Opening Statement of the Honorable Steve Cohen for the Markup of H.R. 725, the "Innocent Party Protection Act of 2017" Before the Committee on the Judiciary

Thursday, February 2, 2017 at 10:00 a.m.
2141 Rayburn House Office Building

H.R. 725, the "Innocent Party Protection Act of 2017," should more properly be named the "Corporate Defendant Forum-Shopping Act," because that is what it facilitates in substance.

If enacted, the bill would upend a century of legal doctrine governing how a federal court decides whether to remand a case that was removed by an out-of-state defendant on diversity grounds and where there is also at least one in-state defendant in the case.

Under this doctrine, known as the fraudulent joinder doctrine, a federal court retains jurisdiction over a case lacking complete diversity only when there is no reasonable basis for the plaintiff's claim against the in-state defendant.

There is simply no evidence that federal courts applying current law have failed to properly address improper joinders.

What H.R. 725's proponents really object to is the fact that current law generally favors remand of cases raising state law issues to state courts.

This is in keeping with the longstanding judicial recognition that constitutionally, federal courts are courts of limited jurisdiction and should therefore construe removal statutes strictly and narrowly.

Tellingly, the Supreme Court has not seen it necessary to change the fraudulent joinder doctrine or ever stated any concern about the way federal courts have been applying the doctrine.

In short, after a century of application, the Court has not deemed it necessary to alter the way federal courts deal with fraudulent joinder.

In addition to being unnecessary, H.R. 725 increases the complexity and costs surrounding remand motions.

The bill effectively requires litigation on the merits at a nascent stage of the case, potentially dissuading plaintiffs from pursuing meritorious claims.

The bill requires the application of vague and undefined standards, which invites further litigation over the meaning and scope of those standards.

For instance, what constitutes a "plausible" claim is not simply self-evident.

We know this because courts have been struggling to apply the "plausibility" standard with respect to pleadings in federal court after the Supreme Court's *Ashcroft v. Iqbal* decision applied such a standard to pleadings under Federal Rule of Civil Procedure 8.

That decision has produced a substantial amount of litigation that has led to increased uncertainty, complexity, and litigation costs.

There is no reason to think that the same thing will not happen once such a "plausibility" standard is imported into the remand context, as H.R. 725 proposes to do.

Similarly, the bill's required inquiry into a plaintiff's subjective "good faith intention" will result in increased litigation, as the bill does not define the phrase "good faith intention" and it is not used anywhere in Title 28.

The increase in costs and complexity would not only drain the limited resources of plaintiffs, but would also burden already-strained federal judicial resources.

Finally, this bill violates states' rights by denying state courts the ability to shape state law.

State courts are the final authorities on state procedural and substantive law, and state law claims ought to be left to state courts except in the narrowest circumstances.

This bill would further deny state courts that authority by making it easier for federal courts to retain jurisdiction where only state law claims are at issue and possibly imposing new heightened pleading standards on state courts.

H.R. 725 represents just the latest in a long line of attempts to deny plaintiffs access to state courts and to extend inappropriately the reach of federal courts into state law matters.

For these reasons, I must oppose this bill.