court were to grant remands in cases such as this, the effect would be to encourage plaintiffs to manipulate the removal process and undermine Congressional intent to provide a federal forum to defendants who expediently seek removal to federal court in diversity jurisdiction cases"); Morrison v. Nat'l Benefit Life Ins. Co., 889 F. Supp. 945, 951 (S.D. Miss. 1995) (applying the exception when "[p]laintiffs engage in an obvious attempt to manipulate statutory rules for determining federal jurisdiction"); *In re:* Rezulin Products Liability Litigation, 2003 U.S. Dist. LEXIS 26528, *7 (S.D.N.Y. June 11, 2003) (applying the equitable exception where "the plaintiff engaged in strategic behavior" to avoid removal within one year); Powell v. SmithKline Beecham Corp., 2013 U.S. Dist. LEXIS 138226, *33-34 (E.D. Pa. Sept. 26, 2013) (recognizing an exception where "*plaintiff's intentional conduct* was the cause of the untimely removal") (emphasis original).

> action, unless the district court finds that the plaintiff has acted in bad faith in order to prevent a defendant from removing the action.[11]

The stated intent of the amendment was to resolve the patchwork jurisprudence on the "equitable exception" and clarify that the one-year time limit is procedural and, therefore, excusable upon a showing that the "plaintiff acted in bad faith" to prevent removal within that time period.[12] Thus far, however, Congress's attempt at clarification has only generated a new patchwork of cases.

II. Two Roads Diverged . . .

District courts have spent the better part of seven years wrestling with the practical application of the bad faith exception. The majority of the resulting decisions can be grouped into two interpretive standards or frameworks. As mentioned above, these frameworks have been characterized in subsequent decisions as being mutually exclusive. While they are not all that dissimilar at their core, each approach has its own weakness.

A. Intentional Conduct to Deny the Chance to Remove

In *Taylor v. King,*[13] the Western District of Kentucky was one of the first courts, if not the first court, to consider the bad faith exception.[14] *Taylor* arose from a personal injury and insurance wrongful death case in which the out-of-state insurer argued that the plaintiff kept a local defendant in the case for years solely to avoid removal.[15] The court determined that, to retain jurisdiction, it must find that the plaintiff's conduct was "employed specifically to defeat diversity jurisdiction."[16] Since Kentucky law allows plaintiffs to bring insurance bad faith claims simultaneously with underlying tort claims, the court found no evidence of conduct intended to avoid removal.[17] The result in *Taylor* was largely a function of Kentucky insurance law,

[11] 28 U.S.C. §1446(c)(1) (emphasis added).
[12] 28 U.S.C. §1446(c)(1); *see also* H.R. Rep. No. 112-10 at 15 (2011), reprinted in 2011 U.S.C.C.A.N. 576, 580; *Powell*, 2013 U.S. Dist. LEXIS 138226 at *41-42; Ehrenreich v. Black, 994 F. Supp.2d 284, 288 (S.D.N.Y. 2014).

[13] Surprisingly, decisions addressing the bad faith exception are not included in the Lexis or Westlaw statutory annotations for 28 U.S.C. §1446(c)(1). As a result, the author relied upon case citations found in known opinions and Shepard's to identify relevant decisions.
[14] *See* Taylor v. King, 2012 U.S. Dist. LEXIS 111352 (W.D. Ky. Aug. 8, 2012).
[15] *Id*. at *1-3.
[16] *Id*. at *16.
[17] *Id*. at *10-11, 17.

but its discussion of the new bad faith exception became the centerpiece for the same court's decision in *Hiser* two years later.

In *Hiser v. Seay*, the plaintiff was a rear seat passenger who suffered catastrophic injuries in a single vehicle accident.[18] He filed suit against the driver, the vehicle manufacturer, and an uninsured motorist insurance carrier. The driver and the UIM carrier were local, non-diverse defendants.[19] Both local defendants offered to settle for policy limits within the first two months of litigation, but plaintiff declined the offers until safely past the one-year mark.[20] The vehicle manufacturer, Volkswagen, removed based upon the bad faith exception.

Building upon its prior decision in *Taylor*, the *Hiser* court focused its analysis on "whether the plaintiff engaged in intentional conduct to deny the defendant the chance to remove the case to federal court."[21] In contrast to *Taylor*, the intentional conduct in *Hiser* was overt and plentiful. During the first year of litigation, plaintiff engaged in some procedural gymnastics in an attempt to settle with the UIM carrier while not settling with the driver.[22] That attempt failed due to the peculiarities of Kentucky UIM law, but it exposed plaintiff's strategy to avoid removal. In addition, plaintiff's counsel made statements in the presence of all counsel that he could not yet accept the policy limit offers from the driver and UIM carrier because it would enable Volkswagen to remove the case.[23] Finally, in briefing on the motion to remand, plaintiff admitted that he "decided to continue the litigation with all parties in the case until the one-year period passed due to the 'likelihood of attempted removal.'"[24] In other words, plaintiff agreed that he intended to deny Volkswagen the opportunity to remove, but viewed it as "sound strategy," not gamesmanship tantamount to bad faith.[25] The court disagreed and found bad faith conduct warranting an exception to the one-year time limit.[26]

In October 2015, another district court in the Sixth Circuit relied upon *Hiser*'s "intentional conduct" standard when considering whether plaintiffs' "methodical delay" in consummating a settlement against a local defendant qualified as bad faith for purposes of §1446(c)(1).[27] *Comer v. Schmitt* recognized that

[18] 2014 U.S. Dist. LEXIS 168429, *2 (W.D. Ky. Dec. 5, 2014).
[19] *Id*.
[20] *Id*. at *2-4.
[21] *Id*. at*10-11.
[22] *Id*. at *2-4.
[23] *Id*. at *4.
[24] *Id*. at *10.
[25] *Id*.
[26] *Id*. at *12.
[27] Comer v. Schmitt, 2015 U.S. Dist. LEXIS 139895, *9-11 (S.D. Ohio Oct. 14 2015), *report and recommendations adopted by*

bad faith "need not amount to malicious or unsavory conduct," and that *Hiser*'s "intentional conduct" standard can apply to either action ***or inaction***.[28] As in *Hiser*, *Comer* involved personal injury and product liability claims arising out of a car accident.[29] As in *Hiser*, the diverse vehicle manufacturer, GM, argued that plaintiffs delayed settling with a local defendant to deprive it of the opportunity to removal.[30] And, as in *Hiser*, evidence of intentional conduct in *Comer* was overt and plentiful. The local defendant filed a motion to enforce settlement that accused plaintiffs of slow-walking the settlement in an effort to forestall removal.[31] Moreover, the local defendant produced written correspondence from plaintiffs' counsel showing that a settlement in principle was reached within the first year of litigation.[32]

Hiser and *Comer* – perhaps inadvertently – spawned a line of cases characterizing the "intentional conduct" test as one of the most stringent standards for finding bad faith under §1446(c)(1).[33] The adverb "inadvertently" is appropriate because the fact patterns of *Hiser* and *Comer* made finding bad faith an easy call under any standard. In both, the methodical delay in settling with non-diverse defendants, coupled with verbal and written statements by opposing counsel, gave the courts direct evidence of overt intent to thwart removal. By comparison, these "easy calls" may have led other courts to apply an artificially narrow and high bar in less overt but equally intentional future fact patterns. And, while neither *Hiser* nor *Comer* implied the need for direct evidence of overt intentional conduct, subsequent decisions inside and outside the Sixth Circuit have since interpreted the standard as requiring the removing defendant to place "Colonel Mustard in the library with the candlestick."[34]

2015 U.S. Dist. LEXIS 153860 (S.D. Ohio Nov. 13, 2015).

[28] *Id*. at *9.

[29] *Id*. at *1-3.

[30] *Id*. at *3.

[31] *Id*. at *2, 10.

[32] *Id*. at *10.

[33] *See*, *e.g.*, RJO Invs., Inc. v. Crown Fin., LLC, 2018 U.S. Dist. LEXIS 76114, *18 (W.D. Ark. May 2, 2018) (citing *Hiser* as an example of a court imposing significant limitations on the use of the bad faith exception).

[34] *See*, *e.g.*, Hopkins v. Nationwide Agribusiness Ins. Co., 2018 U.S. Dist. LEXIS 117619, *11 (N.D. Ala. July 16, 2018) (failure to litigate and suspicious timing of dismissal were not evidence of intentional conduct to prevent removal); *RJO Invs.,* 2018 U.S. Dist. LEXIS 76114 at *18 (requiring removing defendant to offer detailed evidence of "clearly egregious" conduct); Plaxe v. Fiegura, 2018 U.S. Dist. LEXIS 72727 (E.D. Pa. Apr. 27, 2018) (case remanded despite evidence that plaintiff slow-walked settlement with local defendant due to concerns about the impact on venue.); Larue v. Volkswagen Grp. of Am., Inc., 2017 U.S. Dist. LEXIS 81185 (W.D. Ky. May 26, 2017) (plaintiff's failure to litigate against non-diverse defendants on threshold issue of

This is not to say that all of the foregoing decisions were wrong, but rather that they raise a question of whether their interpretation of *Hiser* deviated from the original decision and the intent behind the bad faith exception. In at least one example, the evolving view of the "intentional conduct" standard led to inconsistent results in similar fact patterns. In *Plaxe v. Fiegura*, as in *Comer*, the removing defendant Chrysler pointed to the plaintiff's methodical delay in consummating settlement with a non-diverse defendant.[35] Chrysler, much like GM in *Comer*, had written correspondence showing that the parties reached settlements in principle within the first year of litigation, but delayed those settlements due to concerns about the impact on venue.[36] The correspondence in *Plaxe* was from the settling defendant's counsel, but nevertheless, it showed plaintiff playing coy with the settlement terms while avoiding an outright revelation of his intent to avoid removal.[37] Specifically, the settlement included the unusual condition that the settling defendant not "side with" Chrysler "for venue purposes."[38] Plaintiff certainly never corrected defense counsel in writing about certain unusual conditions related to venue. However, the court in *Plaxe* found the letters and other evidence insufficient to show bad faith for purposes of §1446(c)(1). It determined that it needed direct evidence of intent, and while the letters mentioned "removal," they did not specify removal to federal court.[39]

Was the outcome in *Plaxe* a function of differences in the evidence, or was it because the "intentional conduct" standard fell victim to "mission creep" in subsequent interpretations? Alternatively, we suggest that the *Plaxe* decision shows the *Taylor* standard is not well-suited for cases involving more covert types of forum manipulation.

B. Failure to Actively Litigate Against the Diversity Spoiler

Other district courts have considered how to better address more subtle instances of bad faith, where inaction or even apparent "slacking off" is calculated to evade timely removal.[40] In 2014, a district court in New Mexico fashioned a

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sovereign immunity was insufficient evidence of bad faith); Dutchmaid Logistics, Inc. v. Navistar, Inc., 2017 U.S. Dist. LEXIS 55151 (S.D. Ohio Apr. 11, 2017) (remanding based upon the lack of "direct evidence" of intentional conduct).

[35] 2018 U.S. Dist. LEXIS 72727, *9-10.

[36] *Id*. at *10-12.

[37] *Id*.

[38] *Id*. at *11.

[39] *Id*. at *13.

[40] *See, e.g.*, Lawson v. Parker Hannifin Corp. 2014 U.S. Dist. LEXIS 37085, *17-18, 19-20 (N.D. Tex. Mar. 20, 2014) (plaintiff's failure to prosecute her claim against local

two-step analysis that considered the failure to actively litigate against the non-diverse defendant as the first, potentially dispositive, factor in identifying bad faith.[41] The *Aguayo* case name soon became shorthand for an analytical framework centered on the theory that suing a non-diverse defendant and then doing nothing to develop a case against that defendant was a covert form of bad faith no less intentional than the overt examples seen in *Hiser* and *Comer*.

Aguayo arose out of a wrongful death case in which the plaintiffs' decedent was shot multiple times by one defendant using a pistol stolen from that defendant's stepfather, an officer with the New Mexico State Police.[42] The only out-of-state defendant was AMCO Insurance, the plaintiffs' underinsured motorist carrier.[43] The procedural history was complicated by multiple amended complaints, but eventually plaintiffs dismissed everyone except the shooter and AMCO.[44] Almost two years after filing their original complaint and just six days prior to trial, plaintiffs dismissed the shooter.[45] AMCO removed arguing that plaintiffs failed to litigate against the shooter and brought him along for the ride to destroy diversity.[46]

In an exhaustive opinion, the *Aguayo* court covered many issues related to diversity jurisdiction and removal, but the decision is most cited now for its analysis of what constitutes bad faith for purposes of §1446(c)(1). The court identified the failure to actively litigate against the non-diverse defendant as the first step in its two-part analysis:

> First, the court inquires ***whether the plaintiff actively litigated against the removal spoiler in state court***: asserting valid claims, taking discovery, negotiating settlement, seeking default judgments if the defendant does not answer the complaint, et cetera. ***Failure to actively litigate against the removal spoiler will be deemed bad faith***; actively litigating against the removal spoiler, however, will create a rebuttable presumption of good faith. Second, the defendant may attempt to rebut this presumption with evidence already in the defendant's possession that establishes that, despite the plaintiff's

defendant was sufficient evidence of "legal machinations" to avoid removal).

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

[42] 59 F. Supp.3d at 1229-1230.

[43] *Id*. at 1230.

[44] *Id*. at 1231.

[45] *Id*.

[46] *Id*. at 1231-1232.

> active litigation against the removal spoiler, the plaintiff would not have named the removal spoiler or would have dropped the spoiler before the one-year mark but for the plaintiff's desire to keep the case in state court. The defendant may introduce direct evidence of the plaintiff's bad faith at this stage—e.g., electronic mail transmissions in which the plaintiff states that he or she is only keeping the removal spoiler joined to defeat removal—but will not receive discovery or an evidentiary hearing in federal court to obtain such evidence.[47]

In other words, ***if a plaintiff fails to actively litigate against the non-diverse defendant, bad faith is established and the inquiry ends***.[48] Moreover, since "the bad-faith exception is an exception only to the one-year limitation—not to complete diversity," the only way for a plaintiff to conceal forum manipulation is to avoid "showing his hand": "[i]f the plaintiff keeps a removal-spoiling party . . . joined all the way through trial, then the defendant can never remove the case under the bad-faith exception, regardless how much 'bad faith' the plaintiff had in doing so."[49] Several courts have since adopted or borrowed some version of *Aguayo*'s active litigation test.[50]

The *Aguayo* test has been the subject of much debate, both positive and negative, among district courts struggling to interpret the bad faith exception. In late 2016, Shepard's listed 23 decisions citing to *Aguayo*. Several of these were related to *Aguayo*'s discussion of fraudulent joinder or

[47] *Id*. at 1262-1263 (emphases added).
[48] *Id*.
[49] *Id*. at 1265.
[50] *See, e.g.,* Holman v. Coventry Health & Life Ins. Co., 2017 U.S. Dist. LEXIS 190903 (W.D. Okla. Nov. 17, 2017); NPV Realty, LLC v. Nash, 2017 U.S. Dist. LEXIS 67938 (M.D. Fla. May 4, 2017); Kamal-Hashmat v. Loews Miami Beach Hotel Operating Co., 2017 U.S. Dist. LEXIS 12361 (S.D. Fla. Jan. 27, 2017); Larson v. FedEx Group Package Sys., 2016 U.S. Dist. LEXIS 155090 (D. Mont. Nov. 8, 2016); Bristol v. Ford Motor Co., 2016 U.S. Dist. LEXIS 148867 (E.D. Mo., Oct. 27, 2016); Heacock v. Rolling Frito-Lay Sales, LP, 2016 U.S. Dist. LEXIS 98227 (W.D. Wash. July 27, 2016); Ramirez v. Johnson & Johnson, 2015 U.S. Dist. LEXIS 102967 (S.D. W. Va. Aug. 6, 2015).

other facets of removal. By late 2018, those citing decisions grew to more than 50 with the majority now focused on the opinion's discussion of the bad faith exception. Some courts have rejected *Aguayo* (in favor of the "intentional conduct" standard) because they see it as creating too low of a bar for finding bad faith, or discouraging plaintiffs from dismissing defendants.[51]

Much like the perception of the "intentional conduct" standard, the perception of the *Aguayo* "two-step" seemed to change in subsequent interpretations, but with the opposite result. However, a close look at *Aguayo* reveals a standard not so different from "intentional conduct." First, the *Aguayo* court remanded the case to state court. It concluded that AMCO did not meet the standard for bad faith because the plaintiffs engaged in meaningful litigation against the non-diverse defendants. [52] Second, the court emphasized that the "active litigation standard is over-inclusive."[53] It recognized that there are many good faith motivations for not engaging in traditional discovery against a particular defendant.[54] As a result, "[a]ny non-token amount of discovery or other active litigation against a removal spoiler entitles the plaintiff to the presumption" of good faith.[55] Subsequent cases have found that a "bare minimum" of discovery gets a plaintiff past the first step of the test, including reliance on discovery or depositions taken in other, similar litigation.[56]

Third, because the *Aguayo* court had serious concerns about consistent and equitable application of the "quintessential subjective standard" of bad faith, it relied upon the general presumption against removal and demanded "a smoking gun or close to it" in order to rebut a presumption of good faith.[57] In fact, the court voiced its frustration with Congress's failure to provide an objective, bright-line rule.[58]

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[51] *See*, *e.g.*, *Dutchmaid*, 2017 U.S. Dist. LEXIS 55151 at *10 (concern that *Aguayo* could "deter plaintiffs from dismissing defendants they realize are not necessary, as well as force plaintiffs to request meaningless discovery" all to avoid the exception.); *Larue*, 2017 U.S. Dist. LEXIS 81185 at *17 ("the *Aguayo* analysis seems inappropriate because it would reverse the presumption in favor of remand in cases like this where the plaintiff has a colorable claim against a non-diverse party . . . ."); *Hopkins*, 2018 U.S. Dist. LEXIS 117619 at *11 (echoing *Dutchmaid*).

[52] 59 F. Supp.3d at 1286.

[53] *Id*. at 1274.

[54] *Id*. at 1274; *see also* Herron v. Graco, Inc., 2016 U.S. Dist. LEXIS 173596, *10-11 (S.D. Ill. Dec. 15, 2016) (finding the decision to pursue procedural remedies against non-diverse defendants first was not a bad faith failure to litigate).

[55] 59 F. Supp.3d at 1275.

[56] *See Bristol*, 2016 U.S. Dist. LEXIS 148867 at *13; *Heacock*, 2016 U.S. Dist. LEXIS 98227 at *7.

[57] 59 F. Supp.3d at 1277, 1278.

[58] *Id*. at 1277-1282; *see also id*. at 1279 ("A bright-line rule would allow plaintiffs to satisfy the rule's parameters without going

Therefore, contrary to some characterizations, the *Aguayo* "active litigation" standard can be a high bar for meeting the bad faith exception. The key difference between it and the "intentional conduct" standard is that *Aguayo* recognizes that the failure to litigate against a local defendant can, in some circumstances, be dispositive of subtle, but nonetheless intentional, conduct to deny the opportunity for removal. However, the "active litigation" standard still suffers from the same weakness and potential for inconsistency as the "intentional conduct" standard: how to define the vast gray area between good strategy and very overt forum manipulation. Even *Aguayo* recognized the potential for inconsistency in its own test.[59] If a plaintiff gets past the first step of *Aguayo*, i.e., some active litigation against the removal spoiler, what types of action or inaction can rebut the presumption of good faith? Many of the cases using the "active litigation" standard have found insufficient evidence of bad faith, but many of those decisions focused on defining "active litigation" and offered little analysis on the second step.[60]

III. The Road Less Traveled

Both the courts that use the "intentional conduct" test and those that apply the "active litigation" test struggle with the subjective nature of the "bad faith" standard. Each of these approaches has blind spots related to the factors considered and the nature of the evidence required. How do courts balance the intention behind the exception with the traditional presumption against removal? How do courts fashion a standard that offers guidance and consistency of application to practitioners on both sides? And, how do courts avoid defining "bad faith" with such narrow specificity as to encourage creative plaintiffs to play in the margins and thereby frustrate the purpose of the exception? The "quintessential subjective standard," by definition, eludes a clear, objective framework. While the outcome of removals based upon this exception will always be fact-intensive and fact-dependent, that does not mean courts and litigants should stop looking for an analytical framework that better fits the subjective nature of these cases.

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to wasteful, unnecessary extremes, and would provide defendants with a consciously designed level of protection.").

[59] *Id*. at 1277.

[60] *See*, *e.g.*, *NPV Realty,* 2017 U.S. Dist. LEXIS 67938; *Herron*, 2016 U.S. Dist. LEXIS 173596 *Larson*, 2016 U.S. Dist. LEXIS 155090; *Bristol*, 2016 U.S. Dist. LEXIS 148867; *Heacock*, 2016 U.S. Dist. LEXIS 98227; *Ramirez,* 2015 U.S. Dist. LEXIS 102967.

A. Totality of Circumstances

A handful of courts use an approach that offers flexibility, and at least a little more objectivity, to shape the analysis of the bad faith exception. This "totality of circumstances" analysis looks for indicia of bad faith based upon several non-exclusive guideposts: (i) lack of diligence in service of summons; (ii) inconsistent statements about the need for discovery; (iii) failure to litigate or otherwise develop a case against the non-diverse defendant; (iv) joinder of a party that, while not fraudulent, is highly suspicious; (v) lack of substantive opposition to dispositive motions filed by the local defendant; (vi) implausible explanations as to the timing of dismissal; and (vii) any other evidence of forum manipulation. While all three approaches share the same goal and the same root considerations, the "totality of circumstances" approach embraces tailoring the analysis to the specifics of a given case.

In *Forth v. Diversey Corp.*, the plaintiffs brought a toxic exposure claim against several defendants, including diversity spoiler, Chemical Distributors.[61] Chemical Distributors' counsel informed plaintiffs' counsel immediately that his client was an improper party.[62] Plaintiffs' counsel assured him of a quick dismissal, but then did nothing.[63] Plaintiffs' counsel later claimed he needed additional discovery to verify that Chemical Distributors was an improper party, but again, did nothing even when offered a corporate representative for deposition.[64] Eighteen months after suit was filed and during the middle of the main plaintiff's deposition, plaintiffs' counsel agreed to dismiss Chemical Distributors.[65] He later represented to the district court that the decision to dismiss was based upon his client's deposition testimony and the representations of Chemical Distributors' counsel.[66] The out-of-state defendants removed soon after.

In considering a motion to remand, *Forth* started its analysis by concluding that bad faith under the new language of §1446(c)(1) "'must be supported by clear and convincing evidence.'"[67] The court

[61] 2013 U.S. Dist. LEXIS 165315, *1-2 (W.D.N.Y. Oct. 23, 2013), *report and recommendations adopted by* 2013 U.S. Dist. LEXIS 165224 (W.D.N.Y. Nov. 20, 2013).
[62] *Id*. at *2.
[63] *Id*.
[64] *Id*. at *2-3.
[65] *Id*. at *3.
[66] *Id*. at *6-7.
[67] *Id*. at *5 (quoting Kerin v. United States Postal Service, 218 F.3d 185, 191 (2d Cir. 2000)). *Forth* appears to be one of the few courts to explicitly adopt a clear and convincing evidence standard for judging bad faith in this context. *See*, *e.g.*, *Holman*, 2017 U.S. Dist. LEXIS 187409, *7 n. 2 (noting

also recognized that "bad faith may be overt or may consist of inaction . . . [such as] lack of diligence and slacking off."[68] "Since it would be extraordinary for a party directly to admit a 'bad faith' intention, his motive must of necessity be ascertained from the circumstantial evidence."[69] Turning to the facts of the case, the court found that plaintiffs' counsel's inconsistent positions on the basis for dismissal and the need for discovery, as well as his nonsensical claim that he needed his own client's testimony before agreeing to the dismissal, were "highly suggestive of bad faith."[70] Even under the heightened clear and convincing evidence standard, the court found that plaintiffs' failure to conduct discovery on a threshold issue and his implausible explanations as to the reason for and timing of the dismissal were more than sufficient for an exception to the one-year time limit.[71]

A few months after *Forth*, another federal court in New York relied upon additional guideposts to remand a case. In *Ehrenreich v. Black*, the plaintiffs were the middle car in a chain reaction accident.[72] They sued the driver in front of them (a local resident) and the driver behind them (from out-of-state).[73] Thirteen months later, the state court granted the in-state driver's motion for summary judgment.[74] The remaining defendant removed claiming both fraudulent joinder and bad faith to avoid removal.[75] Using *Forth*'s clear and convincing evidence standard, *Ehrenreich* looked for evidence of "strategic gamesmanship" to prevent removal during the first year.[76] It found none. The local defendant "was not belatedly added in response to an attempted removal."[77] Plaintiff did not dismiss him "as soon as the one-year deadline had passed."[78] Plaintiffs "actively prosecuted the

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Forth's use of the clear and convincing evidence standard is in the minority).

[68] *Id*. at *5-6 (internal citations omitted).

[69] *Id*. at *6 (internal citations omitted).

[70] *Id*. at *7.

[71] *Id*. ("'both inconsistent statements and implausible explanations have been recognized as evidence of guilty knowledge.'") (quoting United States v. Villareal, 324 F.3d 319, 325 (5th Cir. 2003)).

[72] 994 F. Supp.2d 284, 286 (E.D.N.Y. 2014).

[73] *Id*.

[74] *Id*.

[75] *Id*. at 287.

[76] *Id*. at 288.

[77] *Id*.

[78] *Id*. at 289. The temporal proximity of a dismissal can be a tricky factor in evaluating evidence of bad faith. Dismissal of a non-diverse defendant shortly after the one-year deadline is a red flag of forum manipulation. However, dismissal six, 12, or even 18 months beyond the first year is not dispositive of good faith. Biding one's time, under the right circumstances, is by definition, manipulation and gamesmanship

case" against him, and vigorously opposed his dispositive motion.[79]

Borrowing from *Forth* and *Ehrenreich*, a court in the Central District of California used similar guideposts when a plaintiff dismissed the non-diverse defendant after failing to serve her with summons for 18 months.[80] The court in *Heller v. American States Insurance* focused on whether plaintiff could offer a reasonable explanation for his lack of diligence in failing to serve non-diverse defendant, Maryann Mull, during the first year of litigation.[81] Plaintiff could not document efforts to research Mull.[82] Additionally, plaintiff never used discovery requests directed at the other defendants (Mull's former client/principal) to seek out Mull's whereabouts or to develop his claims against her.[83] Most significantly, plaintiff's counsel gave inconsistent explanations as to why Mull was not dismissed earlier. Counsel's affidavit in support of remand stated that he was unable to serve Mull despite countless attempts.[84] However, during a case management conference five months after suit was filed, counsel informed the state court that his client was holding off on service and considering dismissal of Mull.[85] "Although there is a high bar for a finding of bad faith, the totality of the circumstances in this case weighed against a finding of sufficient diligence and are highly indicative of 'strategic gamesmanship' intended to prevent removal."[86]

B. The Merging Lane

The move to a more flexible, fact-driven approach has also reached courts previously in the "intentional conduct" or "active litigation" camps. The result is an amalgam of all three standards. While it is too early to call this a trend, some courts have recently suggested that choosing between specific approaches results in a "one-size-fits-none" analysis.

Holman v. Coventry Health & Life Insurance was cited earlier as a disciple of the *Aguayo* "active litigation" test.[87] *Holman*, for the

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because it intentionally avoids obvious temporal proximity. Courts that are reluctant to find bad faith without immediate temporal proximity encourage savvy forum manipulators to tailor their game with patience.

[79] *Id*.

[80] Heller v. American States Ins. Co., 2016 U.S. Dist. LEXIS 39645 (C.D. Cal. Mar. 25, 2016).

[81] *Id*. at *7-8.

[82] *Id*. at *8.

[83] *Id*.; *see also* Escalante v. Burlington Nat. Indem., Ltd., 2014 U.S. Dist. LEXIS 165085 (C.D. Cal. Nov. 24, 2014) (detailing plaintiff's exhaustive search to effect service on a defendant for over one year).

[84] *Id*. at *8-9.

[85] *Id*. at *9.

[86] *Id*.

[87] 2017 U.S. Dist. LEXIS 19093 (W.D. Okla. Nov. 17, 2017).

most part, concluded that *Aguayo* was a useful analytical guide. [88] However, the court also struggled with the practical distinction between good strategy and bad faith. In *Holman*, the plaintiffs sued health insurer Coventry and local agent Green Insurance Associates following a denial of coverage based upon a dispute over the issuance of a new policy.[89] Plaintiffs dismissed the agent after more than one year of litigation.[90] Since the plaintiffs actively litigated against the agent, the court was left wrestling with how to apply the second step – the rebuttable presumption of good faith. [91] For example, the court expressed "some hesitation" about *Aguayo*'s "emphasis on the presumption against removal."[92] It had "some question as to how aggressively the presumption . . . should be applied" because the bad faith exception showed that Congress "plainly intended to protect access to a federal forum."[93] In addition, the court thought *Aguayo*'s "smoking gun" evidentiary standard was excessive. [94] "[R]equiring a 'smoking gun' may often be tantamount to a requirement of direct evidence of the intent to manipulate forum selection, and evidence of that sort will rarely be available even when bad faith is actually involved."[95]

With this in mind, *Holman* determined that "the defendant must present strong, relatively compelling evidence, direct or circumstantial, of the plaintiff's subjective intent in order to rebut the presumption of good faith."[96] If this sounds familiar, it should. It echoes language from both *Hiser* and *Aguayo* while also hinting at openness to the totality of circumstances specific to a given case. This amalgamated standard enabled the court to consider a wide-variety of "is this smoke or is this fire" evidence offered by each side. Coventry cited several, somewhat unusual circumstances to as evidence of plaintiffs' bad faith:

> The familial relationship between Ms. Holman and the Green principals, Ms. Holman's prior representation of Green or related companies (Ms. Holman is an attorney), the rather pointed question of Jason Green early in the dispute as to whether the reason Green was joined was to avoid federal court, the timing of the dismissal

[88] *Id*. at *4.
[89] *Id*. at *1-2.
[90] *Id*. at *3.
[91] *Id*. at *5.
[92] *Id*. at *6.
[93] *Id*.
[94] Recall that subsequent interpretations of *Hiser*'s "intentional conduct" standard also called for evidence akin to a "smoking gun."
[95] *Id*. at *6-7.
[96] *Id*. at *7.

> relative to other events in the case, and the nature of the dispute plaintiffs claim they wanted resolved prior to dismissal.[97]

Plaintiffs countered with evidence showing that they intended to pursue their claim against Green and that at least some of Green's statements were motivated by "sour grapes" from the litigation.[98] The court characterized the evidence as largely "he said, she said," which "suggests a warm gun but not a smoking one."[99] Ultimately, the court held that the "defendant's evidence falls short – barely – of making the necessary showing."[100]

The lesson of *Holman* is not in its decision to remand, but in its willingness to consider the totality of circumstances in a way that fused the underlying touchstones of the "intentional conduct" and "active litigation" tests. Decisions from the within the Sixth Circuit – home of *Hiser* and *Comer* – have shown a similar willingness to analyze cases under both standards.

In *Dutchmaid Logistics, Inc. v. Navistar, Inc.*, Navistar argued for the adoption of *Aguayo* because the "intentional conduct" standard "is both 'over-inclusive and under-inclusive.'"[101] The *Dutchmaid* court was critical of *Aguayo*, finding "it inappropriate to adopt the test now" based upon *Aguayo*'s self-expressed concerns "with the consequences of the bad faith exception, including consequences resulting from its own test."[102] Nevertheless, the court analyzed the facts under both the "intentional conduct" and the "active litigation" tests (albeit construing *Aguayo*'s "smoking gun" language as requiring direct evidence of bad faith).[103] The court reached the same conclusion under both tests and remanded the case to state court. The fact that both *Comer* and *Dutchmaid* were authored by Magistrate Judge Elizabeth A. Preston Deavers shows how much the bad faith exception and its related case law have developed over a few short years.

More recently, in *Williams v. 3M Co.*, the Eastern District of Kentucky embraced multiple standards in

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[97] *Id*. at *7-8. The *Holman* opinion does not get into the details of this evidence, but a review of the briefing shows that lead plaintiff Melissa Holman worked for a law firm that served as counsel for Green in other matters. She was also Jason Green's cousin. Green claimed that Holman told him that suing his company was merely a formality required when suing the insurance carrier.

[98] *Id*. at *8.

[99] *Id*. *7 n. 4; *see also id*. at *10.

[100] *Id*. at *7.

[101] 2017 U.S. Dist. LEXIS 55151, *9 (S.D. Ohio Apr. 11, 2017), *report and recommendations adopted by* 2017 U.S. Dist. LEXIS 111311 (S.D. Ohio July 18, 2017) (quoting Navistar's brief).

[102] *Id*. at *9-10.

[103] *Id*. at *10-14.

analyzing the bad faith exception.[104] In *Williams*, an out-of-state respirator manufacturer argued that the plaintiff and the local distributor defendants colluded on the timing of dismissals to avoid removal within the first year.[105] The court started from the first principle that "bad faith analysis is necessarily broader than the narrow colorable claim analysis applied . . . in fraudulent joinder cases."[106] The court reviewed the two emerging analytical standards and acknowledged that "in this circuit, the Western District of Kentucky and Southern District of Ohio" have adhered to the "intentional conduct" standard.[107] However, "[r]ather than endorsing either approach as the correct standard, the court has considered 3M's arguments under ***both*** and determined that ***neither*** leads to a finding of bad faith."[108]

Under the "intentional conduct" standard from *Hiser* and *Comer*, the court found that 3M "has not identified any specific, intentional action or inaction" by plaintiff to hold the distributors in the suit.[109] Plaintiff satisfied the first step of *Aguayo* by engaging in "only the bare minimum to actively litigate" against the distributors.[110] While that bare minimum developed, at best, half of a case against the distributors and brought into question the timing and materiality of the eventual settlement, the court found that the record before it lacked "sufficient evidence to validate these concerns" as bad faith.[111] Finally, the court considered other indicia of bad faith including claims of inconsistent statements, implausible explanations, and whether plaintiff's counsel had an "implied understanding" with the distributors, or otherwise engaged in a pattern and practice of naming local defendants and then dismissing or abandoning those claims after the first year.[112] While there was plenty of smoke, the court concluded that it did not have sufficient evidence of fire.

IV. Are We There Yet?

For readers expecting a grand epiphany or nicely-packaged revelation, there is none. The conclusions that one can draw from the current jurisprudence on the bad faith exception are about as subjective and multi-faceted as the exception itself. Given the explosion of decisions on this topic, this article could have parsed through every

[104] 2018 U.S. Dist. LEXIS 104518 (E.D. Ky. June 22, 2018).
[105] *Id*. at *3-6.
[106] *Id*. at *9 (citing agreement with *Taylor*, *Larue*, and *Aguayo* on this point).
[107] *Id*. at *10; *see also id*. at *11 n. 6.
[108] *Id*. at *11 (emphases added).
[109] *Id*. at *12.
[110] *Id*. at *16.
[111] *Id*. at *17.
[112] *Id*. at *17-21.

fact pattern and decision to identify additional trends and nuances. However, the most important conclusion is that the bad faith exception is very much in its infancy, and as a result, courts and practitioners should be wary of clinging too closely to one test or another. The subjective nature of the bad faith standard means that its appearance will continue to evolve even as we attempt to objectively define it. If the exception is to have real meaning, we must be willing to evolve with it.