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Insurer-Initiated Direct Actions and the Section 1332(c) Proviso: Maintaining the Spirit of Diversity Jurisdiction

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NOTE

INSURER-INITIATED DIRECT ACTIONS AND THE SECTION 1332(C) PROVISO: MAINTAINING THE SPIRIT OF DIVERSITY JURISDICTION

INTRODUCTION

In 1964, Congress amended 28 U.S.C. § 1332(c), adding a proviso designed to narrow the scope of federal diversity jurisdiction. It provides

[that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business.]

This amendment is consistent with other congressional legislation limiting the scope of diversity jurisdiction by expanding the definition of corporate citizenship. An insurance company may now be treated

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2. Id.
3. See 28 U.S.C. § 1332 (1976), as amended by Act of July 25, 1958, Pub. L. No. 85-554, § 2, 72 Stat. 415. Initially, a corporation was considered a citizen of every state of which its shareholders were citizens. See Bank of the United States v. Deveaux, 9 U.S. (5 Cranch) 61, 84, 86-87 (1809). As corporations grew in size and complexity, however, their constituent shareholders became increasingly heterogeneous, thereby making this method of determining corporate citizenship too cumbersome for practical application. See Louisville C. & C.R.R. v. Letson, 43 U.S. (2 How.) 497, 554 (1844). To alleviate the problem, courts applied an irrebuttable presumption that all corporate shareholders were citizens of the state in which the corporation was chartered. Marshall v. Baltimore & O.R.R., 57 U.S. (16 How.) 314, 325 (1853); Louisville C. & C.R.R. v. Letson, 43 U.S. (2 How.) 478, 535 (1844); see Jurisdiction of Federal Courts Concerning Diversity of Citizenship, Hearings on H.R. 2516 and H.R. 4497 Before Subcomm. No. 3 of the House Comm. on the Judiciary, 85th Cong., 1st Sess. 4 (1957) [hereinafter cited as Hearings] (statement of Rep. Tuck). This method was codified in the Judiciary Act of 1857-58, ch. 373, § 1, 14 Stat. 552. The 1958 amendment narrowed the scope of diversity jurisdiction by expanding corporate citizenship to include both the state of incorporation and the corporation’s principal place of business. 28 U.S.C. § 1332(c) (1976), as amended by Act of July 25, 1958, Pub. L. No. 85-554, § 2, 72 Stat. 415; see R.H. Bouligny, Inc. v. United Steelworkers, 336 F.2d 160, 164 (4th Cir. 1964) (presumption that stockholders are citizens of state of incorporation abandoned, corporate citizenship created by Congressional act), aff’d. 382 U.S. 145 (1965). The amendment was necessary because the previous formula for corporate citizenship allowed corporations access to the federal courts too often. For example, a corporation chartered in state X, but conducting all its business in state Y, could invoke federal diversity jurisdiction in actions against local parties arising out of local corporate activity. See notes 55-56 infra and accompanying text. This was viewed as an abuse of diversity jurisdiction.
as a citizen of three different states for purposes of determining diversity in a given action.\textsuperscript{4} If the adverse party's citizenship coincides with any of the insurance company's citizenships, the federal courts will not have diversity jurisdiction over the case.\textsuperscript{5}

Although the effect of the proviso is undisputed,\textsuperscript{6} there is currently a split between the Fifth and Sixth Circuits as to whether the phrase "against the insurer" limits the proviso to those direct actions actually initiated by the injured party or whether it encompasses all direct actions between an injured party and the alleged tortfeasor's insurance company.\textsuperscript{7} The Fifth Circuit reasons that for diversity purposes there is no substantive difference between actions on policies of liability insurance brought against and those brought by insurers.\textsuperscript{8} In

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\textsuperscript{4} 28 U.S.C. § 1332(c) (1976); cf. Campbell v. Insurance Co. of N. Am., 552 F.2d 604 (5th Cir. 1977) (citizen of only two states because insurance company was chartered and had principal place of business in same state); Hernandez v. Travelers Ins. Co., 489 F.2d 721 (5th Cir.) (same), cert. denied, 419 U.S. 844 (1974). For example, an insurance company based in New York and chartered in Delaware, which insures a New Jersey citizen, would be considered a citizen of all three states in any direct action brought by an injured claimant against the insurance company.


\textsuperscript{7} Compare Aetna Cas. & Sur. Ins. Co. v. Greene, 606 F.2d 123, 127-28 (6th Cir. 1979) (holding § 1332(c) proviso inapplicable) with Campbell v. Insurance Co. of N. Am., 552 F.2d 604, 605 (5th Cir. 1977) (proviso held applicable to reverse direct actions) and Government Employees Ins. Co. v. LeBleu, 272 F. Supp. 421, 429 (E.D. La. 1967) (indicating same in dicta). A direct action is one in which the insurer replaces the insured as the party against whom liability is sought to be imposed. Walker v. Firemans Fund Ins. Co., 260 F. Supp. 95, 95 (D. Mont. 1966). Reverse direct actions arise, for example, when an insurer brings a declaratory judgment action to decide all potential liability issues arising out of a particular incident, 606 F.2d at 125, or when a workmen's compensation insurer challenges an award to an employee made by a state workmen's compensation board. 552 F.2d at 604.

\textsuperscript{8} Campbell v. Insurance Co. of N. Am., 552 F.2d 604, 605 (5th Cir. 1977). See also O.M. Greene Livestock Co. v. Azalea Meats, Inc., 516 F.2d 509, 510 (5th Cir. 1975) (statute merits a broad interpretation in light of the harm Congress sought to
either case, the essence of the proceeding is to determine the validity and amount of a claim against the insurer. The Sixth Circuit, on the other hand, refuses to apply the proviso to actions initiated by an insurer. It bases this refusal on a literal reading of the phrase "against the insurer" coupled with a conviction that it would be unfair to force an out-of-state insurer to bring an action in the home forum of its adversary.

The correct interpretation of the proviso depends upon an examination of three factors. First, it must be determined whether the proviso should be read literally to prohibit federal court jurisdiction only in actions brought against insurers. Second, if the plain meaning of the proviso does not limit its application, it must be ascertained whether actions brought by insurers are the type of local matter that Congress sought to restrict to state court adjudication. Finally, the practical and theoretical public policy considerations involved and the implications for the future role of diversity jurisdiction in our national court system must be examined. This Note contends that the proviso should be applicable to all direct actions involving an injured party and an insurance company. Diversity jurisdiction should, therefore, be denied whenever the injured party and the party allegedly responsible for the injury are citizens of the same state.

I. INTERPRETING THE PROVISO

A. The Louisiana Problem—Catalyst for Change

The background of the 1964 amendment to section 1332(c) is unique. Although the proviso altered the procedural rules for all fed-

remedy); Williams v. Liberty Mut. Ins. Co., 468 F.2d 1207, 1209 (5th Cir. 1972) (insurer deemed a citizen of the state of its insured in any direct action in which the insured is not joined as a party-defendant).

9. Campbell v. Insurance Co. of N. Am., 552 F.2d 604, 605 (5th Cir. 1977). In Campbell, the insurer contested an award of workmen's compensation by the Texas Industrial Accident Board in a trial de novo. Although the insurer was the nominal plaintiff, the court held that the overall proceeding was more properly characterized as initiated by the injured workman against the insurer. Id.

10. Aetna Cas. & Sur. Ins. Co. v. Greene, 606 F.2d 123, 127 (6th Cir. 1979); see Henderson v. Selective Ins. Co., 369 F.2d 143, 149 (6th Cir. 1966). The First Circuit also favors a narrow interpretation of the proviso. In White v. United States Fidelity & Guar. Co., 356 F.2d 746 (1st Cir. 1966), the court held that, because the action was brought by the plaintiff against her own insurer, it was not a direct action within the scope of the § 1332(c) proviso. Id. at 748. Although this holding is generally accepted, see, e.g., Fiorentino v. Travelers Ins. Co., 448 F. Supp. 1364 (E.D. Pa. 1978); Adams v. State Farm Mut. Auto. Ins. Co., 313 F. Supp. 1349 (N.D. Miss. 1970); Government Employees Ins. Co. v. LeBleu, 272 F. Supp. 421 (E.D. La. 1967); Walker v. Firemans Fund Ins. Co., 260 F. Supp. 95 (D. Mont. 1966), the First Circuit also noted that the proviso refers only to cases brought pursuant to direct action statutes by the victim of an alleged tort against the liability insurer. 356 F.2d at 747.

eral courts, its enactment was mainly precipitated by Congressional concern with the congested calendar of the Eastern District of Louisiana.\textsuperscript{12} Statistics gathered by the Administrative Office of the United States Courts indicated that by 1962 this district had the highest annual caseload per judgeship of all districts in the nation. The average 512 cases per year allocated to each judge was more than twice the national average.\textsuperscript{13}

The major reason for the overcrowding of the federal docket was the operation of Louisiana's direct action statute.\textsuperscript{14} Under a direct action statute, an injured party has the right to sue the insurer of an alleged tortfeasor directly.\textsuperscript{15} It is not necessary for the plaintiff either to join the insured as a party defendant or to first obtain a judgment against the insured.\textsuperscript{16} The majority of tort cases involve two or more parties.

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\item \textsuperscript{13} 110 Cong. Rec. 9313-14 (1964); Senate Report, supra note 12, at 4, reprinted in [1964] U.S. Code Cong. & Ad. News at 2781. The average annual caseload for each judge in Louisiana's Eastern District, weighted by such factors as complexity of and time spent on each case, exceeded the national average by 270 cases. Additionally, this caseload was 81 cases higher than that of the Eastern District of Virginia, Louisiana's closest competitor. Id. at 4, reprinted in [1964] U.S. Code Cong. & Ad. News at 2781.
\item \textsuperscript{14} The Louisiana statute provides in part that "[t]he injured person or his or her survivors or heirs . . . , at their option, shall have a right of direct action against the insurer within the terms and limits of the policy; and such action may be brought against the insurer alone, or against both the insured and insurer jointly." La. Rev. Stat. Ann. § 22:655 (West 1978); see P.R. Laws Ann. tit. 26, § 2003 (1976); Wis. Stat. Ann. § 632.24 (West 1980). The Louisiana direct action statute, in conjunction with the pre-1964 diversity statute, allowed plaintiffs entry to federal court in nearly all tort matters. Even automobile accident cases, which are predominantly local in nature, could be heard in federal courts if the defendant's insurance company was incorporated and had its principal place of business outside of Louisiana. Address by Elmore Whitehurst, Judicial Conference of the Tenth Circuit (July, 1955) [hereinafter cited as Whitehurst Speech], reprinted in Hearings, supra note 3, at 50; see Lumbermen's Mut. Cas. Co. v. Elbert, 348 U.S. 48 (1954) (arising out of automobile accident involving two Louisiana citizens). Various conditions, in addition to Louisiana's direct action statute, compounded the severe docket congestion in the Eastern District. First, increased use of the Port of New Orleans caused an increase in the number of maritime cases heard in the federal courts. Second, attorneys in Louisiana displayed a marked preference for federal court trials, even though trial was available in state court within a few weeks, because findings of fact are reviewed on appeal in the state court system. Senate Report, supra note 12, at 4, reprinted in [1964] U.S. Code Cong. & Ad. News at 2781.
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The insurers of these parties, however, are often corporations that are citizens of foreign jurisdictions by virtue of their states of incorporation and principal places of business. Consequently, direct action statutes, while aimed at facilitating reparation to injured parties, have the collateral effect of creating a new class of cases that, by pre-1964 standards, qualify for diversity jurisdiction. Therefore, partially to relieve the enormous burden resting on the four judges of the Eastern District, Congress amended section 1332(c) and thereby eliminated this particular means of access to the federal courts.

statute, it is generally necessary for a party to sue first and get a judgment against the insured, or at least to join the insured as a party defendant. Note, Direct Actions by Claimants Against Liability Insurers, 27 Fed'n of Ins. Counsel Q. 33, 34 (1976) [hereinafter cited as Direct Actions]. Direct action statutes, therefore, provide a more direct means of reaching the "pocket" from which reparations to an injured party claimant are ultimately taken. Additionally, some commentators view direct action statutes as part of a modern trend to transform liability insurance into a system of reparations for injured parties. J. Appleman, Insurance Law and Practice § 4862 (2d ed. 1962); Direct Actions, supra, at 33. Underlying this trend is the theory that, as a matter of public policy, insurance should be designed to protect the innocent injured party rather than to indemnify the party responsible for his injury. See id. at 33-35. In fact, the intent of the Louisiana direct action statute is "that all liability policies within their terms and limits are executed for the benefit of all injured persons, his or her survivors or heirs, to whom the insured is liable." La. Rev. Stat. Ann. § 22:655 (West 1978); see Whitehurst Speech, supra note 14, reprinted in Hearings, supra note 3, at 50-51.

17. Whitehurst Speech, supra note 14, reprinted in Hearings, supra note 3, at 50.
19. See note 16 supra.
20. The United States Supreme Court acknowledged this effect of the Louisiana direct action statute in Lumbermen's Mut. Cas. Co. v. Elbert, 348 U.S. 48 (1954). This case arose out of an automobile accident involving two Louisiana citizens. The Court held that, because the action was brought directly against an Illinois insurer, diversity jurisdiction existed. Id. at 51-53. In his concurring opinion, Justice Frankfurter foresaw the serious administrative difficulties potentially engendered by direct action statutes. Id. at 57-60.
22. 110 Cong. Rec. 9317 (1964) (remarks of Rep. Boggs); Senate Report, supra note 12, at 6-7, reprinted in [1964] U.S. Code Cong. & Ad. News at 2784. There have been several suggestions that the overcrowding in Louisiana would have been better remedied in ways other than through federal intervention. One view, presented during the debates, was that, rather than seeking to change federal law to accommodate Louisiana at the expense of what had been a useful and convenient system in Wisconsin, the state of Louisiana should have revised its direct action statute. 110 Cong. Rec. 9316 (1964) (remarks of Rep. Kastenmeier). Another view suggests that, rather than denying the federal courts jurisdiction over controversies properly within their power, the number of judges in the district should have been increased. 1 J. Moore, Federal Practice ¶ 0.77[4], at 721.5 (2d ed. 1990). Both of these solutions were rejected by Congress. The debates in the House indicate the
B. Plain Meaning vs. Expansive Construction

Because of the parochial nature of the situation that precipitated the section 1332(c) proviso, it has, at times, received restrictive judicial construction.\(^{23}\) The Sixth Circuit has argued that, because the proviso is unambiguous on its face and because Congress never considered the effect of insurer-initiated actions on the federal dockets,\(^{24}\) it must be read literally.\(^{25}\) It contends that Congressional silence cannot be construed to allow an expansive interpretation of the literal statutory language.\(^{26}\) For this reason, the Sixth Circuit holds that to construe the phrase "against the insurer" as encompassing actions

extent to which Congress is reluctant to interfere with the sovereign rights of the states. 110 Cong. Rec. 9316 (1964) (remarks of Rep. Mathias). The suggestion that more judges be appointed to handle the large caseload was not seriously considered. See 110 Cong. Rec. 9316 (1964) (remarks of Rep. Boggs). There is a long standing fear that increasing the number of judgeships tends to reduce the qualification standards, thereby "depreciat[ing] ... the judicial currency." Lumbermen's Mut. Cas. Co. v. Elbert, 348 U.S. 48, 59 (1954) (Frankfurter, J., concurring); accord, Hearings, supra note 3, at 5 (statement of Rep. Tuck); see Frankfurter, Distribution of Judicial Power Between United States and State Courts, 13 Cornell L.Q. 499, 502 (1928). Not every action initiated against an insurer, without joinder of the insured, is held to be direct and therefore within the coverage of the § 1332(c) proviso. Diversity jurisdiction has been extended in interpleader cases, Home Indem. Co. v. Moore, 499 F.2d 1202 (8th Cir. 1974), and actions brought to enforce uninsured motorist coverage. O'Hanlon v. Hartford Accident & Indem. Co., 439 F. Supp. 377 (D. Del. 1977); Irvin v. Allstate Ins. Co., 436 F. Supp. 575 (W.D. Okla. 1977); Adams v. State Farm Mut. Auto. Ins. Co., 313 F. Supp. 1349 (N.D. Miss. 1970). On the other hand, diversity jurisdiction has been denied in certain cases in which the insured could not have been joined as a party-defendant. See, e.g., Ferrara v. Aetna Cas. & Sur., 436 F. Supp. 929 (W.D. Ark. 1977) (insurer deemed citizen of state of insured hospital although hospital could not have been sued because of charitable immunity doctrine); Salgado v. Employers Ins. of Wausau, 326 F. Supp. 285 (D.P.R. 1971) (insurer deemed citizen of state of insured although statute of limitations had run on cause of action against insured).


24. In Aetna Cas. & Sur. Ins. Co. v. Greene, 606 F.2d 123 (6th Cir. 1979), the court observed that Congress did not consider that insurers may bring actions to determine their liability to prospective claimants. The court similarly found that every case brought pursuant to the the Louisiana direct action statute was by the injured party. Id. at 127. This finding, however, is not verified by the statistics Congress studied while considering the 1964 amendment. These statistics indicate neither the number of cases actually brought under direct action statutes nor the parties bringing them. See 110 Cong. Rec. 9313-14 (1964); Senate Report, supra note 12, at 3-7, reprinted in [1964] U.S. Code Cong. & Ad. News at 2779-83.


26. "No court is allowed to supplement a clear statutory provision such as § 1332(c), even when such supplement would produce beneficial results. To do so
brought by an insurer would exceed the court's authority and would amount to judicial legislation.27

This reasoning is subject to question in two respects. First, although the general rules governing judicial construction of statutes require the courts to be faithful to a statute as written by Congress,28 the "plain meaning" doctrine does not bar them from considering extrinsic factors.29 Furthermore, when there is genuine doubt concerning the proper interpretation of a statute, or a part thereof, there is a greater need to examine the legislative history to determine how the legislators would apply the statute to the set of facts at issue.30 As evidenced by the different meanings assigned the "against the insurer" clause in the Fifth and Sixth Circuits, even a simple phrase is susceptible of different interpretations when applied to varying factual

would exceed the court's power of statutory interpretation, and would encroach upon the congressional power to legislate." Id. at 127-28.

27. Id.


29. The "plain meaning" rule dictates that "[e]ven though the court should be convinced that some other meaning was really intended by the law-making power, and even though the literal interpretation should defeat the very purposes of the enactment, still the explicit declaration of the legislature is the law." H. Black, Hornbook on the Construction and Interpretation Of The Laws 45 (2d ed. 1911). Strict adherence to the literal or plain meaning rule has been largely abandoned in favor of an approach that allows courts to consider a statute's background and legislative history regardless of its facial clarity. Harrison v. Northern Trust Co., 317 U.S. 476, 479 (1943) ("W]ords are inexact tools at best, and for that reason there is wisely no rule of law forbidding resort to explanatory legislative history no matter how 'clear the words may appear on 'superficial examination.' " (quoting United States v. American Trucking Ass'ns, 310 U.S. 534, 544 (1940)); accord. Train v. Colorado Pub. Interest Research Group, 426 U.S. 1, 10 (1976); Aviation Consumer Action Project v. Washburn, 335 F.2d 101, 106 (D.C. Cir. 1970); Air Reduction Co. v. Hickel, 429 F.2d 392, 395 n.2 (D.C. Cir. 1969). Indeed, resort by courts to the "plain meaning" rule to support their readings of particular statutes has been referred to as "a kind of verbal table thumping to express or reinforce confidence in an interpretation arrived at on other grounds instead of a reason for it." 2A C. Sands, Sutherland's Statutes and Statutory Construction § 46.01, at 49 (4th ed. 1972) [hereinafter cited as Sutherland]. See generally Murphy, Old Maxims Never Die: The "Plain-Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts, 75 Colum. L. Rev. 1299 (1975) (arguing that plain meaning rule interferes with determination of legislative intent in enacting statutes).

30. Philbrook v. Glodgett, 421 U.S. 707, 713-14 (1975), United States v. Sisson, 399 U.S. 267, 307 (1970); Cawley v. United States, 272 F.2d 443, 445 (2d Cir. 1959) (L. Hand, J.) ("We are to put ourselves so far as we can in the position of the legislature that uttered them, and decide whether or not it would declare that the situation that has arisen is within what it wished to cover.")
situations.\textsuperscript{31} Therefore, a court's decision to construe a seemingly unambiguous phrase does not constitute usurpation of the legislative power. On the contrary, failure to delve beyond the common meaning of such a phrase would be an abdication of its judicial duty to interpret laws.\textsuperscript{32}

Second, the Sixth Circuit's assertion that the proviso is inapplicable to insurer-initiated actions because these were not considered by Congress is an overly restrictive reading of the legislative history.\textsuperscript{33} Under this view, courts would only apply a given piece of legislation under conditions identical to the one that prompted Congress to enact it. It is unrealistic, however, to assume that the legislature discusses, or even anticipates, every situation that properly lies within the scope of a given law.\textsuperscript{34} Although such a cautious approach would prevent misapplication of the statute, it could also frustrate the legislative purpose by ignoring the more general Congressional fear evoked by the scrutinized incidents.\textsuperscript{35} This likelihood is particularly strong where, as here, Congress chose to remedy an apparently isolated local problem by means of legislation affecting the federal courts of the entire nation.\textsuperscript{36} Additionally, the rules governing judicial con-

\textsuperscript{31} See notes 6-11 \textit{supra} and accompanying text.
\textsuperscript{32} United States v. American Trucking Ass'ns, 310 U.S. 534, 543-44 (1940); Ozawa v. United States, 260 U.S. 178, 194 (1922).
\textsuperscript{33} This approach is no longer a tenable ground for refusal to apply a statute to a particular set of facts. See Montana Power Co. v. Federal Power Comm'n, 445 F.2d 739, 746 (D.C. Cir. 1970) (holding that where Congress was silent court must "project" legislative intent), \textit{cert. denied}, 400 U.S. 1013 (1971); United States v. McDaniels, 370 F. Supp. 298, 311-12 (E.D. La. 1973) (same), \textit{aff'd sub nom.} United States v. Coff, 509 F.2d 825 (5th Cir.), \textit{cert. denied}, 423 U.S. 857 (1975); cf. 2A Sutherland, \textit{supra} note 29, § 45.09, at 29 ("Courts cannot avoid the problem [of legislative silence] by refusing to apply the statute in such a case on the ground that the legislature has not yet extended the statute to make it clearly apply, because a ruling of that nature would itself amount to an interpretation that the statute is inapplicable.").
\textsuperscript{35} There is support for the view that a statute's operation should not be confined to the specific events that prompted the legislation. Rather, "the words of a statute should be regarded as embodying a kind of delegation of authority to exercise responsible creative judgment in relating the statutory concept, spirit, purpose, or policy to changing needs of society." 2A Sutherland, \textit{supra} note 29, § 45.09; see, e.g., Elgin J. & E. Ry. v. Burley, 325 U.S. 711, 738-41 (1945) (construing the Railway Labor Act in situation unforeseen by Congress); Sears, Roebuck and Co. v. United States, 504 F.2d 1400, 1402-03 (C.C.P.A. 1974) (applying Customs Simplification Act of 1954 to situation not contemplated by Congress).
\textsuperscript{36} The legislative history indicates that the statute was designed to have more than parochial application. The Judiciary Committee expressed the feeling that the
struction of remedial or procedural statutes, such as the 1964 amendment,\(^\text{37}\) provide that such statutes should be read expansively so that "if there be any doubt or ambiguity, that construction should be adopted which will best advance the remedy provided and help to suppress the mischief against which it was aimed."\(^\text{38}\)

Indeed, courts, implicitly recognizing the intent of Congress in enacting section 1332(c), have broadly interpreted other terms central to determining the scope of the proviso’s application. Specifically, both the phrases "direct action" and "policy or contract of liability insurance"\(^\text{39}\) have been the subjects of judicial scrutiny. Although these phrases may well owe their presence in the proviso to the circumstances existing in the Eastern District of Louisiana in 1964,\(^\text{40}\) the interpretations given them have not been restricted to the Louisiana situation. "Direct action," for example, has been held to encompass all actions brought by an injured party directly against the alleged tortfeasor’s liability insurer, regardless of whether the suit is brought under a direct action statute.\(^\text{41}\) Thus, "direct action" covers declara-

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\(\text{37. Procedural statutes, as distinguished from those dealing with substantive rights, are usually described as remedial. 3 Sutherland, supra note 29, § 60.05, at 39. Because no well-established personal or property rights are affected, these statutes are given a liberal, expansive interpretation to suppress the evil and advance the remedy intended by Congress. See Tcherepnin v. Knight, 359 U.S. 332, 336 (1967); McMurry v. Prudential Property & Cas. Ins. Co., 455 F. Supp. 209, 211 (E.D. Mich. 1978); Kappel v. United States, 281 F. Supp. 426, 432 (W.D. Pa. 1968), aff’d, 437 F.2d 1222 (3d Cir.), cert. denied, 404 U.S. 830 (1971); Brennan v. Midwestern United Life Ins. Co., 259 F. Supp. 673, 678-79 (N.D. Ind. 1966), aff’d, 417 F.2d 147 (7th Cir. 1969), cert. denied, 397 U.S. 959 (1970).}

\(\text{38. H. Black, supra note 29, at 487.}

\(\text{39. 28 U.S.C. § 1332(c) (1976).}


\(\text{41. Hernandez v. Travelers Ins. Co., 489 F.2d 721, 723-24 (5th Cir.), cert. denied, 419 U.S. 844 (1974). The Hernandez court confronted the argument that the scope of the 1964 amendment should be limited to actions brought under statutes similar to that of Louisiana. It held, however, that the proviso also encompasses direct suits under workmen’s compensation law, stating that “[w]hatever may have been the specific evil prompting congressional action in 1964, Congress chose to remove all direct actions from the diversity jurisdiction.” Id. at 723, see Vines v. United States Fidelity & Guar. Co., 267 F. Supp. 436, 438-39 (E.D. Tenn. 1967).}

tory judgment actions,\textsuperscript{42} workmen's compensation actions,\textsuperscript{43} and even actions converted into direct actions by dismissal of a party defendant.\textsuperscript{44} Similarly, the term "policy or contract of liability insurance" has been held to include workmen's compensation insurance agreements,\textsuperscript{45} omnibus insurance policies,\textsuperscript{46} no-fault insurance contracts,\textsuperscript{47} and any "indemnity agreement which protects the insured against his liability to others."\textsuperscript{48}

\textit{Vines v. United States Fidelity & Guaranty Co.}\textsuperscript{49} best exemplifies the reasoning underlying this broad construction. This was an action by an employee against his employer's workmen's compensation in-


\textsuperscript{44} O.M. Greene Livestock Co. v. Azalea Meats, Inc., 516 F.2d 509, 510 (5th Cir. 1975) (per curiam). The claim in \textit{O.M. Greene} was not brought under a direct action statute. Rather, the insured, initially joined as a party defendant, was subsequently dismissed in an effort to produce diversity of citizenship. \textit{Id.} at 510-11. Holding that \textsection 1332(c) does not require a state direct action statute similar to Louisiana's, the court stated that it had "given the statute the broad interpretation it deserves in light of the harm Congress sought to remedy." \textit{Id.} at 510.


\textsuperscript{46} Torres v. Hartford Ins. Co., 588 F.2d 848 (1st Cir. 1978); Williams v. Liberty Mut. Ins. Co., 468 F.2d 1207 (5th Cir. 1972); Anderson v. Phoenix of Hartford Ins. Co., 320 F. Supp. 399 (W.D. La. 1970). An omnibus clause in an insurance policy includes any person driving the vehicle with the owner's permission in the term "insured". \textit{Id.} at 402. Application of the proviso to omnibus insurance policies has been criticized as not only preventing the potential diversity jurisdiction created by the direct action procedure, but eliminating diversity from actions between truly diverse parties. 26 \textit{Wayne L. Rev.} 1051 (1980). Under the holdings of \textit{Torres, Williams,} and \textit{Anderson,} the insurer is assigned \textit{four} state citizenships, incorporation, principal place of business, state of contract insured, and state of omnibus insured. This occurs when a plaintiff from state X is injured by another citizen of state X who is covered by the omnibus insurance plan of his employer, a citizen of state Y. The employer is the natural object of suit because he is more likely to be able to pay a judgment. If plaintiff sued employer's insurer directly, however, diversity jurisdiction would not exist because under \textsection 1332(c) the insurer would assume the citizenship of both the employer and the omnibus insured. \textit{Id.} at 1062-64.


\textsuperscript{49} 267 F. Supp. 436 (E.D. Tenn. 1967).
surance carrier.\textsuperscript{50} Rejecting the plaintiff's contention that the legislative history of the amendment limited its application to actions nearly identical to those brought under the Louisiana direct action statute,\textsuperscript{51} the court stated that "the legislation is not subject to such a restrictive interpretation. . . . [T]here is no adequate basis for the inference that Congress intended that such a fine distinction be applied."\textsuperscript{52} In fact, the legislative history of diversity jurisdiction validates this view. The history of the 1964 amendment cannot be fully understood if approached as an isolated piece of legislation.\textsuperscript{53} It is, rather, a further modification of diversity jurisdiction begun by the 1958 amendment.\textsuperscript{54}

\textbf{C. Congressional Purpose—Removing Local Matters from Federal Jurisdiction}

During the quarter century preceding the 1958 amendment, Congress became increasingly aware that the rules governing diversity jurisdiction were inadequate to deal with the rising flood of corporate litigation.\textsuperscript{55} Companies with established operations in a given state

\textsuperscript{50} Id. at 437; see Lane v. Insurance Co. of N. Am., 268 F. Supp. 345, 345 (E.D. Tenn. 1967).

\textsuperscript{51} 267 F. Supp. at 438.

\textsuperscript{52} Id. The \textit{Vines} court did not directly address the issue of the proper interpretation of the "against the insurer" clause. It did, however, indicate that it would be hesitant to subject this clause to any "fine distinction[s]." \textit{Id.} The court noted that Congress intended that the proviso apply "wherever a party claiming to have suffered injuries or damage for which another is legally responsible is entitled to sue the other's liability insurer without joining the insured and without having first obtained a judgment against the insured." \textit{Id.} at 438-39 (emphasis added).

\textsuperscript{53} Statutory amendments are to be read in conjunction with those sections they modify, and the amended statute should be read as if it had been originally enacted in that form. Blair v. Chicago, 201 U.S. 400, 475 (1906); Republic Steel Corp. v. Costle, 581 F.2d 1282, 1232 (6th Cir. 1978), \textit{cert. denied}, 440 U.S. 909 (1979); Kirchner v. Kansas Turnpike Auth., 336 F.2d 222, 230 (10th Cir. 1964).

\textsuperscript{54} In addition to amending the law to provide that a corporation shall be deemed a citizen of both the state in which it has its principal place of business and its state of incorporation, the Act of July 25, 1958, \textit{Pub. L. 85-554}, \textsection 2, 72 Stat. 415, increased the amount necessary to qualify civil cases for federal jurisdiction from $3,000 to $10,000. This minimum amount in controversy applies both to suits brought under federal law and to those involving diversity of citizenship. Additionally, the problems potentially caused by direct action statutes were discussed during the hearings on the 1958 amendment. \textit{Hearings, supra} note 3, at 34 (statement of Judge Maris).

\textsuperscript{55} Numerous proposals to curtail the use of diversity jurisdiction by corporations were considered both during and before this period. See, e.g., H.R. 4219, 46th Cong., 2d Sess. (1880) (seeking to eliminate diversity jurisdiction between a corporation and a citizen of any state in which the corporation is doing business), S. Rep. No. 530, 72d Cong., 1st Sess. (1934) (Attorney General Mitchell's proposed amendment to eliminate diversity jurisdiction); President Hoover's Message to Congress Recommending Methods to Improve Judicial Administration (Feb. 29, 1932) (on file with the \textit{Fordham Law Review}) (same). See also H.R. 2516, 85th Cong., 1st Sess.
had access to the federal courts in suits involving local parties simply because they were chartered in another jurisdiction. Even corporations conducting business entirely within their adversary's state of citizenship could sue in federal court.\textsuperscript{56} Both Congress and the judiciary ultimately came to view such local actions as outside the spirit of diversity jurisdiction.\textsuperscript{57} The 1958 amendment eliminated the most flagrant of these abuses\textsuperscript{58} by adding a corporation's principal place of business to the states of which it is considered a citizen, thereby preventing at least one group of local actions from reaching the federal courts.\textsuperscript{59} By 1964, it had become apparent to both Congress and the judiciary that the direct action device provided a new means through which local controversies could be heard in federal court.\textsuperscript{60} The response of Congress was once again to modify the

\textsuperscript{56} Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518 (1928), is an example of the extent to which this occurred under the pre-1958 rules. In \textit{Black & White Taxicab}, a Kentucky corporation reincorporated in Tennessee to create diversity jurisdiction. The Court held that, because the reincorporation was valid, it would not examine the party's motives. \textit{Id.} at 524. The plaintiff actually made the change to avoid unfavorable Kentucky case law. This was possible because at that time the federal courts could apply federal law in diversity cases under \textit{Swift v. Tyson}, 41 U.S. (16 Pet.) 1 (1842), overruled, \textit{Erie R.R. v. Tompkins}, 304 U.S. 64 (1938). See C. Wright, \textsuperscript{ supra note 3, \$ 23, at 86-87.}

\textsuperscript{57} In its official report, the Committee on Jurisdiction and Venue specifically mentioned "the evil that a corporation, which in reality is a local corporation engaged in local business and locally owned, can drag its litigation into Federal courts because it has obtained a charter from another State, and may proceed on a legal fiction that a diversity of citizenship exists." \textit{Hearings, supra note 3, at 8 (statement of Rep. Ashley).}

\textsuperscript{58} C. Wright, \textsuperscript{ supra note 3, \$ 23, at 86-87.}

\textsuperscript{59} 28 U.S.C. \$ 1332(e) (1976); see \textit{Canton v. Angelina Cas. Co.}, 279 F.2d 553, 554 (5th Cir. 1960) (Texans asserted workmen's compensation claims against corporation with principal place of business in Texas). The \textit{Hearings} on the 1958 amendment indicate that it was not as radical a change as many of the judges and legislators desired. Proposals made at the time included considering a corporation a citizen of every state in which it does substantial business or in which it is qualified to do business, and even to eliminate diversity jurisdiction completely with regard to corporations. \textit{Hearings, supra note 3, at 35-39 (statements of Judge Maris and Rep. Willis).} It was suggested that such proposals were not enacted because strenuous opposition by corporations throughout the country was anticipated. \textit{Id.} at 35 (statement of Judge Maris).

\textsuperscript{60} Senate Report, \textsuperscript{ supra note 12, at 4, reprinted in [1964] U.S. Code Cong. & Ad. News at 2781.}
scope of diversity jurisdiction by expanding the corporate citizenship fiction. This had the dual effect of eliminating technical diversity from a situation in which diversity did not exist in fact and of returning the situation to the pre-direct action status quo. Those courts that have fully examined the legislative history and have held that specific actions are within the coverage of the proviso have essentially determined that these actions are local matters that Congress felt were more properly allocated to the state courts.

D. Analysis of the Reverse Direct Action

The Fifth Circuit, conscious of Congressional attempts to uphold the true spirit of diversity jurisdiction, has found that, because there is only a nominal distinction between those direct actions brought by and those brought against insurers, no substantial reason exists for allowing insurer-initiated actions into federal courts. The Sixth Circuit, however, has refused to accept this line of thought. Determining that there is a substantial difference between the two actions, it has noted that

the injured party . . . always ha[s] the option of fully litigating his claims against the insured party, a fellow resident, in his own local forum. In other words, the direct action procedure merely provide[s] the injured party with the additional option of bringing a

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61. The official purpose of the 1964 amendment, as stated in the Senate Committee on the Judiciary Report, is to eliminate "suits on certain tort claims in which both parties are local residents" from federal diversity jurisdiction. Id. at 1, reprinted in [1964] U.S. Code Cong. & Ad. News at 2778. Additionally, one letter, included in the Senate Report, states that "[w]hile within the letter of the diversity jurisdiction, it appears that 'these direct action cases' are not within its spirit or intent." Letter from Warren Olney III to Rep. Emanuel Celler (May 16, 1963), reprinted in Senate Report, supra note 12, at 7, reprinted in [1964] U.S. Code Cong. & Ad. News at 2784; see 26 Wayne L. Rev. 1051, 1062 (1980).

62. In Vines v. United States Fidelit, & Guar. Co., 267 F. Supp. 436 (E.D. Tenn. 1967), for example, the court determined that, as far as jurisdictional considerations were concerned, direct suits under the Tennessee workmen's compensation law were of the same type as suits under Louisiana's direct action statute. Id. at 439. The court's major concern was that such local actions, although sounding in contract rather than tort, would cause overcrowding problems if allowed in the federal courts. Id. at 438-39; see Hernandez v. Travelers Ins. Co., 489 F.2d 721 (5th Cir.) (agreeing with Vines reasoning), cert. denied, 419 U.S. 844 (1974); Lane v. Insurance Co. of N. Am., 268 F. Supp. 345 (E.D. Tenn. 1967) (same).

63. Campbell v. Insurance Co. of N. Am., 552 F.2d 604 (5th Cir. 1977). The Campbell court noted that the same reasoning under which the proviso was held applicable to workmen's compensation actions in Hernandez v. Travelers Ins. Co., 489 F.2d 721 (5th Cir.), cert. denied, 419 U.S. 844 (1974), applied in the reverse direct action situation. 552 F.2d at 605. The Hernandez court examined the relative positions of the parties and found the action to be direct, and brought under a policy of liability insurance. 489 F.2d at 733-25. see note 41 supra.

federal action, based on diversity jurisdiction, solely against the out-of-state insurer. Such situation is not analogous to the situation presented when an action is initiated by an insurance company. If, pursuant to § 1332(c), a liability insurer is denied access to the federal courts, the insurer is thereby forced to commence its action in a foreign jurisdiction, namely the local jurisdiction of the injured party. In this forum, the out-of-state insurer may, at least in theory, be subject to a local prejudice in favor of the injured resident. Because of this possibility of prejudice, direct actions brought by liability insurers, unlike direct actions brought by injured parties, lie squarely within 'the spirit and the intent . . . of the diversity jurisdiction of the Federal judicial system.'

Although this argument is compelling on its face, closer examination casts some doubt upon the court's reasoning. The major objection to including insurer-initiated actions within the scope of section 1332(c) is that it forces the insurer to litigate in the home forum of its adversary. Arguably, applying the proviso deprives insurers of a necessary alternative forum. The insurer, however, is forced to defend in a foreign state court when the issue of its liability is brought through the normal procedure of a direct action by the injured party. By removing the extra forum provided by the direct procedure, the jurisdictional possibilities available in a particular type of controversy are made uniform. In both situations, the parties involved in the actual tort are local citizens, and the issues are mat-

65. Id. at 127.
66. Id.
67. 28 U.S.C. § 1332(c) (1976). Just as § 1332(c) precludes certain plaintiffs from bringing actions in federal court, insurers are also precluded from removing actions to federal court if they could not have been brought there originally. 28 U.S.C. § 1441 (1976); see C. Wright, supra note 3, § 38, at 148-49; cf. Snow v. Ford Motor Co., 561 F.2d 787, 789 (9th Cir. 1977) (action not removable by defendant because plaintiff's cause of action failed to satisfy jurisdictional amount requirement); Cunningham v. State Farm Mut. Auto. Ins. Co., 297 F. Supp. 1138, 1139 (E.D. Tenn. 1969) (motion to remand denied because action not within § 1332(c)).
68. Application of the statute to insurer-initiated as well as claimant-initiated actions ensures that the extent of the insurer's liability is litigated in state court regardless of which party initiates the action. Campbell v. Insurance Co. of N. Am., 552 F.2d 604, 605 (5th Cir. 1977). Situations in which the jurisdictional possibilities are dependent upon which party brings the action can encourage races to the courthouse. Such races are against public policy because they reduce the probability of calm reflection and negotiation between the parties, aimed at settlement of the controversy. See Board of Educ. v. Department of H.E.W., 396 F. Supp. 203, 250 (S.D. Ohio 1975), aff'd in part, rev'd in part per curiam, 532 F.2d 1070 (6th Cir. 1976); Independent Tape Merchants Ass'n v. Creamer, 346 F. Supp. 456, 461-62 (M.D. Pa. 1972); State ex rel. United States Fire Ins. Co. v. Terte, 351 Mo. 1089, 1099, 176 S.W.2d 25, 31 (1943) (en banc); notes 77-78 infra and accompanying text.
69. For an action to be considered a "direct action" under § 1332(c), it is not essential that it sound in tort. Courts have found, for example, that workmen's com-
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ters of local concern. Regardless of whether a foreign insurer is the nominal plaintiff or defendant in a direct action suit, it represents the interests of a local, non-diverse party. The nature of the action is not changed simply because an insurer chooses to initiate it, rather than waiting to defend a claim brought by the injured party. The basic issue in both proceedings is the same, to determine the existence and extent of the insurance company's liability to the injured party.


By definition, the injured party and the insured are citizens of the same state in cases affected by the § 1332(c) proviso. Although local law would be applied by the federal court should it have jurisdiction, Erie R.R. v. Tompkins, 304 U.S. 64 (1938), there is no need for the federal court to involve itself with such a local matter. 124 Cong. Rec. H1553-54 (daily ed. Feb. 28, 1978) (remarks of Rep. Kastenmeier). American Law Institute, Study of the Division of Jurisdiction Between State and Federal Courts 99 (1969) [hereinafter cited as ALI Study]. Freeing the federal courts from local adjudications is considered by some as essential to the functioning of the federal court system. See, e.g., Frankfurter, supra note 22, at 506.


The Aetna court characterized that action as one "for the purpose of settling any compensation claims that might arise as a result of defendant's ... accident." Aetna Cas. & Sur. Ins. Co. v. Greene, 606 F.2d 123, 125 (6th Cir. 1979). It is evident that, by bringing such an action, Aetna was anticipating potential claims against it. See Lumbermen's Mut. Cas. Co. v. Elbert, 348 U.S. 48, 51 (1954); Government Employees Ins. Co. v. LeBlue, 272 F. Supp. 421, 429 (E.D. La. 1967); 1 J. Moore, supra note 22, ¶ 0.77[4], at 721.3-4. Government Employees Ins. Co. v. LeBlue, 272 F. Supp. 421 (E.D. La. 1967), a well-reasoned district court case, provides some helpful insights into the logic behind the Fifth Circuit's more expansive, common-sense approach to the § 1332(c) proviso. The court held that because the insurer in that case initiated a declaratory judgment action against its insured, and not against the injured party, the suit was not a "direct action" as described in the proviso. Id. at 430-31. It also stated, however, that "for purposes of determining the existence of federal jurisdiction, a cause of action must be considered as having been brought by the party asserting it, regardless of which party initiates the proceeding, ... [J]urisdiction must be shown to exist over the cause of action had it been brought under conventional procedures." Id. at 427. Furthermore, the court agreed with the contention that "the basic principles and concepts governing declaratory judgment procedure compel us to apply the § 1332(c) proviso to actions which, although instituted by the insurer ... are in reality 'direct actions against the insurer.'" Id. at 429.
Furthermore, when deciding questions of jurisdiction, federal courts generally examine the nature of the proceedings as a whole, rather than the technical position of parties.73 Thus, when diversity is in question, courts ignore nominal or collusive arrangements of parties designed to create complete diversity when none exists in fact.74 Similarly, in matters of federal question jurisdiction, they ignore less important features of an action, such as which party initiated it, and look instead to the nature of the action.75

Congress clearly favored having an insurer defend the issue of its liability in its adversary’s local forum when the injured party brings the action.76 The same considerations should govern when the insurer is the nominal plaintiff. To conclude otherwise would be to allow insurance companies to avoid the citizenship characteristics conferred on them by Congress by simply initiating an action before their adversaries.77 In light of the policy to discourage such “races to court,”78 it is difficult to imagine that Congress intended that federal

74. Indianapolis v. Chase Nat’l Bank, 314 U.S. 63, 69 (1941); City of Dawson v. Columbia Trust Co., 197 U.S. 178, 180 (1905); C. Wright, supra note 3, § 30, at 110. “In determining whether diversity jurisdiction exists, the alignment of the parties as plaintiffs and defendants in the pleadings is not conclusive. It is the duty of the court to ‘look beyond the pleadings, and arrange the parties according to their sides in the dispute.’” Id. (quoting City of Dawson v. Columbia Trust Co., 197 U.S. 178, 180 (1905)).
76. See notes 60–61 supra and accompanying text.
77. Thus, an insurer, by anticipating a claim and commencing a declaratory judgment action, could effectively defeat the Congressional purpose to clear the federal dockets of “certain tort claims in which both parties are local residents, but which . . . may be brought directly against a foreign insurance carrier without joining the local tort-feasor as a defendant.” Senate Report, supra note 12, at 1, reprinted in [1964] U.S. Code Cong. & Ad. News at 2778-79.
78. State ex rel. United States Fire Ins. Co. v. Terte, 351 Mo. 1089, 1099, 176 S.W.2d 25, 31 (1943) (en banc). See also Board of Educ. v. Department of H.E.W., 396 F. Supp. 203, 250 (S.D. Ohio 1975), aff’d in part, rev’d in part per curiam, 532 F.2d 1070 (6th Cir. 1976); Independent Tape Merchants Ass’n v. Creamer, 346 F. Supp. 456, 461 (M.D. Pa. 1972). In Public Serv. Comm’n v. Wycoff Co., 344 U.S. 237 (1952), the Court stated that the declaratory judgment procedure could not be used to create federal question jurisdiction by a party asserting what is really a federal law defense to an anticipated claim, who beats his adversary to court. Id. at 248. It reasoned that “[f]ederal courts will not seize litigations from state courts merely because one, normally a defendant, goes to federal court to begin his federal-law defense before the state court begins the case under state law.” Id. The basis of this position is that the Declaratory Judgment Act, 28 U.S.C. § 2201 (1976), is merely a procedural vehicle for causes of action otherwise within the jurisdiction of federal
subject matter jurisdiction could be created through such tactical maneuvering.\textsuperscript{79}

\section*{II. Administrative Policy Considerations}

The goal of federal judiciary acts and related legislation is to ensure the smooth and efficient functioning of our national court system.\textsuperscript{80} Proper administration of this dual system requires constant adjustment to societal and economic changes that affect the nature and volume of litigation.\textsuperscript{81} One of the most important, yet most difficult, tasks in this adjustment process is to achieve a fair balance of power between the federal system and the state judiciaries.\textsuperscript{82} State courts must be allowed to retain enough autonomy to protect their integrity and effectiveness, and federal courts must be left with enough time and energy to devote to adjudication of the "great issues of government."\textsuperscript{83}

\textsuperscript{79} The strict attitude of Congress towards the use of artificial devices to create federal subject matter jurisdiction is evidenced by the Judicial Code provision that states that "[a] district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court." 28 U.S.C. § 1359 (1976); see Swick v. Benscoter, 462 F. Supp. 24, 26 (E.D. Pa. 1978); Asher v. Pacific Power & Light Co., 249 F. Supp. 671, 674 (N.D. Cal. 1965).

\textsuperscript{80} Felix Frankfurter, expanding upon the numerous goals such legislation must accomplish if the smooth functioning of the federal court system is to be realized, stated that "[t]o mobilize adequately the resources of the judicial establishment, to simplify as much as possible the inevitable complexities of a system of courts spanning a continent, to secure a fair balance between the federal system and state judiciaries, to relieve the Supreme Court from all obstructions to the performance of its functions,—these have been the aims of legislation regulating the organization of the federal courts." Frankfurter, supra note 22, at 502.

\textsuperscript{81} Id. at 503.

\textsuperscript{82} Id. Frankfurter described the problem of arriving at the proper distribution of authority—the power to hear cases—between the federal and state courts as "a complication peculiar to a federated nation. Here is a conflict full of political explosives, because entangled in the complex of relations between states and nation. These are issues of the very stuff of American politics . . . . They are not technical issues, nor within the special province of lawyers." Id. at 500; see 124 Cong. Rec. H1554 (daily ed. Feb. 28, 1978) (remarks of Rep. Kastenmeier).

The traditional justification for federal diversity jurisdiction is the guarantee that a citizen, forced to litigate in a foreign jurisdiction, will have access to an impartial forum.\textsuperscript{84} This remains a valid and important function of the federal courts.\textsuperscript{85} In view of the enormous strain placed on the federal court system by overcrowded dockets, however, the instances in which a federal court should be made available must be reevaluated.\textsuperscript{86} Efficient functioning of both state and

\textsuperscript{84} James Madison's statement during the Virginia debates on the Constitution is indicative of the role diversity jurisdiction was intended to play in the national court scheme. He stated that "[i]t may happen that a strong prejudice may arise, in some states, against the citizens of others, who may have claims against them. We know what tardy, and even defective, administration of justice has happened in some states. A citizen of another state might not chance to get justice in a state court, and at all events he might think himself injured." 3 J. Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution 533 (2d ed. 1941) [hereinafter cited as Elliot's Debates] (quoting James Madison). Although he was a proponent of diversity jurisdiction, Madison did not consider it necessary. Id. ("I will not say it is a matter of much importance. Perhaps it might be left to the state courts." (quoting James Madison)). This view was also held by John Marshall. Id. at 556; see 124 Cong. Rec. H1555 (daily ed. Feb. 28, 1978) (remarks of Rep. Railback).\textsuperscript{85} When there actually is a controversy between two individual citizens of different states, federal diversity jurisdiction provides a useful and sometimes necessary alternative to trial in the home forum of either party. A number of commentators still support retention of diversity jurisdiction. See, e.g., Frank, \textit{For Maintaining Diversity Jurisdiction}, 73 Yale L.J. 7 (1963); Marbury, \textit{Why Should We Limit Federal Diversity Jurisdiction?}, 46 A.B.A.J. 379 (1960); Moore & Weckstein, \textit{Diversity Jurisdiction: Past, Present, and Future}, 43 Tex. L. Rev. 1 (1964); Phillips & Christenson, \textit{Should Corporations Be Regarded as Citizens Within the Diversity Jurisdiction Provisions?}, 48 A.B.A.J. 435 (1962); Wright, \textit{The Federal Courts and the Nature and Quality of State Law}, 13 Wayne L. Rev. 317 (1967). But cf. H.R. 9622, 95th Cong., 1st Sess., 124 Cong. Rec. H1553 (daily ed. Feb. 28, 1978) (to abolish diversity jurisdiction completely); R. Jackson, The Supreme Court in the American System of Government 38 (1955) (arguing that Congress should abolish diversity jurisdiction); Bratton, \textit{Diversity Jurisdiction—An Idea Whose Time Has Passed}, 51 Ind. L.J. 347 (1976) (advocating adoption of proposals for decreasing diversity jurisdiction); Currie, \textit{The Federal Courts and the American Law Institute}, 36 U. Chi. L. Rev. 1 (1969) (criticizing ALI’s suggestion to redefine diversity jurisdiction as too complex). One of the original goals of diversity jurisdiction, for example, was to encourage entrepreneurial investment in the more remote and less developed areas of our nation. C. Wright, \textit{supra} note 3, § 23, at 91. This goal has been realized with great success. Committee on Jurisdiction and Venue of the Judicial Conference of the United States, Report (March 12, 1951) [hereinafter cited as Judicial Conference Report], reprinted in \textit{Hearings, supra} note 3, at 13. Although, given the degree of economic mobility now present in the American business world, encouragement of investment across state lines is no longer an important goal, ALI Study, \textit{supra} note 70, at 105, diversity does provide an additional safeguard for the interests of the prospective entrepreneur. Judicial Conference Report, \textit{supra, reprinted in Hearings, supra} note 3, at 9.\textsuperscript{86} McMurray v. Prudential Property & Cas. Ins. Co., 458 F. Supp. 209, 212 (E.D. Mich. 1978)."It is unwise to paralyze the federal courts by maintaining conditions that will generate constant and unending pressure for the expansion of the
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federal tribunals requires that the number of cases heard by the federal courts under diversity jurisdiction be limited to those in which there is a legitimate need to afford one or more parties an alternative to the state forum.87

There are two major policy arguments against allowing an out-of-state insurer access to an alternative forum when it commences the action. First, the insurance company is typically a large corporation that actively seeks customers in broad geographical areas without regard to state lines.88 Although it may neither be chartered nor have its principal place of business in the state in which the direct action arises, it has, by soliciting and procuring its insured's business, availed itself of that state's benefits and protections.89 It should, therefore, be held to have acceded to that state's judicial processes.90 Additionally, insurance companies often seek to force prospective claimants into unwanted settlements by initiating wars of attrition through federal judiciary. It is intolerable that these delays and these pressures be produced by cases that have no proper place in the federal courts.” ALI Study, supra note 70, at 1.

87. One of the functions of the federal courts is to serve as an example to other tribunals in matters of procedural and administrative reform. 1 J. Moore, supra note 22, ¶ 0.71(3.-2), at 701.31. It is, therefore, desirable that a number of attorneys from every state be exposed to the judicial process in federal courts. Diversity jurisdiction has been an important means of carrying on this instructive process. Id. If this practice is carried too far, however, it becomes counter-productive. The easy accessibility of the federal courts not only may cause overcrowded docket, as in Louisiana, see notes 12-14, 20 supra and accompanying text, but may actually inhibit state court reform by withdrawing “from the incentives and energies for reforming state tribunals . . . the interests of influential groups who through diversity litigation are now enabled to avoid state courts.” Lumbermen's Mut. Cas. Co. v. Elbert, 348 U.S. 48, 60 (1954) (Frankfurter, J., concurring); accord Frankfurter, supra note 22, at 522.

88. See Direct Actions, supra note 16, at 38.

89. The Supreme Court held in McGee v. International Life Ins. Co., 355 U.S. 220 (1957), that an insurance company, which had sold a policy to a California citizen, but which had no office in California, had availed itself sufficiently of that state's benefits and protections to satisfy the minimum contacts test of International Shoe Co. v. Washington, 326 U.S. 310 (1945). Although these cases applied the minimum contacts test to determine amenity to process in a given state, satisfaction of the same criteria arguably indicates an acceptance of that state's judicial processes. See ALI Study, supra note 70, at 109-10 (noting that corporations that do business in a given state are aware of that state's local laws and of the quality of its justice administration).

90. ALI Study, supra note 70, at 109-10. This position has been incorporated into the American Law Institute's additions to the diversity statute. Id. at 112 (proposed § 1302(b)). Additionally, prevention of similar advantages for foreign corporations was a major reason for passage of the 1958 amendment. Act of July 25, 1958, Pub. L. No. 85-554, § 2, 72 Stat. 415. Congress considered it unfair that a basically local corporation with a foreign charter should have a choice of federal or state forum when its neighbor with a local charter did not. Hearings, supra note 3, at 29 (statement of Judge Maris).
various dilatory tactics. Thus, access to federal court may give an insurance company an unfair advantage in those large metropolitan areas in which overcrowded federal dockets have produced long calendar delays.

Second, the sole justification for this distinction—the fear that out-of-state insurers may be subject to local prejudice in state courts—is no longer viable when balanced against the very real threat to judicial efficiency caused by overcrowded federal dockets. Fear of judicial prejudice on the basis of statehood was a valid concern when diversity jurisdiction was first adopted. At that time, the states maintained many of the attributes of independent nations, including a healthy partisanship on behalf of their citizens. Their political and judicial systems were comparatively new, autonomous, and independent of any national influence towards uniformity. Political and societal changes, however, have reduced the instances in which fear of local prejudice is legitimate. Although personal prejudice still exists in many forms, prejudice on the basis of statehood is one of the least prevalent. Politically, the independence of the

91. Lumbermen’s Mut. Cas. Co. v. Elbert, 348 U.S. 48, 58 (1954); 124 Cong. Rec. H1555 (daily ed. Feb. 28, 1978) (remarks of Rep. Kastenmeier). For example, weighing the relative disadvantages of being subjected either to delay or review of jury findings, Louisiana plaintiffs chose the former. See note 14 supra. Where the scope of appellate review is less broad, as it is in most other large metropolitan areas, the delay in the federal courts would be welcomed by the insurers who have the financial advantage in expensive wars of attrition. See Lumbermen’s Mut. Cas. Co. v. Elbert, 348 U.S. at 58.


93. See Martin v. Hunter’s Lessee, 14 U.S. (1 Wheat.) 304, 347 (1816); Bank of the United States v. Deveaux, 9 U.S. (5 Cranch) 61, 87 (1809); 3 Elliot’s Debates, supra note 84, at 553; The Federalist No. 80 (A. Hamilton) [hereinafter cited as Hamilton].

94. For a brief description of the various quirks of the state judiciaries and legislatures, see Friendly, The Historic Basis of Diversity Jurisdiction, 41 Harv. L. Rev. 483 (1928). Despite the paucity of documented evidence of judicial prejudice during the late eighteenth century, id. at 493, it is almost “incredible that in the narrow, provincial, petty spirit of inter-colonial relations, there should not have been local bias in the administration of justice.” Frank, Historical Bases of the Federal Judicial System, 13 Law & Contemp. Prob. 3, 23-24 (1948). Frank bases this statement on the numerous examples of state partisanship collected by Professors Yntema and Jaffin. See Yntema & Jaffin, Preliminary Analysis of Concurrent Jurisdiction, 79 U. Pa. L. Rev. 869, 876 n.13 (1931).

95. See Yntema & Jaffin, supra note 94, at 876 n.13.


The state judiciaries are now well-established\(^9\) and, with minor exceptions,\(^{10}\) sufficiently uniform to ensure that a litigant from another state will receive due process without unfair procedural or substantive surprise.\(^{101}\) Insurance companies engaged in multistate operations are well aware of the possibility of becoming involved in litigation in the states of those they insure.\(^{102}\) They should not be allowed to pursue the tactical or dilatory advantages sometimes available in the federal forum under the guise of avoiding state-based prejudice in the local courts.\(^{103}\) Thus, given tried diversity cases indicated that fear of local prejudice against their clients was one of the least influential factors in their preference for the federal forum. Only 4.3\% of the 164 responses elicited in the survey mentioned local prejudice as a factor, and it was never cited as the controlling reason for choosing the federal court. Summers, Analysis of Factors that Influence Choice of Forum in Diversity Cases, 47 Iowa L. Rev. 933, 937-38 (1962). It is worth noting that in six of the seven instances when local prejudice was mentioned, the attorney’s client was an insurance company. Thus, it appears “that attorneys do not differentiate between biases related to the nature of the client’s business and those related to his nonresidency.”\(^{104}\) at 939. But see 51 Va. L. Rev. 178, 179 (1965) (survey indicating local prejudice against out-of-state client as important factor in choice of forum).  

\(^{98}\) Perhaps this was overstated by Representative William Tuck during the hearings on the 1958 amendment. “[A] greedy and Gargantuan Central Government in the last few years has usurped the powers of the States by expanding its activities into almost every phase of our existence, and we can feel its tentacles in all walks of life.” Hearings, supra note 3, at 3 (statement of Rep. Tuck).  

\(^{99}\) See R. Jackson, supra note 85, at 38-39. James Madison, one of diversity jurisdiction’s chief proponents, believed that, once state tribunals were established, Congress would divest federal courts of the power to hear cases between citizens of different states. 3 Elliot’s Debates, supra note 84, at 536.  


\(^{101}\) 124 Cong. Rec. H1554 (daily ed. Feb. 28, 1978) (remarks of Rep. Kastenmeier). “[A]rguments stemming from a supposed inferiority of state justice are susceptible of proof and hardly politic to advance.” C. Wright, supra note 3, § 23, at 80. There was a longstanding argument, first espoused by Alexander Hamilton, that diversity jurisdiction was necessary to ensure that citizens of each state are given all the privileges and immunities of citizens of the several states. Hamilton, supra note 93. This argument, however, has been characterized as spurious because any violation of the privileges and immunities clause is in itself grounds for federal question jurisdiction. Friendly, supra note 94, at 492 n.44.  

\(^{102}\) By its nature, liability insurance involves an insurance company in claims asserted against its individual clients, wherever they are located. If there is a risk that those claims may arise and be litigated in a foreign jurisdiction, the insurer should be held to have assumed that risk. Letter from William M. Shernoff to Michael Remington (Aug. 29, 1977), reprinted in Diversity of Citizenship Jurisdiction/Magistrates Reform: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 95th Cong., 1st Sess. 293-94 (1977); ALI Study, supra note 70, at 109.  

\(^{103}\) A number of commentators have noted that diversity jurisdiction is most often used for tactical purposes rather than to ensure impartial trials. See, e.g., C.
the severe problems of overcrowding faced by the entire federal court system, a merely theoretical fear of state-based prejudice must yield to the documented, practical fact that litigants with legitimate federal law questions are not receiving adequate and timely consideration from the federal courts.104

CONCLUSION

Abuses of diversity jurisdiction and increasingly congested federal court dockets are problems in our national court system. Determining that the section 1332(c) proviso is applicable to insurer-initiated direct actions might not solve these administrative problems. It would, however, be an important step in the context of the currently evolving policies of the judiciary, the bar, and Congress respecting the proper role of diversity jurisdiction within this system. Furthermore, if a solution is to be found short of abolishing diversity jurisdiction completely, Congress and the judiciary must join in an effort to reduce the instances in which diversity is available as a mere luxury to litigants, rather than a needed protection of their rights. Legislation modifying the rules towards this end is the first step; judicial implementation of such modification is the necessary second.

William Murphy

Wright, supra note 3, § 23, at 91 ("Undoubtedly, so long as diversity exists, the choice of forum will be utilized for tactical purposes by particular litigants in particular cases, who think they may obtain an advantage from one forum or the other, but to the extent this exists . . . it would seem more an abuse of concurrent jurisdiction than an argument for its retention." (footnote omitted)); Kennedy, Federal Diversity Jurisdiction, 10 U. Kan. L. Rev. 47, 54 (1961) (tactical advantages of filing in federal court include liberal discovery and could mean difference between winning or losing case); Summers, supra note 97, at 937-38 (statistical survey indicating prevalence of tactical purposes in decisions to invoke diversity jurisdiction); 51 Va. L. Rev. 178, 179 (1965) (factors leading to preference for federal court when representing defendant).

104. In holding the proviso applicable to actions brought under no-fault insurance contracts, one court stated that "where there are larger federal interests at stake—in this case, reducing the overload on federal dockets—it is incumbent upon a federal court to apply the law to further the congressional policy." McMurry v. Prudential Property & Cas. Ins. Co., 458 F. Supp. 209, 213 (E.D. Mich. 1978) (footnote omitted); see Miller v. Davis. 507 F.2d 308, 314 (6th Cir. 1974).