FROM PROXY TO PRINCIPLE: FRAUDULENT JOINDER RECONSIDERED

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I. INTRODUCTION

A. Background

To most seasoned trial lawyers, the identity of the court hearing their case is at least as important as the facts of their case.¹ As one legal scholar has commented, “[e]very trial lawyer . . . would agree that [where] the case is to be tried, is without question one of the most significant factors, perhaps the most significant factor, in the outcome of the case.”² Even if one would like to believe that the locale of the lawsuit is not outcome determinative, the fact is that lawyers who try cases believe that it makes a big difference.³ In a world where most cases are disposed of by settlement,⁴ perception

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² Id. at 581 n.1 (first alteration in original) (quoting Professor Louis Muldrow’s comments before the Texas Legislature in the context of possible venue reform legislation); see also Note, Forum Shopping Reconsidered, 103 HARV. L. REV. 1677, 1686 (1990) (observing the “reality” that our legal system produces decisions which are premised largely upon the politics of the forum court, rather than upon logic alone).

³ See Note, supra note 2, at 1677 (recognizing that forum shopping is generally considered to be a litigant’s attempt to secure a forum that will produce a favorable result).

⁴ KEVIN M. CLERMONT, PRINCIPLES OF CIVIL PROCEDURE 414–15 (2005) (“In fact, the settlement rate could be increasing of late. A basic truth, then, is that settlement is numerically much more important than actual litigation. . . . [A]s settlement has blossomed, the civil trial has all but disappeared recently, without any clear single cause. The percentage of filed federal cases that see trial is now dropping toward 1.5%, and state trials too have dropped off.”). In a fairly recent roundtable discussion summary from the Justice Department’s Bureau of Justice Statistics, one lamentation concerned the lack of reliable statistics concerning civil case outcomes: “A key problem identified with the BJS civil trial series is that it focuses only on the small number of all civil cases that end in a trial (an estimated 3% or less). The vast majority of civil cases that settle are not included in these surveys.” BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, SUMMARY: CIVIL JUSTICE
becomes reality. Nobody would dispute the importance of a lawsuit's venue. As two researchers concluded, “forum matters.”

This preoccupation with the identity of the decision-maker is no more profound than in the context of the choice between a state and federal court for resolution of a civil lawsuit, particularly when the plaintiff is deprived of her original selection of a state court as the preferred forum due to a defendant’s removal to federal court. As one researcher noted, “a plaintiff's ability to avoid removal [from state to federal court] could mean the difference between winning and losing.”

Empirical research that is available suggests that such assertions are not hyperbole, with removed cases sharing a statistically significant low win-rate. Issues affecting the forum that will adjudicate claims, therefore, have a profound impact on the adjudication of such claims.

In terms of federal-state jurisdiction, the last decade might fairly be characterized as one wherein the legal profession has witnessed a three-fold significant expansion of federal court jurisdiction over state law claims. First, in 1990, Congress passed the supplemental jurisdiction statute—28 U.S.C. § 1367—which not only provided sustenance to the threatened doctrines of pendent and ancillary jurisdiction but also expanded the scope of cases over which federal courts could exercise jurisdiction. Over the last decade, the growth in federal court jurisdiction has been substantial, with a recent study showing a significant increase in the number of cases removed to federal court.


Id.; see also Theodore Eisenberg & Trevor W. Morrison, Overlooked in the Tort Reform Debate: The Growth of Erroneous Removal, 2 J. EMPIRICAL LEGAL STUD. 551, 551–52 (2005) (“Disputes over forum are a staple of civil litigation, often centering on whether the case should proceed in state or federal court. The pattern is familiar: plaintiff sues in state court; defendant removes to federal court, contending the case meets the requirements of federal jurisdiction; plaintiff counters by seeking a remand to state court, arguing removal was improper. These skirmishes matter. First, a party tends to fare better when the case is litigated in its chosen forum. Thus, when a defendant removes a state case to federal court, it obtains an advantage. Even if the case is never fully tried, the terms of the settlement will likely reflect the results of the forum contest.” (footnotes omitted)). Perhaps for this reason, one should not be shocked to see that the percentage of state court tort claims removed to federal court during the last decade has gone up significantly. See id. at 551.


Id. (reporting that the plaintiff win-rate in removed federal civil lawsuits is 36.7%, while the overall win-rate in federal cases reached 57.9%); Clermont & Eisenberg, supra note 5, at 581 (finding a win-rate in original diversity cases of 71%, but only a 34% win-rate for cases originally filed in state court but removed to federal court). After questioning the reliability of some win-rate empirical research conclusions, Professors Eisenberg and Clermont conclude that their statistics actually do reveal a difference based on forum: “The shift from a favorable forum [state court], chosen by plaintiffs, to a less favorable forum [federal court], chosen by defendants, drives down plaintiffs’ win rates. Thus, notwithstanding the ubiquitous interpretive problem of case selection, carefully analyzed win-rate data can convey useful information about the legal system.” Id. at 584.
jurisdiction, but when read literally, undermines some doctrinal creatures of the federal courts designed to limit the scope of the courts’ diversity jurisdiction. At the end of its 2004–05 term, the United States Supreme Court finally resolved a longstanding circuit split by giving the statute a literal interpretation such that no longer must each claimant in a diversity case joined pursuant to Federal Rule of Civil Procedure 20 independently satisfy § 1332’s amount in controversy requirement despite the Supreme Court’s contrary pre-statutory requirements enunciated in Clark v. Paul Gray, Inc. and Zahn v. International Paper Co. Indeed, in certain

9 The supplemental jurisdiction statute came on the heels of the Supreme Court’s decision in Finley v. United States, in which Justice Scalia’s majority opinion threatened the very existence of both pendent and ancillary jurisdiction by suggesting that Congress had never authorized the exercise of either type of extra-subject matter jurisdiction. 490 U.S. 545, 554–56 (1989); see also David D. Siegel, Practice Commentary, 28 U.S.C.A. § 1367, at 829, 832 (West 1993) (observing that § 1367 codified ancillary and pendent jurisdiction and overruled Finley). The supplemental jurisdiction statute primarily was enacted with two goals in mind—to codify the existing doctrines of pendent and ancillary jurisdiction and thereby give them sustained life, and to overrule the specific holding in Finley that greatly curtailed, if not completely eliminated, pendent-party jurisdiction. James M. Underwood, Rationality, Multiplicity & Legitimacy: Federalization of the Interstate Class Action, 46 S. TEX. L. REV. 391, 430–31 (2004) [hereinafter Rationality, Multiplicity & Legitimacy]; James M. Underwood, Supplemental Serendipity: Congress’ Accidental Improvement of Supplemental Jurisdiction, 37 Akron L. Rev. 653, 667–68 (2004) [hereinafter Supplemental Serendipity]; see also, e.g., Rosmer v. Pfizer, Inc., 263 F.3d 110, 113–14 (4th Cir. 2001); Thomas M. Mengler et al., Congress Accepts Supreme Court’s Invitation to Codify Supplemental Jurisdiction, 74 Judicature 213, 213 (1991) (observing that § 1367 was enacted to respond to Finley’s threat “to subvert the federal courts’ power to deal with related matters efficiently, in single rather than in multiple litigation”).

10 See Mengler et al., supra note 9, at 214.

11 See Supplemental Serendipity, supra note 9, at 660–61 (summarizing the circuit split).

12 Prior to 1990, supplemental jurisdiction was purely a court-created doctrine, known under the twin banners of pendent and ancillary jurisdiction. The modern genesis for pendent jurisdiction was United Mine Workers v. Gibbs, where the Supreme Court held that a claimant with a federal question cause of action could join to it other purely state law claims, despite the absence of diversity jurisdiction, so long as the various claims were part of “one constitutional ‘case’” in that they arose out of the same “common nucleus of operative fact.” 383 U.S. 715, 725, 729 (1966). In terms of permitting federal courts to adjudicate state law claims without the presence of diversity of citizenship, Gibbs can be seen as a dramatic expansion of federal court jurisdiction. In hindsight, it is remarkable that the Supreme Court made this leap without any Congressional word of assent. This lack of legislative foundation for such a significant new exercise of federal court trial level jurisdiction simmered beneath the doctrines of pendent and ancillary jurisdiction until Justice Scalia’s majority opinion in Finley cast doubt on the constitutionality of pendent and ancillary jurisdiction absent congressional approval. Of course, this opinion is what led to the rather rapid adoption of § 1367, which now provides the legislative pillars for supplemental jurisdiction.


contexts, this statute arguably permits results inconsistent with the complete diversity requirement of *Strawbridge v. Curtiss*. Most interestingly, in a very recent case the Supreme Court displayed a tolerance for a broad reading of the supplemental jurisdiction statute even in the face of increasing the reach of diversity jurisdiction in a way that the Court found illogical:

It is not immediately obvious why Congress would withhold supplemental jurisdiction over plaintiffs joined as parties “needed for just adjudication” under Rule 19 but would allow supplemental jurisdiction over plaintiffs permissively joined under Rule 20. The omission of Rule 20 plaintiffs from the list of exceptions in § 1367(b) may have been an “unintentional drafting gap.” If that is the case, it is up to Congress rather than the courts to fix it.

Second, in 2002, Congress passed the Multi-Party Jurisdiction Statute—28 U.S.C. § 1369—which provides for federal court jurisdiction over certain mass tort state law claims (e.g., suits arising out of single occurrences resulting in the deaths of at least seventy-five people) with only minimal diversity—cases that would have traditionally only been heard in state courts.\(^\text{19}\)

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\(^\text{16}\) Following the logic of the Seventh Circuit in *Stromberg Metal Works, Inc. v. Press Mechanical, Inc.*, 77 F.3d 928, 930–31 (7th Cir. 1996), and the Fifth Circuit in *In re Abbott Laboratories*, 51 F.3d 524, 529 (5th Cir. 1995), some lower federal court decisions have emerged recognizing that when a plaintiff amends her complaint to add a Rule 20 co-plaintiff who is not diverse from the defendant, the supplemental jurisdiction statute provides federal jurisdiction for such a claim. *See, e.g.*, Sunpoint Sec., Inc. v. Porta, 192 F.R.D. 716, 719 (M.D. Fla. 2000); El Chico Rests., Inc. v. Aetna Cas. & Sur. Co., 980 F. Supp. 1474, 1484 (S.D. Ga. 1997); *see also Supplemental Serendipity*, supra note 9, at 701–02 (supporting this majority literal interpretation of the statute).

\(^\text{17}\) *7 U.S. (3 Cranch) 267*, 267 (1806). The Supreme Court has fairly recently offered the following interpretation of its seminal decision in *Strawbridge*:

The Constitution provides, in Article III, § 2, that “[t]he judicial Power [of the United States] shall extend . . . to Controversies . . . between Citizens of different States.” Commencing with the Judiciary Act of 1789, Congress has constantly authorized the federal courts to exercise jurisdiction based on the diverse citizenship of parties. In *Strawbridge v. Curtiss*, this Court construed the original Judiciary Act’s diversity provision to require complete diversity of citizenship. We have adhered to that statutory interpretation ever since.


\(^\text{19}\) 28 U.S.C. § 1369(a) provides that “district courts shall have original jurisdiction of any civil action involving minimal diversity between adverse parties that arises from a single accident, where at least 75 natural persons have died in the accident at a discrete location . . . .” 28 U.S.C. § 1369(a) (Supp. III 2003).
Third, after more than a decade of wrangling, Congress finally passed the Class Action Fairness Act in 2005 (revising, in part, § 1332), which provides for federal court diversity jurisdiction over putative state law damage class actions with minimal diversity and an aggregate amount in controversy of at least $5 million. Congress passed this statute because it believed that many state courts could not be trusted to adjudicate nationwide class actions fairly:

Abuses in class actions undermine the national judicial system, the free flow of interstate commerce, and the concept of diversity jurisdiction as intended by the framers of the United States Constitution, in that State and local courts are—

(A) keeping cases of national importance out of Federal court;
(B) sometimes acting in ways that demonstrate bias against out-of-State defendants; and
(C) making judgments that impose their view of the law on other States and bind the rights of the residents of those States.

This triumvirate of change in the arena of federal court diversity jurisdiction, at least on a macro level, demonstrates a desire and willingness, respectively, by a relatively bipartisan Congress and the Supreme Court to lower some of the barriers that have historically prevented federal courts from hearing many state law disputes. With regard to congressional legislation, this desire seems to be fueled by the emerging perception that in certain contexts, a federal forum is more appropriate than a state court, even for

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20 Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 4, 119 Stat. 4, 9 (amending, in part, 28 U.S.C. § 1332(d)(2)(A)) (“The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class action in which (A) any member of a class of plaintiffs is a citizen of a State different from any defendant . . . .”). The act also provides that the removal of any class action from state court can be at the behest of any single defendant sued in such an action. § 5, 119 Stat. at 12.


22 On February 10, 2005, the Senate finally passed the Class Action Fairness Act by a vote of 72 to 26 after a long deliberative process. Press Release, U.S. Chamber of Commerce, Chamber Hails Senate Passage of Class Action Reform, Calls on House to “Finish the Job” (Feb. 10, 2005), http://www.uschamber.com/press/releases/2005/february/05-22.htm. In an era when many believe that Republicans and Democrats in Congress have become increasingly polarized, this degree of bipartisan support for increased federal court jurisdiction is striking.
adjudication of purely state law claims.\textsuperscript{23} Ironically, this expansion of diversity jurisdiction comes on the heels of the important \textit{Report of the Federal Courts Study Committee}, which recommended that Congress eliminate diversity jurisdiction essentially to save the federal courts for more important work on federal issues.\textsuperscript{24} Far from adopting this proposal, Congress instead has shown a determination to expand diversity jurisdiction, at least in certain circumstances, while maintaining general diversity of citizenship jurisdiction in the federal courts.

Against this backdrop of expansion of diversity jurisdiction lies the important doctrine of fraudulent joinder. Stated simply, fraudulent joinder is a doctrine that permits federal courts to essentially ignore the inclusion in a lawsuit of a nondiverse party who would otherwise destroy federal diversity jurisdiction when the district court concludes that the party’s joinder is a sham.\textsuperscript{25} This doctrine has significant impact on the determination of which state law claims receive a federal forum, yet it has been largely ignored by the academic community,\textsuperscript{26} even while the federal circuits are

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\textsuperscript{23} See \textit{Rationality, Multiplicity & Legitimacy}, supra note 9, at 452–58 (discussing some of the arguments in favor of expanded federal court jurisdiction over class actions).

\textsuperscript{24} \textit{JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE} 39 (1990). In this report, the committee found that because commerce and the state court systems had changed so dramatically since diversity jurisdiction was established with Congress’ passage of the Judiciary Act of 1789, this form of subject matter jurisdiction should either be eliminated or substantially curtailed: After extensive discussion, a substantial majority of the committee strongly recommends that Congress eliminate [diversity jurisdiction], subject to certain narrowly defined exceptions. . . . We believe that diversity jurisdiction should be virtually eliminated for two simple reasons: On the one hand, no other class of cases has a weaker claim on federal judicial resources. On the other hand, no other step will do anywhere nearly as much to reduce federal caseload pressures and contain the growth of the federal judiciary. Given all the demands on the federal courts, there is little reason to use them for contract disputes or automobile accident suits simply because the parties live across state boundaries—especially when litigants who do not live in different states must bring otherwise identical suits in state courts. Id. Given some of the expanding body of empirical research on the differences in outcomes between disputes resolved in state versus federal courts, the committee’s values-driven determination—that diversity jurisdiction is no longer warranted—appears suspect. See, e.g., Clermont & Eisenberg, supra note 5, at 599–602. Indeed, since there was no general federal question jurisdiction authorized by Congress in the Judiciary Act of 1789, one could argue credibly that the proliferation of federal statutory causes of action during the last fifty years has done much to erode the ability of the lower federal courts to maintain their focus on their first mission—resolving disputes between citizens of different states.

\textsuperscript{25} See, e.g., \textit{Griggs v. State Farm Lloyds}, 181 F.3d 694, 699, 702 (5th Cir. 1999) (refusing to send the action to state court where the plaintiff’s complaint failed to allege actionable facts against the nondiverse defendant).

\textsuperscript{26} Describing the futility of the federal circuits to come up with a single consistent standard for the doctrine of fraudulent joinder, one student scholar noted that, “[i]n spite of this inconsistency in federal removal doctrine, there is no scholarly commentary about it, and few
enmeshed in a seemingly intractable and fruitless search for an analytical Rosetta stone—the proper standard to apply to the doctrine. This Article will attempt to work through this thicket of judicial confusion, and will propose a change to the analysis that will eliminate the doctrinal dilemmas with which the courts have grappled and will ensure that the state law claims most deserving of a federal forum receive one without trampling on federalism.

B. Fraudulent Joinder and the Voluntary/Involuntary Rule

The phrase “fraudulent joinder” is a bit of a misnomer “because the doctrine requires neither a showing of fraud nor joinder in one sense.” While a defendant may support the invocation of the doctrine by demonstrating that the plaintiff has made fraudulent allegations (e.g., falsely stating the citizenship of a defendant) in the state court complaint or petition, this is only one of the two most significant contexts where courts apply fraudulent joinder.

The more important context, at least in terms of the frequency of its attempts have been made to resolve the obvious split.” As one scholar counted up the circuits, he observed:

A circuit split has developed, with several courts recognizing only one of these categories of fraudulent joinder. The Fourth, Fifth, and Tenth Circuits follow the “pierce the pleadings” approach, in which the court examines the entire state court record to determine if the plaintiff might possibly prove a cause of action. The Third and Eleventh Circuits follow the “pleadings only” approach in which the court examines only the plaintiff’s pleadings. The First, Second, Sixth, Seventh, and Eighth Circuits “are split internally.”

Nevertheless, it is clear that the circuits are in serious need of Supreme Court guidance in the form of a principled approach.

16 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE § 107.14[2][c][iv][A], at 107-57 (3d ed. 2005) (citing Mayes v. Rapoport, 198 F.3d 457, 461 n.8 (4th Cir. 1999)).


The other aspect of the title “fraudulent joinder” that may be misleading is the implicit suggestion that the doctrine applies to a plaintiff’s post-complaint “joinder” of a nondiverse party. In fact, the doctrine typically applies in contexts where the plaintiff has “joined” the nondiverse party in its initial pleading. See Cobb v. Delta Exps., Inc., 186 F.3d 675, 677–78 (5th Cir. 1999) clarifying that the fraudulent joinder doctrine usually applies where the plaintiff names a nondiverse defendant in the original complaint, and that it never applies to the situation where a nondiverse defendant is joined after a state court action has been removed to federal court.)
attempted use,\textsuperscript{31} is where the diverse defendant removes a case to federal court asking the district court judge to find that a co-defendant who shares citizenship with a plaintiff should be ignored jurisdictionally because the plaintiff has no possible claim against that co-defendant.\textsuperscript{32} As will be seen later in this Article,\textsuperscript{33} this latter situation does not really focus upon the intentions of the plaintiff, but upon the viability of the claim against the local defendant. For this reason, at least one circuit has recently abandoned the nomenclature “fraudulent joinder” and replaced it with the phrase “improper joinder.”\textsuperscript{34} This latter scenario is the type of fraudulent joinder where the federal courts have been unable to embrace a single standard and is the focus of this Article.

When a plaintiff in a state court suit joins a questionable claim against a local (nondiverse) defendant to a claim against a diverse

\textsuperscript{31} According to the Seventh Circuit, in its first opportunity to address fraudulent joinder, “[a]lthough false allegations of jurisdictional fact may make joinder fraudulent, in most cases fraudulent joinder involves a claim against an in-state defendant that simply has no chance of success, whatever the plaintiff's motives.” Poulos v. Naas Foods, Inc., 959 F.2d 69, 73 (7th Cir. 1992) (citations omitted).

\textsuperscript{32} See, e.g., Hartley v. CSX Transp., Inc., 187 F.3d 422, 424 (4th Cir. 1999) (recognizing the rule that fraudulent joinder exists where the plaintiff has no cognizable claim against the nondiverse defendant, but holding that the defendant was unable to meet its burden in proving that the plaintiff had no claim against the nondiverse defendant). Two other fairly rare types of fraudulent joinder have also gained some recent recognition. First, there is a rare variation on this type of fraudulent joinder where the fraudulently joined party is a co-plaintiff, rather than a co-defendant, added to destroy complete diversity. See, e.g., West Virginia v. Minn. Mining & Mfg. Co., 354 F. Supp. 2d 660, 666–67 (S.D. W. Va. 2005) (rejecting the defendant's argument that the plaintiff state was fraudulently joined to destroy diversity); Foslip Pharms., Inc. v. Metabolife Int'l, Inc., 92 F. Supp. 2d 891, 903–04 (N.D. Iowa 2000) (describing the test for analyzing claims of fraudulent joinder of plaintiffs). The second rare type of fraudulent joinder involves cases where a party's joinder is procedurally improper, not because the claim is flawed on the merits, but because it cannot appropriately be joined to the main claim due to the lack of requisite relationship between the claims. See John S. Clark Co. v. Travelers Indem. Co. of Ill., 359 F. Supp. 2d 429, 436–37 (M.D.N.C. 2004) (“Procedural misjoinder of parties is a relatively new concept that has emerged from the Eleventh Circuit and appears to be part of the doctrine of fraudulent joinder at least in that circuit.”) (citing Tappcott v. MS Dealer Serv. Corp., 77 F.3d 1353, 1359–60 (11th Cir. 1996) (holding that misjoinder due to procedural irregularity may constitute fraudulent joinder), abrogated on other grounds by Cohen v. Office Depot, Inc., 204 F.3d 1069, 1076 (11th Cir. 2000)). In addition, some courts have indicated that where the plaintiff has “no real intention in good faith to prosecute the action against the defendant,” a finding of fraudulent joinder is possible. See, e.g., Abels v. State Farm Fire & Cas. Co., 770 F.2d 26, 32 (3d Cir. 1985) (quoting Goldberg v. CPC Intl', Inc., 495 F. Supp. 233, 239 (N.D. Cal. 1980)).

\textsuperscript{33} See infra Part III.A.

\textsuperscript{34} Smallwood v. Ill. Cent. R.R. Co., 385 F.3d 568, 571 n.1 (5th Cir. 2004) (en banc) (“We adopt the term ‘improper joinder’ as being more consistent with the statutory language than the term ‘fraudulent joinder,’ which has been used in the past. Although there is no substantive difference between the two terms, ‘improper joinder’ is preferred.”), cert. denied, 125 S. Ct. 1825 (2005).
defendant, one might wonder why the case cannot simply be removed to federal court after the spuriously named local defendant obtains a summary judgment or other dismissal of the claim. After all, the removal statute contemplates the possibility of a case becoming removable sometime after the inception of the suit and permits defendants thirty days after the case becomes removable to file the notice of removal. An important corollary to fraudulent joinder, however, is the voluntary/involuntary dismissal rule. The Supreme Court made it clear a century ago that, while a plaintiff’s decision to voluntarily dismiss the local defendant makes the case removable (e.g., following a settlement with that defendant), an involuntary dismissal of the local defendant effectively does not count. As the Eleventh Circuit has stated this rule:

The statute governing removal procedure was amended in 1949 to permit removal of cases subsequent to the inception of the case when something happens to make the case removable later in the procedural life of the dispute. Act of May 24, 1949, ch. 139, § 83, 63 Stat. 89, 101. The statute now reads:

If the case stated by the initial pleading is not removable, a notice of 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 . . . . 28 U.S.C. § 1446(b) (2000).

Rather than just considering the voluntary/involuntary rule as a corollary to fraudulent joinder, some commentators characterize fraudulent joinder as an “exception” to the voluntary/involuntary rule. According to these observers, fraudulent joinder is merely an exception to the broader rule that a state court dismissal of a claim against a local defendant (e.g., on a summary judgment motion) does not affect diversity removal jurisdiction. See Archibald, supra note 26, at 1378. (“Fraudulent joinder is an exception to the voluntary/involuntary rule, for if the nondiverse defendant was ‘fraudulently joined,’ the fact that [the state court] dismissal of the nondiverse defendant was involuntary does not matter: the case becomes removable.”). However, the doctrine of fraudulent joinder is free-standing from the voluntary/involuntary rule because fraudulent joinder may be—and frequently is—invoked in the absence of any state court action on the claim against the local defendant. In other words, a diverse defendant may remove a case immediately upon being served with a state court complaint that the diverse defendant believes involves the fraudulent joinder of a co-defendant whose presence, if considered, would destroy diversity. See, e.g., Lewis v. Time, Inc., 83 F.R.D. 455, 466 (E.D. Cal. 1979) (denying motion to remand when diverse defendant in libel action immediately removed state court action invoking fraudulent joinder doctrine), aff’d, 710 F.2d 549 (9th Cir. 1983). In these instances, there is no state court dismissal of the claim against the nonresident defendant—and thus no application of the voluntary/involuntary rule—and yet fraudulent joinder is being applied to permit removal to federal court. For this reason, fraudulent joinder obviously is more than just an exception to the voluntary/involuntary rule. Indeed, the American Law Institute has characterized fraudulent joinder as “the more general doctrine” than the voluntary/involuntary rule. AM. LAW INST., FEDERAL JUDICIAL CODE REVISION PROJECT 515 (2004). Rather, the voluntary/involuntary rule is more accurately characterized as a complement to Strawbridge’s complete diversity requirement which effectively requires federal courts, upon removal due to an alleged fraudulent joinder, to engage in their own analysis of the sham nature of the claim against the local defendant.

Compare Powers v. Chesapeake & Ohio Ry. Co., 169 U.S. 92, 98, 101, 102 (1898) (holding that removal was proper once plaintiff discontinued action against nondiverse defendants)
If the resident defendant was dismissed from the case by the voluntary act of the plaintiff, the case became removable, but if the dismissal was the result of either the defendant's or the court's action against the wish of the plaintiff, the case could not be removed.38

Thus, where the local defendant obtains summary judgment, even early in the litigation, the local defendant's citizenship still counts and destroys diversity jurisdiction.39 As discussed below, by virtue of this voluntary/involuntary dismissal rule, the federal courts have not been able to utilize the state courts as filters for determining whose citizenship should be counted when a questionable claim is alleged against a no diverse defendant.40

The Supreme Court has never—certainly not in modern times—made clear what the standard is for determining when a claim is fraudulently joined and what information or evidence ought to be considered by the federal district courts.41 Instead the lower federal courts have been left to fashion their own standard to the rather amorphous concept of fraudulent joinder.

To say that these courts have lacked success in this regard would be an understatement. At least three standards have evolved,
leaving the result in one circuit different from the next and the
litigants often uncertain as to what standard will be applied to any
attempted removal of their case to federal court. Moreover, it is
often difficult to decipher in a particular circuit exactly what the
standard is that the circuit court is directing the district judges
under its domain to apply. Briefly stated, one standard is akin to
the standard used in a Federal Rule of Civil Procedure 12(b)(6)
review of the plaintiff’s state court complaint. Only if the removing
defendants can demonstrate, on the face of the plaintiff’s complaint,
that no claim is stated against the local defendant may the district
court ignore the local defendant’s citizenship. This appears to be
the closest standard to what the rather ancient Supreme Court
opinions on the topic had in mind, and is arguably the majority
approach today. At the other extreme are the circuits that permit
the district courts to engage in a much more probing summary
judgment-like critique of the plaintiff’s claim against the local
defendant. In these circuits, the defendant is permitted to offer
evidence of the lack of liability by the local defendant to the plaintiff
in order to demonstrate fraudulent joinder. Finally, there is at
least some support for an alternative seemingly somewhere between
these two extremes that can be characterized as a Federal Rule of
Civil Procedure 11 probe into the plaintiff’s good faith in alleging a
claim against the local defendant.

Of course, the foregoing three variations are rough
categorizations, and differences exist even among those circuits
purporting to apply the same standard. For example, among those
courts utilizing the summary judgment approach, some permit the
removing defendant to apply a Celotex-style “burden” to support its
removal of the case. In these courts, the plaintiff has the burden at

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42 See infra Part III.B.1.
43 See infra text accompanying note 148.
44 See infra Part III.B.2.
45 See infra text accompanying notes 209–10.
46 See infra at Part III.B.4.
47 See Celotex Corp. v. Catrett, 477 U.S. 317 (1986). In Celotex, the Supreme Court
indicated that a party defending a claim may make a “no evidence” motion for summary
judgment, merely indicating that the plaintiff lacks an evidentiary basis for an element of a
claim upon which the plaintiff bears the burden of proof at trial. Id. at 325. Thus, the
defendant need not prove much in moving for summary judgment, but instead may shift the
burden entirely to the plaintiff (with regard to summary judgment on a plaintiff’s cause of
action) to support her claim with evidentiary material listed in Federal Rule of Civil
Procedure 56. Id. at 324. The idea was that, since summary judgment was a tool to weed out
cases where trial would be futile, the summary judgment standard should approximate the
trial burdens.
the outset of the case to proffer evidence that would justify the claims against the local defendant, and the removing party's only burden is to inform the district court of the perceived lack of evidentiary basis for the claim against the nondiverse defendant.\textsuperscript{48} On the other hand, some circuits using the summary judgment standard put the evidentiary burden solely upon the removing defendant to affirmatively negate the plaintiff's claim against any nondiverse defendants.\textsuperscript{49} Also, even among those circuits that refuse to pierce the pleadings and require fraudulent joinder to be determined based solely upon the face of the plaintiff's state court complaint, there are some subtle differences. Some of these circuits say that the analysis is essentially a 12(b)(6) determination, while others say the standard is actually more difficult to establish than just showing a failure to state a claim. Finally, there are schizophrenic examples abounding within those circuits applying inconsistent standards, depending either upon the circumstances of the case\textsuperscript{50} or the identity of the panel members hearing the case,\textsuperscript{51} with the resulting circumstance of a rather unsatisfying

\textsuperscript{48} This Article will use the expressions "resident defendant," "local defendant," and "nondiverse defendant" interchangeably when referring to the defendant named by the plaintiff's state court pleading whose joinder defeats the complete diversity requirement.

\textsuperscript{49} See infra text accompanying notes 230–33.

\textsuperscript{50} In the Ninth Circuit, for example, which adheres to the 12(b)(6) approach for analyzing fraudulent joinder, some district courts have applied a much more liberal standard approaching the summary judgment model in cases where First Amendment issues are raised as defenses to state law libel claims due to the involvement of "peculiarly federal interests." See Med. Lab. Mgmt. Consultants v. Am. Broad. Cos., 931 F. Supp. 1487, 1491 (D. Ariz. 1996) ("[T]he underlying goals of diversity and removal jurisdiction strongly support the retention of jurisdiction in cases involving the First Amendment."); Spence v. Flynn, 647 F. Supp. 1266, 1272 (D. Wyo. 1986) ("[T]his Court agrees with Lewis that first amendment values demand special federal protections."); Lewis v. Time Inc., 83 F.R.D. 455, 466 (E.D. Cal. 1979), aff'd, 710 F.2d 549, 552 (9th Cir. 1983) (affirming refusal to remand following final adjudication and noting that, at the time of final determination, the only remaining defendant was diverse). These district court decisions reflect a willingness to depart from the directives of their circuit courts of appeals to apply a 12(b)(6) model of review to allegations of fraudulent joinder in instances when the district courts are more desirous of keeping the case even though the federal interests would not provide subject matter jurisdiction under the well-pleaded complaint rule. See Louisville & Nashville R.R. Co. v. Motley, 211 U.S. 149, 152 (1908) (holding that a plaintiff's anticipation of a potential constitutional defense by the defendant is insufficient, in itself, to secure federal court jurisdiction). This particular exception does not appear to extend beyond the district courts of the Ninth Circuit. See Gateway 2000, Inc. v. Cyrix Corp., 942 F. Supp. 985, 995–96 (D.N.J. 1996) (granting motion to remand where allegations against local defendant were sufficient on their face to withstand 12(b)(6) scrutiny, notwithstanding potential First Amendment implications).

\textsuperscript{51} Compare Poulos v. Naas Foods, Inc., 959 F.2d 69, 73 (7th Cir. 1992) (utilizing a 12(b)(6) approach) with Faucett v. Ingersoll-Rand Mining & Mach. Co., 960 F.2d 653, 654–55 (7th Cir. 1992) (utilizing a standard that pierces the pleadings notwithstanding the Poulos decision—which used a 12(b)(6) standard—that was rendered just two weeks earlier).
bewilderment of the bench and bar.\footnote{See Stephen E. Abraham \& William M. Hensley, Remand: One Constitution, One Standard, 27 PEPP. L. REV. 263, 264 (2000) (lamenting the lack of “certainty to the bar and judiciary” when different courts apply different fraudulent joinder standards, and calling for a “unified” analysis based upon the 12(b)(6) model).}

This Article will review the origins and historical usages of fraudulent joinder with a focus upon the justifications for the doctrine. It will then canvass and critique the various models used by lower federal courts, demonstrating, ultimately, that each of the three prevailing models of analysis is deficient. The Rule 12(b)(6) model is woefully underinclusive of the cases that deserve federal court attention, the summary judgment model is perhaps overinclusive and certainly a threat to federalism, and the Rule 11 model misses the purpose behind diversity jurisdiction altogether while not offering any significant improvement over the other models. In fact, each of these approaches illustrates a misguided attempt to rely upon a proxy for the determination of fraudulent joinder rather than a principled and intellectually direct analysis with a consideration for the principles underlying federal diversity jurisdiction. What emerges from this review and critique is a firm conviction that the appropriate doctrinal change is the elimination of the voluntary/involuntary corollary to fraudulent joinder, and a requirement that issues of such improper joinder be presented to the state trial courts for rulings on the merits of such claims. Only after a state court has declared that the claim against the nondiverse defendant is not worthy of proceeding to trial will removal of the case to federal court be permitted. Such an approach would eliminate the need to find a proxy method of analysis while helping to ensure that a greater percentage of the cases that need the protection of federal diversity jurisdiction receive it. Perhaps equally important, this recommended approach would further these goals while eliminating the current practice of federal courts trampling on federalism by essentially adjudicating the merits of purely state law issues between nondiverse citizens.

II. THE VOLUNTARY/INVOLUNTARY DISMISSAL RULE

The reason that the lower federal courts have to try to identify some method for analyzing the merits of state claims—that is, which claims against nondiverse defendants have “no possibility” of success—is because the voluntary/involuntary rule does not permit the federal courts to use state court adjudications as a filter for
removal. But for this rule, federal courts could refuse to consider the citizenship of any defendant who had already been dismissed from the state court case. Instead, the federal courts must decide for themselves which state claims between nondiverse citizens have no possibility of success without meddling too much in the adjudication of the merits of such claims. The voluntary/involuntary rule has a questionable pedigree and its justifications are suspect.

The case that is most frequently cited as the foundation of the voluntary/involuntary rule actually does not mention any such rule, but applies it without explanation. In *Powers v. Chesapeake & Ohio Railway Co.*, the plaintiff from Kentucky, who was injured by a train that hit him, filed suit against the Virginia railroad corporation. In addition to this claim, plaintiff also joined claims against two individual employees of the railway who were both Kentucky citizens. The railroad first attempted to remove, arguing that the claims were separable; but the federal court rejected the argument and remanded the case due to incomplete diversity. Thereafter, the plaintiff discontinued the action against the two railroad employees, and the railroad removed the case a second time. In ruling on the issue of the propriety of the removal and, in particular, whether it could be sustained despite the defendant’s lack of compliance with the statutory deadline for removals, the Supreme Court identified the time when the case first become removable:

The petition [for removal], as amended, distinctly alleged that Evans was a citizen of Virginia, that Boyer and Hickey were both citizens of Kentucky, and that by the discontinuance against them the action was for the first time pending against the railway company alone; and thus showed a case which the railway company was entitled to remove, independently of the allegations that these persons had been fraudulently joined as defendants to defeat the right of removal . . . .

Thus, the Supreme Court clarified that when nondiverse defendants are voluntarily dropped from the case by the plaintiff’s own actions,

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53 169 U.S. 92 (1898).
54 Id. at 96.
55 See id. at 97–98.
56 Id.
57 Id. at 102.
the case may be considered ripe for removal if the remaining defendants are diverse from the plaintiff.

The other analytical shoe dropped two years later in *Whitcomb v. Smithson.* 58 This case involved another train accident, though in this instance two trains collided. The plaintiff was hurt in the accident and sued both railways. 59 After the state court directed a verdict on the claim involving the nondiverse railway, the remaining defendant (who was diverse from the plaintiff) sought removal. 60 The Supreme Court held that the removal was improper despite the complete diversity because the nondiverse defendant had been taken out of the case by a court ruling “adverse to plaintiff, and without his assent.” 61 Again, as with the *Powers* ruling, the Court did not set forth a rule of voluntary/involuntary dismissal, but seemed to apply this to reach its holding. In its 1915 decision in *American Car & Foundry Co. v. Kettelhake,* the Supreme Court confirmed that, indeed, the rule was that only the dismissal of a defendant by the voluntary act of the plaintiff could remove a defendant’s citizenship from consideration in evaluating federal court removal jurisdiction. 62 However, no clear explanation for the rule’s basis was offered.

Three years later, the Supreme Court finally offered a clear statement of the rule and its justification in *Great Northern Railway Co. v. Alexander:* 63

The obvious principle . . . is that, in the absence of a fraudulent purpose to defeat removal, the plaintiff may by the allegations of his complaint determine the status with respect to removability of a case, arising under the law of the United States, when it is commenced, and that this power to determine the removability of his case continues with the plaintiff throughout the litigation, so that whether such a case nonremovable when commenced shall afterwards become removable depends not upon what the defendant may allege or prove or what the court may, after hearing upon the merits, *in invitum,* order, but solely upon the form which the plaintiff by his voluntary action shall give to the

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58 175 U.S. 635 (1900).
59 Id. at 635.
60 Id. at 636.
61 Id. at 638.
63 246 U.S. 276 (1918).
pleadings in the case as it progresses towards a conclusion.\textsuperscript{64} This is the clearest statement from the Supreme Court offering any explanation for the voluntary/involuntary dismissal rule. As another court has phrased the rule: “[I]f the resident defendant was dismissed from the case by the voluntary act of the plaintiff, the case became removable, but if the dismissal was the result of either the defendant’s or the court’s acting against the wish of the plaintiff, the case could not be removed.”\textsuperscript{65} Accordingly, “the only justification that the Supreme Court has given [as support for the rule] is the plaintiff's right to determine removability.”\textsuperscript{66} Apparently this court-created rule was designed to “protect[] the plaintiff's right to control the removability of his case throughout the litigation by allowing removal only when complete diversity results from a voluntary act by the plaintiff. The Alexander court did not elaborate, but merely stated that the right existed and that it supported the . . . rule.”\textsuperscript{67} Such a justification for so important a rule has been called “baseless[\textsuperscript{68} “antiquated,”\textsuperscript{69} and “arbitrary”\textsuperscript{70} by others. Indeed, such allegiance to the plaintiff’s right to determine the removability of a claim is strikingly at odds with the early historical views of the Supreme Court concerning a defendant’s equal right to have a federal forum:

The constitution of the United States was designed for the common and equal benefit of all the people of the United States. The judicial power was granted for the same benign and salutary purposes. It was not to be exercised exclusively for the benefit of parties who might be plaintiffs, and would elect the national forum, but also for the protection of defendants who might be entitled to try their rights, or assert their privileges [sic], before the same forum.\textsuperscript{71} This view was not novel or isolated: “Justice Story was not alone in this view. Rather, for roughly a century after Martin v. Hunter’s Lessee, most federal courts treated removal as a necessary

\textsuperscript{64} Id. at 282.
\textsuperscript{65} Weems v. Louis Dreyfus Corp., 380 F.2d 545, 546 (5th Cir. 1967) (quoting Comment, The Effect of Section 1446(b) on the Nonresident's Right to Remove, 115 U. Pa. L. Rev. 264, 267 (1966)). Weems contains a very good discussion of the historical roots of the voluntary/involuntary rule. See id. at 547.
\textsuperscript{66} Archibald, supra note 26, at 1383.
\textsuperscript{67} Id. at 1384.
\textsuperscript{68} Id.
\textsuperscript{70} Id.
\textsuperscript{71} Martin v. Hunter’s Lessee, 14 U.S. (1 Wheat.) 304, 348 (1816) (Story, J.).
procedural mechanism affording defendants an equal opportunity with plaintiffs to select a federal forum.” 72 In addition to the historical problems with giving plaintiff’s autonomy such force, it would seem that the voluntary/involuntary rule is at odds with other aspects of modern litigation. For example, such autonomy over a plaintiff’s choice of forum is hardly absolute, and instances abound of such autonomy being overcome by principles of convenience 73 and avoiding prejudice. 74 One must wonder why convenience can trump autonomy while a nonresident’s right to a fair forum does not. No answers have been forthcoming from the Supreme Court, and there appear to be no defenders of this doctrine on such grounds.

In apparent recognition that the voluntary/involuntary rule does not have a firm foundation from the Supreme Court, various circuit courts of appeals have offered another post hoc alternative justification. In a case frequently cited by other courts concerning the voluntary/involuntary rule, the Fifth Circuit offered this alternative justification for the rule:

Although the [voluntary/involuntary] rule has often been criticized for failing to explicate an underlying rationale, it nevertheless has merit in that it prevents removal of those cases in which the issue of the resident defendant’s dismissal has not been finally determined in the state courts. This avoids the duplication and expense which would result if a resident defendant was dismissed on an appealable ground,

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72 Scott R. Haiber, Removing the Bias Against Removal, 53 Cath. U. L. Rev. 609, 618 (2003). Mr. Haiber offers his view that, following the Civil War, several factors changed the “small tide of litigation that formerly flowed in federal channels [into a] swollen . . . mighty stream.” Id. at 622 (quoting John F. Dillon, Removal of Causes from State Courts to Federal Courts 2–3 (5th ed. 1889)). These factors include the commercial development following the war, expanded removal opportunities, and the creation of federal question jurisdiction. Id.

73 See, e.g., 28 U.S.C. § 1404(a) (2000). Section 1404(a) permits a district court to overcome the plaintiff’s choice of forum by transferring a case to another federal district where the case might have been originally brought: “For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.” Id. Similarly, courts have created the doctrine of forum non conveniens—which predicated § 1404(a)—by which a court may dismiss a case that the court concludes should have been brought elsewhere due to considerations of various public and private interest factors. See Piper Aircraft Co. v. Reyno, 454 U.S. 235, 249 (1981) (“[D]ismissal will ordinarily be appropriate where trial in the plaintiff’s chosen forum imposes a heavy burden on the defendant or the court, and where the plaintiff is unable to offer any specific reasons of convenience supporting his choice.”).

74 See, e.g., Fed. R. Civ. P. 42(a)–(b). Rule 42(a) and (b) permit a district court, in its discretion, to separate claims within one case for separate trials or to consolidate separate but related lawsuits for a common trial over issues shared in common with the cases.
the nonresident was permitted to remove, and the plaintiff then obtained a reversal of the dismissal in the state appellate courts. On the other hand, that danger does not arise where a plaintiff voluntarily drops a resident defendant since appeal then is not available, and the elimination of the resident defendant from the case is final.\textsuperscript{75}

Other courts appear to have gone even “further than \textit{Weems}, holding that the [foregoing] finality/appealability rationale is synonymous with the voluntary-involuntary rule.”\textsuperscript{76} Whether phrased in terms of finality or efficiency—as some have done\textsuperscript{77}—it should be clear that this alternative rationale was never offered by the Supreme Court when it created the rule, nor has the Court ever embraced this justification.\textsuperscript{78} Accordingly, it would appear to be a rationale that is subject to rather easy attack. In fact, one district court spent considerable time considering and refuting an interpretation of the voluntary/involuntary rule that relied upon such an attempted legitimization:

Removal is not proper here, however, because the above discussed cases are simply incorrect. Study of the Supreme Court cases that developed the rule discloses that the

\textsuperscript{75} \textit{Weems v. Louis Dreyfus Corp.}, 380 F.2d 545, 546 (5th Cir. 1967) (footnote omitted).

\textsuperscript{76} \textit{Jenkins v. Nat’l Union Fire Ins. Co.}, 650 F. Supp. 609, 612 (N.D. Ga. 1986) (citing Burke \textit{v. Gen. Motors Corp.}, 492 F. Supp. 506, 508 (N.D. Ala. 1980)); \textit{see also Quinn v. Aetna Life & Cas. Co.}, 616 F.2d 38, 40 n.2 (2d Cir. 1980) (“The purpose of [the voluntary/involuntary] distinction is to protect against the possibility that a party might secure a reversal on appeal in state court of the non-diverse party’s dismissal, producing renewed lack of complete diversity in the state court action . . . .” (citation omitted)); \textit{LGP Gem Ltd. v. Cohen}, 636 F. Supp. 881, 883 (S.D.N.Y. 1986) (“The reasoning of the \textit{Weems} decision . . . indicates that the finality of the dismissal, not the plaintiff’s participation in it, is the factor that determines removability.”); \textit{Atlanta Shipping Corp. v. Int’l Modular Hous., Inc.}, 547 F. Supp. 1356, 1360 n.8 (S.D.N.Y. 1982) (“An involuntary dismissal of the non-diverse party in a state court action should not lead to removal of the action to federal court if the complete diversity just created by the dismissal might be destroyed by an appeal and reversal of the state court’s decision.”); \textit{Ennis v. Queen Ins. Co. of Am.}, 364 F. Supp. 964, 966 (W.D. Tenn. 1973) (“The reason for the ‘voluntary dismissal’ rule is based on judicial efficiency. The voluntary dismissal of a resident defendant is not appealable. Such a dismissal finally determines who are the parties to the action in a state court proceeding immediately prior to removal to a federal court. The involuntary dismissal of a resident defendant, however, is appealable. Thus, an involuntary dismissal would involve the possibility of duplication and expense of an appeal being heard in state courts and the same proceeding being before the federal courts at the same time, if such a case could be removed to the federal courts.”).

\textsuperscript{77} \textit{See Archibald, supra} note 26, at 1385 (“Increasingly . . . courts discussing the voluntary/involuntary rule have offered judicial efficiency as another justification for the rule.”).

\textsuperscript{78} “Predictably, courts continuing to adhere solely to the Supreme Court’s stated rationale for the rule have rejected these cases and, accordingly, have deemphasized the role of federal courts in allocating cases between state and federal forums.” \textit{Id.} at 1386.
voluntary-involuntary rule is not based upon an appealability/finality rationale. . . .

. . . . Lack of finality could not have been the rationale for the voluntary-involuntary distinction developed and applied in those cases because the state court action that arguably made the cases removable had been affirmed by or had originated in the state’s highest court in three of the four cases cited. No appeal was possible within the state courts and, therefore, no possibility of a duplication of proceedings existed, yet the United States Supreme Court denied removal. . . .

. . . . What emerges from an examination of the Supreme Court cases on the voluntary-involuntary rule is the conclusion that the rule is not based upon an appealability/finality rationale but upon a policy favoring the plaintiff’s “power to determine the removability of his case.”

It is also worth noting that while the voluntary/involuntary rule seems rather straightforward, lower courts have had to expend some effort defining what is truly considered to be a “voluntary” removal of the nondiverse defendant from a case. For example, the Second Circuit has held that the “rule [does] not apply where the plaintiff ha[s] elected not to appeal the involuntary dismissal of a non-diverse party.” The Second Circuit’s reasoning for this distinction is arguably sound, in light of both of the justifications for the rule:

The district court had subject matter jurisdiction over this action despite the line of cases holding that, even under the 1949 amendment to 28 U.S.C. § 1446(b), the involuntary dismissal of non-diverse parties does not make an action removable. The purpose of this distinction is to protect against the possibility that a party might secure a reversal on appeal in state court of the non-diverse party’s dismissal, producing renewed lack of complete diversity in the state court action, a result repugnant to the requirement

in 28 U.S.C. § 1441 that an action, in order to be removable, be one which could have been brought in federal court in the first instance. By the time [the district judge] came to decide the removability of this case, however, the time for plaintiffs to take an appeal from the involuntary dismissal of the non-diverse defendants had long passed, and no appeal by the plaintiffs had been taken. Thus he was correct in concluding that no appeal could occur which could produce the result, described above, forbidden by the statute. Under these circumstances, plaintiffs' failure to take an appeal constituted the functional equivalent of a “voluntary” dismissal.\textsuperscript{81}

In addition to the failure to pursue a timely appeal, another “functional equivalent” to a voluntary dismissal can include remarks made in closing argument that the plaintiff did not want the jury to return a verdict against the nondiverse defendant.\textsuperscript{82} As will be discussed below, one district court has even stretched the idea of functional equivalency to include a claim brought in bad faith by the plaintiff and never actually dismissed, based upon a \textit{fictional} voluntary dismissal in reliance upon the attorney's Rule 11 obligations.\textsuperscript{83} Further, at least one circuit has limited the rule additionally by holding that the rule did not apply to state court dismissals that are unrelated to the merits.\textsuperscript{84} Perhaps inconsistently, other courts have held that dismissals based upon the expiration of the statute of limitations do amount to an involuntary dismissal.\textsuperscript{85} Nevertheless, courts have fairly uniformly held that most summary judgments, judgments on the pleadings, and directed verdicts amount to involuntary dismissals.\textsuperscript{86}

Thus, while the origins and justifications for the voluntary/involuntary rule are not altogether clear or satisfying, the

\textsuperscript{81} \textit{Quinn}, 616 F.2d at 40 n.2 (citations omitted).


\textsuperscript{83} \textit{See} \textit{Katz v. Costa Armatori, S.P.A.}, 718 F. Supp. 1508, 1515–16 & n.13 (S.D. Fla. 1989) (“The removal would be tantamount to finding that the plaintiff's attorney 'should have' voluntarily dismissed the action against the nondiverse defendant. Pursuant to the voluntary/involuntary rule, this fictitious dismissal makes the case removable.” (footnote omitted)).

\textsuperscript{84} \textit{See} \textit{Insinga v. LaBella}, 845 F.2d 249, 254 (11th Cir. 1988).


federal courts have for the most part been fairly consistent in applying the rule that does not allow a state court’s dismissal of a nondiverse defendant to be used to create complete diversity needed for removal jurisdiction, regardless of the fact that the remaining litigants are completely diverse. The major exception to this, of course, is when the nondiverse defendant—whether already dismissed by the state court or not—has been found to have been fraudulently joined.

III. THE IMPRECISE ORIGINS OF FRAUDULENT JOINDER AND THE CURRENT ANALYTICAL QUANDARY

The doctrine of fraudulent joinder dates to the end of the nineteenth century when the Supreme Court rather abruptly announced that sham parties could be ignored when determining whether complete diversity of citizenship was present in a case. The justification for the doctrine being somewhat hazy, the early Supreme Court precedents were also unclear on what evidence the lower courts should resort to considering in analyzing a case of possible fraudulent joinder. Further, the role of bad faith—relying upon the subjective mind of the plaintiff or plaintiff’s counsel—evolved in even the early Supreme Court cases. These doctrinal seedlings go a long way toward understanding the confusion abounding among the lower federal courts today in attempting to apply the doctrine.

A. Origins

The actual source of the doctrine of fraudulent joinder has caused some confusion. Some have mistakenly asserted that the fraudulent joinder doctrine “derives from the statutory requirements of 28 U.S.C. § 1441(b),” which provides: “Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.” There are several problems with this assumption.

First, the language from § 1441(b) merely provides an exception to removability even where complete diversity exists when at least one defendant is a citizen of the forum state. However, the

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87 Katz, 718 F. Supp. at 1510; see also Archibald, supra note 26, at 1387.
89 The idea behind this exception is that, where the parties are diverse, yet a nonresident
fraudulent joinder doctrine is much broader than overcoming this limited exception. Fraudulent joinder allows a federal court to establish subject matter jurisdiction even in the absence of true complete diversity of citizenship generally required by § 1332. See Wecker v. Nat'l Enameling & Stamping Co., 204 U.S. 176, 185–86 (1907).

Second, the United States Supreme Court made no mention of the removal statute when it created the doctrine of fraudulent joinder. See id.

Third, and most telling, at the time of the Supreme Court’s adoption of the doctrine of fraudulent joinder, the removal statute then extant made no mention of “parties in interest properly joined.”

One other court has similarly suggested that the fraudulent joinder doctrine has its basis in Federal Rule of Civil Procedure 21, which authorizes district courts to dismiss parties that have been improperly joined. Rule 21 provides:

Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately.

FED. R. CIV. P. 21.

Of course, this cannot be true because the doctrine significantly predates the adoption of the modern Federal Rules of Civil Procedure. Further, Rule 21 concerns itself with the plaintiff has chosen to file the case in the defendant’s home state forum, there is no purpose to be served by allowing that local defendant to remove the case from the local courts.

Neither the Judiciary Act of 1789, which contained the first removal statute, nor subsequent nineteenth century versions of the Act (notably the Judiciary Act of 1887, which was still in effect when the Supreme Court first embraced fraudulent joinder), referred to the “proper” joinder of any defendants for purposes of stating the removal jurisdiction of the lower federal courts. See Judiciary Act of 1789, ch. 20, § 12, 1 Stat. 73, 79–80 (permitting removal of suits “commenced in any state court . . . by a citizen of the state in which the suit is brought against a citizen of another state [in which] the matter in dispute exceeds the aforesaid sum or value of five hundred dollars . . . .”); Judiciary Act of 1887, ch. 373, § 2, 24 Stat. 552, 553 (as corrected by Act of Aug. 13, 1888, ch. 866, 25 Stat. 433, 434–35) (providing that where “there shall be a controversy which is wholly between citizens of different States . . . then either one or more of the defendants actually interested in such controversy may remove said suit into the circuit court of the United States for the proper district”). For an excellent and interesting discussion of the history behind the removal statutes during the eighteenth and nineteenth centuries, see Haiber, supra note 72, at 616–626.

The modern version of the Federal Rules of Civil Procedure became effective in 1938. See STEVEN BAICKER-MCKEE ET AL., A STUDENT'S GUIDE TO THE FEDERAL RULES OF CIVIL PROCEDURE 133 (8th ed. 2005) (“Under the authority vested by the Rules Enabling Act of 1934, the United States Supreme Court promulgated the original Federal Rules of Civil Procedure in December 1937. The original Rules became effective in September 1938, and have been amended on numerous occasions since.” (footnote omitted)). Meanwhile, the fraudulent joinder doctrine has been extant since at least the late nineteenth century. See infra text accompanying notes 98–99.
procedural misjoinder of parties, not the jurisdictional misjoinder.\(^96\)

The nature of the doctrine’s origin—a court-created exception to the complete diversity requirement of § 1332—informs the discussion of possible changes to the doctrine.\(^97\) In other words, unless and until Congress speaks on the subject legislatively, the federal courts, as creators of the doctrine, are free to work out the contours of fraudulent joinder, unhindered by any bow to legislative intent.

Particularly because the Supreme Court has not meaningfully addressed the proper fraudulent joinder analysis in so long,\(^98\) it is worthwhile to pause and consider some of the earliest fraudulent joinder cases to come out of that Court. One of the very first Supreme Court decisions recognizing this doctrine was in the 1886 decision in *Plymouth Consolidated Gold Mining Co. v. Amador & Sacramento Canal Co.*\(^99\) This case involved a claim by a California canal corporation against a New York gold mining company and three California individuals, accusing them of polluting waters through their business of crushing gold-bearing quartz rock and using water to wash away the debris. The water from the gold mining operations apparently carried pollutants into the pure water flowing under the plaintiff’s canal. Plaintiff sought damages of $25,000 against the defendants.\(^100\) The defendant gold mine filed its

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\(^96\) Professor Moore offers the following synopsis of Rule 21:

Rule 18 deals with joinder of claims; Rule 19 with joinder of parties needed for a just adjudication; and Rule 20 with permissive joinder of parties. Rule 21 governs in the situation where one or more of the above rules has been violated. . . . [T]he plaintiff generally may structure the litigation as it sees fit, so that if the plaintiff joins a proper non-diverse defendant under Rule 21, another defendant is not entitled to severance of that defendant in order to create diversity and a basis for removal.


\(^98\) As discussed *infra* at Part III.B, the Supreme Court’s failure to offer any recent cogent analysis of the doctrine has led to the circuit courts applying rather distinct and inconsistent analytical models. Further, the Supreme Court recently declined to grant certiorari on a case raising, in part, the issue of the correct fraudulent joinder analysis. *See Am. Home Prods. Corp. v. Collins*, 125 S. Ct. 1823 (2005).

\(^99\) 118 U.S. 264 (1886).

\(^100\) *Id.* at 265.
petition for removal of the case to federal court, averring that the individual defendants were “sham defendants, sued in said action . . . with the object, purpose, intent, and design of endeavoring thereby to prevent the removal of said cause into the circuit court of the United States for the district of California by your petitioner, who is the real defendant therein . . . .”

Specifically, the petition for removal alleged that only the mining company could be liable because two of the individuals were merely stockholder/officers of the mining company, and the third was merely employed by the mining company. Plaintiff filed a motion to remand and indicated in the motion an intention to offer both affidavit testimony and oral evidence at the hearing in support of its claims against the three individuals. At the hearing, the federal trial court ordered a remand of the action to state court, and the defendant mining company appealed to the Supreme Court.

The Supreme Court’s analysis of the appeal from the remand order in Plymouth Consolidated is important to the early shaping of the doctrine of fraudulent joinder. After noting the fact that evidence in support of the merits of the claims against the alleged “sham” defendants was offered to the trial court, the Supreme Court noted that “[n]one of the affidavits . . . are found in the transcript, and there is no statement of any oral evidence that was produced.” Therefore, the Supreme Court went on to analyze the “face of the complaint” filed by the plaintiff in state court. From this review, the Court concluded that “[s]o far as the complaint goes, all the defendants are necessary and proper parties.” The Court noted that it was “possible” that the individual defendants (i.e., the nondiverse parties) might not be liable to the plaintiff notwithstanding the liability of the gold mining company, and completed its analysis as follows:

Under these circumstances, the averments in the petition

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101 Id. at 268.
102 Id.
103 Id. at 268–69.
104 Id. at 269. The modern removal statutes do not permit appeals from orders of remand generally. See 28 U.S.C. § 1447(d) (2000). One notable exception is in the context of putative class actions removed to federal court under the terms of the Class Action Fairness Act of 2005. 28 U.S.C.A. § 1453(c)(1) (West Supp. 2005). In any such case originally filed in state court but later removed to federal court, any order by the federal district court ruling to remand the case to state court is both immediately appealable, with the appellate court’s consent, and subject to a rather tight deadline for the court of appeals to resolve the appeal. See id. § 1453(c)(1), (2).
105 Plymouth Consol., 118 U.S. at 269.
106 Id. at 270.
that the defendants were wrongfully made to avoid a removal can be of no avail in the circuit court, upon a motion to remand, until they are proven, and that, so far as the present record discloses, was not attempted. The affirmative of this issue was on the petitioning defendant. That corporation was the moving party, and was bound to make out its case.107

From this decision one can make out a few contours of the sham-defendant or fraudulent joinder doctrine. First, a defendant named to defeat removal and against whom the plaintiff has no “possible” claim can be ignored in terms of analyzing the federal court’s subject matter jurisdiction. Second, the burden is on the removing party to demonstrate the federal court’s removal jurisdiction. Third, the federal court should consider any evidence proffered by the removing party in support of its fraudulent joinder allegations. And, finally, in the absence of evidence offered to defeat the possibility of claims against the nondiverse parties, the court should look solely to the allegations in the plaintiff’s state court pleading to determine if any possible claims are stated.

The next significant visit by the Supreme Court to the doctrine of fraudulent joinder was the Court’s 1907 decision in Wecker v. National Enameling & Stamping Co.108 The plaintiff, Conrad Wecker from Missouri, filed a personal injury lawsuit against two coworkers who were alleged to be Missouri citizens. The suit arose out of a workplace accident in which Wecker fell into a large vat of boiling grease and sustained “great and painful injuries.”109 To the claims against his coworkers, he included a claim against his employer, National Enameling & Stamping Company, a New Jersey corporation.110 All claims were essentially for common law negligence.111 In the petition for removal,112 the defendant employer asserted that one of the two coworkers was actually a citizen of Illinois (and thus diverse) and that, with respect to the other coworker, he had been

107 Id. at 270–71.
108 204 U.S. 176 (1907).
109 Id. at 178.
110 Id.
111 Id. at 178–79.
improperly and fraudulently joined as a defendant for the purpose of fraudulently and improperly preventing, or attempting to prevent, the defendant from removing the cause to the United States circuit court, and that the plaintiff well knew, at the time of the beginning of the suit, that Wettengel [the nondiverse coworker] was not charged with the duties [creating negligence], and that he was joined as a party defendant to prevent the removal of the cause, and not in good faith.\(^{113}\)

As it turns out, the diverse employer indicated in its removal petition, supported by affidavit proof, that the nondiverse coworker was merely a “draftsman” with no supervisory responsibility for the plaintiff or for the vat into which the plaintiff had fallen.\(^{114}\)

Following logic similar to that displayed in its earlier decision in \textit{Plymouth Consolidated}, and perhaps as foretaste of the ensuing analytical debate, the Supreme Court suggested that two different analyses were potentially available to determine the propriety of the removal. Initially, the Court indicated that it was appropriate to review the mere allegations of the state court complaint:

[I]f the plaintiff had, in good faith, elected to make a joint cause of action, the question of proper joinder is not to be tried in the removal proceedings, and that, however that might turn out upon the merits, for the purpose of removal the case must be held to be that which the plaintiff has stated in setting forth his cause of action.\(^{115}\)

In other words, if there is no indication of bad faith in the complaint and the plaintiff has adequately stated a cause of action, the court should not attempt to prejudge the merits of the claim against the nondiverse party, but should accept their joinder and remand the case to state court. However, the Supreme Court did not actually utilize this analysis in the case. Rather than stop with a review of Wecker's complaint, the Court went on to consider the affidavit evidence filed by the parties with the trial court in support of and in opposition to the claim against the nondiverse defendant, apparently because the parties had filed this evidence with the

\(^{113}\) \textit{Wecker}, 204 U.S. at 179–80.

\(^{114}\) \textit{Id.} at 183–84.

\(^{115}\) \textit{Id.} at 182 (citing and, later, quoting Ala. Great S. Ry. Co. v. Thompson, 200 U.S. 206, 218 (1906) (“The fact that by answer the defendant may show that the liability is several cannot change the character of the case made by the plaintiff in his pleading so as to affect the right of removal.”)).
federal trial court.\textsuperscript{116} Upon reviewing this extra-pleading evidence, the Court concluded:

\begin{quote}
In view of this testimony and the apparent want of basis for the allegations of the petition as to Wettengel’s relations to the plaintiff, and the uncontradicted evidence as to his real connection with the company, we think the court was right in reaching the conclusion that he was joined for the purpose of defeating the right of the corporation to remove the case to the Federal court.\textsuperscript{117}
\end{quote}

Thus, the Supreme Court ultimately found removal proper based upon the doctrine of fraudulent joinder from a review of the evidence regarding the lack of merit of the plaintiff’s claim against the nondiverse defendant. Even though the Court appeared to be engaged in a search for possible bad faith on the part of the plaintiff in joining Wettengel, the Court imputed fraudulent intent solely based upon the lack of evidentiary basis for the claim.\textsuperscript{118}

The Supreme Court’s early efforts to grapple with fraudulent joinder in \textit{Wecker} were rather mixed. Without explaining the rationale for the doctrine, other than that the Court apparently was opposed to plaintiffs pleading claims against defendants solely to defeat federal court jurisdiction, the Court indicated that a bad faith joinder of a nondiverse defendant permits a federal court to disregard that defendant’s citizenship and to entertain subject matter jurisdiction over the case. Further, the Court equated bad faith (i.e., using joinder to defeat diversity jurisdiction) with presenting a case flawed on the merits, so long as that preliminary finding could be made either by viewing the plaintiff’s pleading alone or after considering pretrial evidence filed by the parties. Finally, the Supreme Court offered its view of the attitude that federal courts should adopt in terms of their willingness to entertain fraudulent joinder-based invocations of removal jurisdiction:

\begin{quote}
While the plaintiff, in good faith, may proceed in the state courts upon a cause of action which he alleges to be joint, it is equally true that the Federal courts should not sanction devices intended to prevent a removal to a Federal court where one has that right, and should be equally vigilant to protect the right to proceed in the Federal court as to permit
\end{quote}

\textsuperscript{116} \textit{Id.} at 183–85.
\textsuperscript{117} \textit{Id.} at 185.
\textsuperscript{118} \textit{Id.} ("[E]ven in cases where the direct issue of fraud is involved, knowledge may be imputed where one wilfully closes his eyes to information within his reach.").
the state courts, in proper cases, to retain their own jurisdiction.\textsuperscript{119} As will be demonstrated below, this concept of being “equally vigilant” to protect the rights of the removing party to a federal forum has been turned on its head as a result of other decisions—notably in the voluntary/involuntary rule jurisprudence.\textsuperscript{120}

*Chesapeake & Ohio Railway Co. v. Cockrell*\textsuperscript{121} presented the Supreme Court with another early and important opportunity to evolve the fraudulent joinder doctrine. That case involved a wrongful death action against the railway company (which was diverse from the plaintiff) and the engineer and fireman of a train that fatally injured the decedent at a public crossing.\textsuperscript{122} All parties except the railroad were Kentucky citizens and, thus, removal of the case filed in Kentucky state court was possible only if the engineer and fireman were deemed to be fraudulently joined.\textsuperscript{123} The state court declined to “surrender its jurisdiction” in the face of a petition for removal filed by the railroad, and proceeded to a trial and entry of judgment against the railroad.\textsuperscript{124} Upon appeal to the United States Supreme Court, the sole question was whether the removal to federal court based upon allegations of fraudulent joinder should have been permitted.\textsuperscript{125} The railroad had alleged in its petition for removal that the engineer and fireman were fraudulently joined to defeat removal because the charges of negligence against them were “false and untrue, and were known by the plaintiff, or could have been known by the exercise of ordinary diligence, to be false and untrue . . . .”\textsuperscript{126} The Court began its analysis with a review of the basic contours of the doctrine of fraudulent joinder:

\begin{quote}
[T]his right of removal cannot be defeated by a fraudulent joinder of a resident defendant having no real connection with the controversy. So, when in such a case a resident defendant is joined with the non-resident, the joinder, even
\end{quote}

\textsuperscript{119} *Id.* at 185–86. One might contrast this spirit with that displayed many decades later when the Supreme Court indicated that “Congress’ clear intention is to restrict removal . . . in favor of retaining state court jurisdiction.” See PinnOak Res., LLC v. Certain Underwriters at Lloyd’s, London, 394 F. Supp. 2d 821, 825 (S.D. W. Va. 2005) (citing Am. Fire & Cas. Co. v. Finn, 341 U.S. 6, 9–10 (1951)).

\textsuperscript{120} See infra Part IV.B.

\textsuperscript{121} 232 U.S. 146 (1914).

\textsuperscript{122} *Id.* at 149–50.

\textsuperscript{123} *Id.* at 150.

\textsuperscript{124} *Id.*

\textsuperscript{125} *Id.*

\textsuperscript{126} *Id.* at 150–51.
although fair upon its face, may be shown by a petition for removal to be only a fraudulent device to prevent a removal; but the showing must consist of a statement of facts rightly engendering that conclusion. Merely to traverse the allegations upon which the liability of the resident defendant is rested or to apply the epithet “fraudulent” to the joinder will not suffice: the showing must be such as compels the conclusion that the joinder is without right and made in bad faith, as was the case in [Wecker].127

Applying the foregoing principles to the issue of fraudulent joinder, the Court found from reviewing the plaintiff’s state court pleading that it “stated a good cause of action against the resident defendants . . . .”128 The Court also stated that a finding of fraudulent joinder could not be made unless the claims against the resident defendants were “without any reasonable basis.”129 The Court concluded that the removal petition, in effect, merely amounted to a denial of negligence by the two resident defendants, and was not sufficient to overcome the facially sufficient allegations of the plaintiff’s pleading.130 The only error the Court found with the state court—harmless in hindsight—was that the state court should have acquiesced in the removal so that the federal court could reject the fraudulent joinder theory.131 Thus, the Court began to make clear that fraudulent joinder was something more than showing that the resident defendants might prevail on the claims against them. Instead, it amounted to demonstrating to the federal court upon removal that there was no “reasonable basis” for those claims such that the plaintiff should not even be able to proceed to a final adjudication against them.132

Repeatedly in the foregoing cases, while the Supreme Court

127 Id. at 152 (citations omitted).
128 Id.
129 Id. at 153.
130 Id. at 153–54.
131 As the Court noted:
[I]t is thoroughly settled that issues of fact arising upon a petition for removal are to be determined in the Federal court, and that the state court, for the purpose of determining for itself whether it will surrender jurisdiction, must accept as true the allegations of fact in such petition.
Id. at 154.
132 The Supreme Court shortly thereafter re-emphasized that the burden of demonstrating that there was no reasonable basis for the plaintiff’s claims against the nondiverse defendants rests solely upon the petitioning defendant who “must take and carry the burden of proof, he being the actor in the removal proceeding.” Wilson v. Republic Iron & Steel Co., 257 U.S. 92, 97 (1921) (citing Carson v. Dunham, 121 U.S. 421, 425–26 (1887)).
seemed to rely upon the plaintiff's bad faith intention to defeat removal jurisdiction as the justification for the doctrine, it seemed to be willing to impute such bad faith from a finding that there was “no reasonable basis” for the claims. Finally, in *Mecom v. Fitzsimmons Drilling Co.*, the Supreme Court squarely addressed the issue of the plaintiff's actual motive in joining the nondiverse defendants to its claims:

The case falls clearly within the authorities announcing the principle that in a removal proceeding the motive of a plaintiff in joining defendants is immaterial, provided there is in good faith a cause of action against those joined. . . . It has been uniformly held that, where there is a prima facie joint liability, averment and proof that resident and nonresident tortfeasors are jointly sued for the purpose of preventing removal does not amount to an allegation that the joinder was fraudulent, and will not justify a removal from the state court.

What cases such as *Mecom* demonstrate is the intellectual oddity that, while the plaintiff's bad faith may serve as the theoretical linchpin for the doctrine of fraudulent joinder, the motives of any particular plaintiff actually plays no role in the determination of when fraudulent joinder occurs. Instead, the Supreme Court evolved the doctrine to the point of courts “adopt[ing] a proxy rule that required remand if the joiner was objectively meritless.” As far as making the determination of when a claim was without merit, the Court did not offer much guidance about what should be looked at—at times seeming to focus upon the prima facie allegations of the state court pleading, and at other times focusing upon extra-pleading evidence offered by the removing defendant. However, the object of the Supreme Court’s inquiry has seemed to amount to a type of pretrial adjudication that the claims against the nondiverse defendants have no “reasonable basis” such as to permit further proceedings against them.

Given the motives-based foundation for the doctrine of fraudulent

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134 Id. at 189 (citing Ill. Cent. R.R. Co. v. Sheegog, 215 U.S. 308, 316 (1909)).

135 Recent Case, *Fifth Circuit Establishes “Common Defense” Exception to Fraudulent Joinder Doctrine*, 118 HARV. L. REV. 1086, 1090 (2005); see also Riverdale Baptist Church v. Certainteed Corp., 349 F. Supp. 2d 943, 947–48 (D. Md. 2004) (referring to the “no cause of action” test for fraudulent joinder, and stating that “it is more properly applied not rigidly, but—as it was intended—as a proxy for the detection of fraud in joinder”).
joinder, one wonders whether the assumption is correct that plaintiffs make a practice of joining certain defendants just to avoid removal to federal court. Certainly this assumption has been universally accepted by the federal courts, Congress, and also legal scholars, some acknowledging the frequency of the practice. The American Law Institute has remarked, “[t]he most marked abuse has been joinder of a party of the same citizenship as plaintiff in order to defeat removal on the basis of diversity jurisdiction. Such tactics have led to much litigation, largely futile, on the question of fraudulent joinder.”

It is interesting that, apparently due to the many pronouncements by courts to the complete irrelevancy of actual bad motives to the analysis, the country’s preeminent plaintiff trial attorney group—the Association of Trial Lawyers of America (“ATLA”)—has been quite candid in its publications concerning the strategy of using joinder to stay out of federal court. For example, in a 2003 publication, ATLA recommends:

In some circumstances, plaintiffs may take advantage of this restriction [the one-year limit on diversity removals] by naming a non-diverse defendant who is potentially liable but

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137 The Commentary to the 1988 revisions to 28 U.S.C. § 1446 noted that the new one-year restriction on diversity removals would likely be incorporated by plaintiffs’ attorneys into their fraudulent joinder practice:

The amendment may sometimes give too much control to the state court plaintiff who wants to resist a removal to the federal court at all costs. It can invite tactical chicanery.

A plaintiff with the motive of defeating removal, for example, may be able to join as a defendant, in a case in which there is genuine diversity between the plaintiff and the other defendants, someone of nondiverse citizenship whom the plaintiff does not really intend to sue but who is arguably liable on the claim and hence properly joined under state law. The plaintiff can then just wait a year and drop that party, polishing the action to just the point desired and at the same time dissolving the threat of federal jurisdiction.

The one-year cutoff therefore has an anti-diversity ring to it. Congress acknowledged this, but called it a “modest curtailment.” David D. Siegel, Commentary on 1988 Revision of Section 1446, 28 U.S.C.A. § 1446 (West 1994).


essentially judgment proof (or whose liability is tangential or vicarious and unlikely to add significantly to the economic value of the claims), with the intention of dropping that defendant a year later.\footnote{Elizabeth J. Cabraser, \textit{Mass Tort Class Actions, in 1 ATLA'S LITIGATING TORT CASES} § 9:35 (Roxanne Barton Conlin & Gregory S. Cusimano eds., 2003).}

Another chapter in the same ATLA publication suggests the following strategy to avoid federal court:

\[\text{To avoid removal to federal court in cases where it is deemed advisable to do so, a wise strategy for a plaintiff in a personal injury case is to look for a valid claim against a local party in the forum in which the plaintiff seeks to file the claim. To remove a case, all defendants must consent to removal, but if there is a local defendant, removal is not an option despite consent.}\footnote{Michael L. Williams & John Waldman, \textit{Parties, in 1 ATLA'S LITIGATING TORT CASES} § 5:33 (Roxanne Barton Conlin & Gregory S. Cusimano eds., 2003).} \]

ATLA goes on in its publications to identify particular types of local defendants that plaintiffs' attorneys can add to their cases solely to defeat federal diversity jurisdiction, such as local doctors, pharmacists, retailers, suppliers, store managers, and local employees of corporations.\footnote{See, e.g., David S. Casey, Jr. & Jeremy Robinson, \textit{Removal to Federal Court, in 1 ATLA'S LITIGATING TORT CASES} § 7:6 (Roxanne Barton Conlin & Gregory S. Cusimano eds., 2003).} This strategy works well in product liability cases against manufacturing corporations incorporated in other states that would otherwise be entitled to the protections of federal court. In these instances, the savvy plaintiff's attorney merely needs to identify a local defendant having some connection to the plaintiff's purchase or receipt of the product and name that individual as a co-defendant, regardless of the plaintiff's real interest in obtaining any recovery from that defendant. In fact, this strategy can be coupled successfully with the plan of obtaining useful deposition testimony from such a local defendant that exonerates the local defendant while incriminating the manufacturer or other real deep-pocket target of the suit, since the plaintiff's attorney will likely drop the local defendant after one year anyway.

Given the analytical book-ends of (a) plaintiffs' attorneys' ethical duty to zealously represent their clients and (b) the Supreme Court's pronouncement in \textit{Mecom} that the plaintiff's motives for joinder cannot be considered, it is difficult to find fault with
plaintiffs’ attorneys’ frequent strategy of using joinder to establish the most favorable forum for their clients’ cases. Further, as alluded to earlier, some interesting empirical evidence now available supports the long-held view that state courts are better—from the plaintiff’s perspective—for most personal injury or consumer lawsuits than federal courts. For instance, a 1998 study by Professors Clermont and Eisenberg found that plaintiff “win rates in removed cases are very low, compared to cases brought originally in federal court and to state cases.”\textsuperscript{144} The authors found that the plaintiff win-rate in removed diversity civil cases was thirty-four percent, compared to a rate of seventy-one win-rate for diversity cases filed in federal court originally.\textsuperscript{145} According to those authors, “[t]he explanation for this phenomenon could be the ready one based on the purpose of removal: by defeating the plaintiffs’ forum advantage, defendants thereby shift the biases, inconveniences, court quality, and procedural law in their own favor.”\textsuperscript{146} Other research similarly shows that plaintiffs’ attorneys much prefer state courts over federal courts.\textsuperscript{147}

The Supreme Court was apparently justified in its decision to create the doctrine of fraudulent joinder in order to confront the problem of plaintiffs’ attorneys sometimes taking advantage of a perceived forum advantage in state court by abusing the limits of federal court removal jurisdiction. But having created this doctrine, the Supreme Court has failed to offer much specificity to the lower federal courts in terms of the standard that governs and exactly what the lower courts should be looking at to apply the doctrine. Because of this, the lower courts have struggled to come up with their own proxies to make a finding of fraudulent joinder.

\textsuperscript{144} Clermont & Eisenberg, supra note 5, at 581.
\textsuperscript{145} Id. at 581, 593. “The shift from a favorable forum, chosen by plaintiffs, to a less favorable forum, chosen by defendants, drives down plaintiffs’ win rates. Thus, notwithstanding the ubiquitous interpretive problem of case selection, carefully analyzed win-rate data can convey useful information about the legal system.” Id. at 584.
\textsuperscript{146} Id. at 581.
\textsuperscript{147} For a good discussion of attorney and litigant preferences for forum, see generally Victor E. Flango, Litigant Choice Between State and Federal Courts, 46 S.C. L. REV. 961 (1995). In this Article, the author discusses empirical research showing that when a plaintiff is suing an out-of-state defendant, between sixty-three percent and seventy percent of plaintiffs’ attorneys preferred to file the case in state court instead of federal court. Id. at 966 (citing Victor E. Flango, Attorneys’ Perspectives on Choice of Forum in Diversity Cases, 25 AKRON L. REV. 41, 63 (1991)).
B. In Search of a Standard

This section will review the major analytical modes employed by the various federal circuits, including a summary of the approach taken within each circuit and a critique of the positives and negatives of each approach. Perhaps the reason that the lower federal courts have been unable to agree on a unified approach to fraudulent joinder is because the doctrine is steeped in the use of proxies never created with the intention of serving as a filter for federal court jurisdiction. Thus, each approach currently being used among the federal circuits is flawed and imperfect as applied to the search for the appropriate contours of federal diversity jurisdiction.

1. Pleadings Only—The 12(b)(6) Proxy

Historically, the majority of lower federal court decisions applying the doctrine of fraudulent joinder have used a standard similar to that of Rule 12(b)(6).148 Rule 12(b)(6) is the rule that permits a defending party (either a defendant responding to a complaint, or a plaintiff responding to a counterclaim) to seek dismissal for “failure to state a claim.”149 The standard that the Supreme Court has embraced for 12(b)(6) motions is that such a motion should be granted only if there is “no set of facts” that would permit the claimant to prevail solely in light of the allegations made in the claimant’s pleading.150 Courts deciding Rule 12(b)(6) motions may only examine the contents of the claimant’s pleading, and must assume, for purposes of deciding the motion, that all facts stated in that pleading are true. No extrinsic evidence is permitted to be considered or else the motion must be converted to a Rule 56 motion for summary judgment.151 Motions to dismiss for failure to state a claim are rarely granted, and even more rarely upheld on appeal.152

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148 Abraham & Hensley, supra note 52, at 263. (“For the vast majority of federal courts, [a] remand motion, based on the absence of diversity, will be evaluated under a standardmitigating against federal jurisdiction except under quite narrow constitutional grounds. The court will look at the complaint to determine if it presents a colorable claim under state law.”).
149 FED. R. CIV. P. 12(b)(6).
151 FED. R. CIV. P. 12(b) provides, in part, that: “[i]f, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56 . . . .
152 As one civil procedure text has explained: “In its liberality, the Rule erects a powerful
This is because the grant of such a motion is harsh, denying the plaintiff the right to commence prosecution of a claim or to engage in discovery to shed light on facts that might actually support the maintenance of the cause of action. Such motions are also typically filed and ruled upon at the very outset of the litigation before there is any opportunity to engage in discovery.\footnote{153}

A number of circuits and lower courts appear to apply something akin to a Rule 12(b)(6) analysis to invocations of fraudulent joinder in the context of motions to remand removed cases back to the state court where they originated. It appears that the majority of circuits either currently apply this 12(b)(6) standard exclusively to fraudulent joinder issues or at least have tended to apply this standard and permit a summary judgment analysis as an exception—one not necessarily based upon any stated principle—to the general approach.

A review of the circuits' effort at applying the fraudulent joinder doctrine will be invaluable in informing a discussion of the doctrine. Lower courts in the First Circuit have been left somewhat in the dark due to the absence of direct guidance from the First Circuit on how to analyze fraudulent joinder issues.\footnote{154} Nevertheless, the First Circuit has at least offered the observation in one case that "a finding of fraudulent joinder bears an implicit finding that the plaintiff has failed to state a cause of action against the fraudulently joined defendant."\footnote{155} Accordingly, the district courts within that circuit generally confine their analysis in fraudulent joinder situations to a Rule 12(b)(6) type of scrutiny—they review the "four corners of the state court complaint" and ask only whether there is any possibility of success based upon those allegations under the governing state's laws.\footnote{156}

\footnote{153}Id. at 312 ("The courts are especially hesitant to dismiss at the pleading stage those claims pressing novel legal theories, where the claims could be better examined following development of the facts through discovery, or in peculiarly fact-intensive antitrust cases and state-of-mind cases." (footnotes omitted)).


\footnote{155}Polyplastics, Inc. v. Transconex, Inc., 713 F.2d 875, 877 (1st Cir. 1983).

\footnote{156}Ponce Super Ctr., Inc., 359 F. Supp. 2d at 30 (granting motion to remand because the plaintiff's claim against the resident defendant was cognizable under state law, disregarding any possible defenses to that claim or any review of evidence negating the cause of action).
However, because the First Circuit itself has not directly dictated the proper analysis, the district courts within the First Circuit have demonstrated some increasing willingness to go beyond the four-corners review characteristic of 12(b)(6) motions. In Mills v. Allegiance Healthcare Corp., the district court for Massachusetts denied a motion to remand a products liability case involving fifteen defendants where only one of the defendants was not diverse from the plaintiff. 157 The court denied the motion to remand because discovery in the case had revealed that the plaintiff had never actually used any of the nondiverse defendant’s products until after her injuries had already been sustained. 158 The district court stated that the court “is not held captive by the allegations in the complaint” when analyzing fraudulent joinder, a noticeable departure from the Rule 12(b)(6) line of inquiry. 159 The district court admitted, however, that going beyond the four corners of the complaint and considering extrinsic evidence was “problematic.” 160

The Second Circuit has been more vocal than the First Circuit in embracing a 12(b)(6) standard. In Whitaker v. American Telecasting, Inc., 161 the Second Circuit stated that fraudulent joinder can be demonstrated only by “clear and convincing evidence . . . that there is no possibility, based on the pleadings, that the plaintiff can state a cause of action against the non-diverse defendant in state court.” 162 The reference to “clear and convincing evidence” not being altogether clear itself, this statement of the standard is at least suggestive of a begrudging attitude toward findings of

158 Id. at 7.
159 Id. at 5 (citing Wecker v. Nat’l Enameling & Stamping Co., 204 U.S. 176, 181, 184 (1907)).
160 Id. at 6.
161 261 F.3d 196 (2d Cir. 2001).
162 Id. at 207 (quoting Pampillonia v. RJR Nabisco, Inc., 138 F.3d 459, 461 (2d Cir. 1998)).
fraudulent joinder, and possibly indicative of a standard even more rigid than a traditional 12(b)(6) analysis. Indeed, the Second Circuit states that the removing party “bears a heavy burden” of demonstrating fraudulent joinder.  

District courts within the Second Circuit have mostly followed this articulated standard for fraudulent joinder. One case that has captured the attention of media nationwide is the class action filed against McDonald’s Corporation, claiming that an unhealthy menu has led to obesity among class members. In addition to suing the nationwide McDonald’s Corporation, which was diverse from the plaintiff class representatives, the plaintiffs also named several McDonald’s franchises in New York, which were not diverse from the plaintiffs. McDonald’s removed the case to federal court, arguing that the local McDonald’s franchisees were fraudulently joined. The district court stated that while McDonald’s bore a heavy burden, it was “not impossible of satisfaction.” The court stated that the fraudulent joinder decision “necessarily augurs the discussion . . . of whether the Complaint [as against the nondiverse defendants] should be dismissed.”

The court was satisfied that McDonald’s met its heavy burden, finding that the state court complaint failed to state any cognizable

\[163\] Pampillonia v. RJR Nabisco, Inc., 138 F.3d 459, 461 (2d Cir. 1998).


\[166\] Id. at 521. With regard to determining whether complete diversity of citizenship exists in class actions, the Supreme Court held in Supreme Tribe of Ben Hur v. Cauble that only the citizenship of the named class representatives should be counted and that the court can ignore the citizenship of any unnamed putative class members. 255 U.S. 356, 364–67 (1921), overruled on other grounds, Toucey v. N.Y. Life Ins. Co., 314 U.S. 118, 138 (1941), superseded by statute, Act of June 25, 1948, ch. 646, 62 Stat. 869, 968 (codified at 28 U.S.C. § 2283 (2000)). In a striking display of the left hand not knowing what the right hand was doing, the Supreme Court subsequently decided (without even acknowledging Ben Hur) that with regard to § 1332’s amount in controversy requirement, each and every unnamed putative class member must independently possess a claim for an amount higher than the statutory minimum. See Zahn v. Int’l Paper Co., 414 U.S. 291, 301 (1973), superseded by statute, Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 309, 104 Stat. 5089, 5113 (codified at 28 U.S.C. § 1367), as recognized in Exxon Mobil Corp. v. Allapattah Servs., Inc., 125 S. Ct. 2611, 2625 (2005). The supplemental jurisdiction statute, as the Supreme Court has now resolved, fixed this inconsistency. See supra notes 9–18 and accompanying text. In any event, the recent Class Action Fairness Act has arguably rendered those decisions mostly irrelevant to any future class actions as the modified § 1332 requires only minimal diversity of citizenship and an aggregate amount in controversy of at least $5 million in total damages being sought by the entire class. See supra notes 20–21 and accompanying text.


\[168\] Id.
claim against the local franchisees under New York law. Concluding with a witty turn of phrase, it held that “the plaintiffs’ real beef is with McDonalds [sic] Corp.”Interestingly, the district court then proceeded to dismiss the case against McDonald’s Corporation for essentially the same reasons as it found the local defendants had been fraudulently joined. As discussed below, the Fifth Circuit has recently indicated that fraudulent joinder should not be found—regardless of how unmeritorious the claim against the local defendant may be—when the same deficiencies beset the claims against the remaining diverse litigants.

Another recent example of how the so-called “heavy burden” of a pleadings-only fraudulent joinder analysis may be satisfied arose in the interesting context of stolen pre-Columbian American Indian gold artifacts. In Sanchez v. University of Pennsylvania Museum of Archeology & Anthropology, the plaintiffs (heirs of the original treasure-discoverer) sued the current holder of the artifacts—the University of Pennsylvania—and the company who possessed the treasures shortly after they were stolen (“the prior possessor”). The inclusion of the prior possessor destroyed diversity of citizenship, as both it and the plaintiffs were New York citizens. The University promptly removed the case to federal court, contending that the inclusion of the prior possessor was fraudulent because the plaintiffs’ conversion claim against it was time-barred under New York’s applicable statute of limitations. The district court looked solely to the plaintiffs’ pleadings, and found that the plaintiffs’ claims were, in fact, barred by New York’s three-year statute of limitations for bringing suit to recover a chattel. Accordingly, the district court denied the motion to remand.

Although the Second Circuit’s analysis seems fairly straightforward, though strict, one can still find—as within the First Circuit—at least some level of disenchantment in the lower courts with a standard that prohibits any peeking at the facts of the

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169 Id. at 523.
170 See id. at 542–43. On appeal from a subsequent, related dismissal, the Second Circuit reversed and remanded, finding that the plaintiff had at least adequately stated a claim under a New York statute against McDonald’s Corporation. See Pelman ex rel. Pelman v. McDonald’s Corp., 396 F.3d 508, 512 (2d Cir. 2005).
171 See infra text accompanying notes 235–40.
173 Id. at *1.
174 Id.
175 Id.
In *Arseneault v. Congoleum Corp.*, the district court engaged in a fraudulent joinder analysis that looked beyond the four corners of the plaintiff’s state court complaint. While discussing the “manner of factual inquiry appropriate” for fraudulent joinder evaluation, the district court recognized that other circuits “thoroughly approve[]” using a “summary judgment-like approach.” The court went on to consider not only the pleadings of the plaintiff, but deposition testimony, discovery responses, and several affidavits. Ultimately, the district court found no fraudulent joinder, so there was never any appeal to the Second Circuit available to the removing defendant.

The Third Circuit, while similarly adhering to a pleadings-only scrutiny generally reminiscent of a Rule 12(b)(6) analysis, has expressly stated that its fraudulent joinder review is actually more demanding of the removing party than in other circuits. *Boyer v. Snap-On Tools Corp.* provides a very clear illustration of the Third Circuit’s embrace of a pleadings-only inquiry for fraudulent joinder. That case involved an action by a former Snap-On Tool dealer in Pennsylvania against Snap-On Tools Corporation and two of its Pennsylvania managers, premised on claims for fraud, breach of contract, and violation of Pennsylvania’s Unfair Trade Practices statute. The corporate defendant immediately removed the case to federal court, arguing that the joinder of the Pennsylvania managers was fraudulent because the plaintiff had already released them in his termination agreement. The district court denied the plaintiff’s motion to remand because the “in-state defendants would prevail in a motion for summary judgment for failure to state a cause of action by reason of the release in the termination agreement.”

On appeal, the Third Circuit reversed the district court, disapproving of the latter’s “summary judgment type inquiry.” Instead, the Third Circuit held that there was no fraudulent joinder because the plaintiff had stated a cause of action against the local

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177 Id. at *6 & n.6.
178 See id. at *6.
179 Id. at *9; see 28 U.S.C. § 1447(d) (2000) (providing that appellate review from orders of remand is generally not available).
180 913 F.2d 108 (3d Cir. 1990).
181 Id. at 109–110.
182 Id. at 110.
183 Id. (citation and quotation marks omitted).
184 Id. at 112, 113.
managers under Pennsylvania law for fraud and misrepresentation, regardless of the likely defense available on the merits.\textsuperscript{185} The court also observed that the fact that the corporate defendant had this same affirmative defense of “release” available to it made any finding of fraudulent joinder even more inappropriate.\textsuperscript{186} While embracing a pleadings-only analysis generally, the Third Circuit did acknowledge an ambiguously phrased exception that permits a court to “pierce the pleadings” simply to determine whether a “colorable” claim really exists.\textsuperscript{187} The suggestion of this exception seems to be that the court can sometimes pierce the pleadings when they show the inclusion of the local defendant to be based upon some undisputed misstatement of general background fact. Apparently this exception is extremely limited in the eyes of the Third Circuit since there seemed to be no dispute about the language of the release in the termination agreement applicable to the local managers. Nevertheless, the Third Circuit indicated that the fraudulent joinder analysis should have been done with blinders on to the actual facts, regardless of how clear the claim’s lack of merit was against the local defendants: “[T]he district court, in the guise of deciding whether the joinder was fraudulent, stepped from the threshold jurisdictional issue into a decision on the merits . . . . [T]his it may not do.”\textsuperscript{188}

The Third Circuit, in addition to showing that it will slavishly adhere to a pleadings-only inquiry, has even more recently stated that its standard puts a heavier burden on a removing party than on a party moving for dismissal under Rule 12(b)(6). In Batoff v. State Farm Insurance Co.,\textsuperscript{189} the Third Circuit contrasted a 12(b)(6) analysis with a fraudulent joinder analysis as follows:

[T]he inquiry into the validity of a complaint triggered by a motion to dismiss under Rule 12(b)(6) is more searching than that permissible when a party makes a claim of fraudulent joinder. Therefore, it is possible that a party is not

\textsuperscript{185} Id. at 112.
\textsuperscript{186} The court stated:
In this case, we need not decide the extent of permissible inquiry into the validity of the release of [the plaintiff’s] claims against [the local managers], because that issue, which the district court stated “is likely to be dispositive of plaintiffs’ claims against [the managers],” is equally applicable to Snap-On.
Id. at 112; see also infra text accompanying notes 235–40 (discussing the Fifth Circuit’s similar holding of a “common defense” exception to fraudulent joinder).
\textsuperscript{187} Boyer, 913 F.2d at 112.
\textsuperscript{188} Id.
\textsuperscript{189} 977 F.2d 848 (3d Cir. 1992).
fraudulently joined, but that the claim against that party ultimately is dismissed for failure to state a claim upon which relief may be granted. 190

Specifically, the Third Circuit stated that the inquiry is not whether the state court complaint has failed to state a claim against the nondiverse defendant, but whether such claim is “wholly insubstantial and frivolous.” 191 It is far from clear exactly when a complaint might “fail to state a claim” yet still be substantial and non-frivolous. 192 In any event, the district courts within the Third Circuit, apparently having taken the Third Circuit’s stingy views to heart, fairly regularly refuse to find fraudulent joinder using a pleadings-only analysis. 193 One recent example of a district court taking this very tough approach to fraudulent joinder is *PNC Bank v. AmerUs Life Insurance Co.* 194 That case involved a dispute concerning whether the cash value of a whole life insurance policy should have been applied to the premiums to avoid a default. 195 Diversity of citizenship existed between the plaintiff and the defendant insurance company. However, the plaintiff also sued the insurance agent who was not diverse. 196 The insurance company removed, alleging fraudulent joinder because Pennsylvania arguably did not recognize a cause of action against the agent in such scenarios. 197 The district court remanded the case despite the fact that it conceded that the state court complaint may very well have failed to state a valid claim against the agent:

Were the standard to be applied that of a motion to dismiss for failure to state a claim, Defendant might well prevail.

The Court of Appeals, however, has made clear that the inquiry to determine fraudulent joinder is significantly less

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190 Id. at 852.
191 Id. (quoting Lunderstadt v. Colafella, 885 F.2d 66, 70 (3d Cir. 1989)).
192 One might speculate that the Third Circuit was imposing a Rule 11 standard, although it has not expressly held this to be the case. If so, its view might be fairly close to that recently suggested by a district court in Florida. See Katz v. Costa Armatori, S.P.A., 718 F. Supp. 1508, 1515 (S.D. Fla. 1989).
195 Id. at *1.
196 See id.
197 Id.
searching than that under Rule 12(b)(6). Dismissal for fraudulent joinder is appropriate only if the joinder was “wholly insubstantial and frivolous.”

I cannot say it is entirely beyond the realm of possibility that [in this context] a Pennsylvania court would impose a continuing duty upon the agent to advise the policy owner about payments. . . . A state court may well decide to dismiss the claims against the agents on the merits, but I do not reach that question. 198

As demonstrated in AmerUs, obtaining a finding of fraudulent joinder in the Third Circuit is extremely difficult, apparently requiring a controlling state court precedent that affirmatively negates the claim against the nondiverse defendant. Obtaining a finding of fraudulent joinder in the Fourth Circuit is similarly difficult. The seminal case out of the Fourth Circuit on fraudulent joinder is Hartley v. CSX Transportation, Inc., where that court indicated its belief that the plaintiff must do very little to defeat a defendant’s attempted fraudulent joinder invocation:

The district court erred by delving too far into the merits in deciding a jurisdictional question. The district court should not have made its own determination concerning the novel application of the public duty rule to [the plaintiff’s] claims. . . . The issues that the district court attempted to resolve are properly left to the state court for later stages of litigation.

. . . [The plaintiff’s] claims may not succeed ultimately, but ultimate success is not required to defeat removal. Rather, there need be only a slight possibility of a right to relief. Once the court identifies this glimmer of hope for the plaintiff, the jurisdictional inquiry ends. 199

To justify this standard, the court asserted that “[j]urisdictional rules direct judicial traffic. They function to steer litigation to the proper forum with a minimum of preliminary fuss. The best way to advance this objective is to accept the parties [as] joined . . . unless joinder is clearly improper.” 200 In case there were any doubts about

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198 Id. at *1.
199 187 F.3d 422, 425–26 (4th Cir. 1999) (citation omitted).
200 Id. at 425.
the enormous burden the Fourth Circuit was placing on the removing defendant, it clarified in the same case that the fraudulent joinder standard is “even more favorable to the plaintiff than the standard for ruling on a motion to dismiss under Fed. R. Civ. P. 12(b)(6).”\textsuperscript{201} The district courts within the Fourth Circuit appear to be adhering to the heightened standard.\textsuperscript{202} One district court within that circuit has referred to the approach as being a “black-and-white analysis,” with “[a]ny shades of gray [being] resolved in favor of remand.”\textsuperscript{203} In addition, there is authority within the circuit that even inconsistent allegations involving the claims against the diverse and the nondiverse defendants do not give rise to a finding of fraudulent joinder.\textsuperscript{204}

There is apparent unanimity within the Fourth Circuit that the removing defendant’s burden to establish fraudulent joinder is very stiff. Further, the statement of the standard that the defendant’s burden is even greater on fraudulent joinder than on a 12(b)(6) motion is certainly suggestive of a pleadings-only analysis. Nevertheless, there is some confusing surface language in the cases concerning the precise issue in the Fourth Circuit about whether the court should accept as true the allegations of the plaintiff’s complaint or permit more factual probing beyond the pleadings to analyze an accusation of fraudulent joinder. Several district courts, in reliance upon some Fourth Circuit language predating \textit{Hartley}, have said—at least in dicta—that “the court is not bound by the allegations of the pleadings, but may instead consider the entire record, and determine the basis of joinder by any means available.”\textsuperscript{205} However, this language mostly appears to be dicta,

\textsuperscript{201} Id. at 424. It is interesting that, in a recent case where the Fourth Circuit actually agreed that fraudulent joinder had been demonstrated, it chose to affirm the decision of the district court—only in an unpublished opinion, seemingly embarrassed with the result. See \textit{Bessinger v. Food Lion, LLC}, 115 F. App’x 636, 638 (4th Cir. 2004) (unpublished opinion), \textit{cert. denied}, 125 S. Ct. 2270 (2005).


\textsuperscript{204} See \textit{Cordill}, 2002 WL 31474466, at *4.

\textsuperscript{205} See, e.g., \textit{John S. Clark Co. v. Travelers Indem. Co. of Ill.}, 359 F. Supp. 2d 429, 436 (M.D.N.C. 2004) (internal quotation marks omitted) (quoting AIDS Counseling & Testing
and in one case, the district court specifically held that only a very limited form of piercing the pleadings was possible—when the court deals with a procedural defect in the claim, such as statute of limitations problems easily detected and determined from the face of the plaintiff's pleading and any facts of which the court could take judicial notice. Further, other courts have recognized within the Fourth Circuit the rule—consistent with a 12(b)(6) analysis—that the allegations of the plaintiff's pleading must be taken as true and the court must disregard any allegations to the contrary by the defendant. Thus, it appears that notwithstanding the dicta about a court's ability to look beyond the pleadings, the courts in the Fourth Circuit do not truly pierce the pleadings, but instead analyze fraudulent joinder from the face of the plaintiff's complaint.

2. Piercing the Pleadings—The Summary Judgment Proxy

While some courts in circuits that apply the Rule 12(b)(6) standard for fraudulent joinder sometimes try to sneak a peek...
beyond the pleadings, there are three circuits that expressly embrace the concept of looking to the actual evidence in the case to perform fraudulent joinder analysis. The Fifth, Tenth and Eleventh Circuits have instructed the district courts within their borders to go beyond the plaintiff’s pleadings and to consider any other evidence that might negate the plaintiff’s cause of action against the nondiverse defendant. This process considers some of the same materials federal courts are accustomed to examining as part of Rule 56 summary judgment proceedings. Nevertheless, the actual procedure employed in this pierce-the-pleadings fraudulent joinder analysis is not exactly the same as summary judgment procedure, being somewhat more sympathetic to the plaintiff at this early stage of the case.

The Fifth Circuit recently clarified that the district courts may consider any extrinsic evidence tending to establish or negate the plaintiff’s cause of action against nonresident defendants. Prior to 2003, the Fifth Circuit had been somewhat unclear in terms of the fraudulent joinder standard and the procedure by which district courts should undertake consideration of allegations of fraudulent joinder.

Travis v. Irby represented an attempt by the Fifth Circuit to add some certainty to the law. Travis arose out of one of those tragic collisions between a train and an automobile, reminiscent of the fact patterns from some of the early fraudulent joinder cases in the Supreme Court. In the resulting wrongful death state court case against the railroad company and the individual engineer, complete diversity did not exist between the Mississippi plaintiff

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209 See, e.g., supra text accompanying notes 154–60 (discussing the First Circuit’s approach to fraudulent joinder).

210 Federal Rule of Civil Procedure 56(e) expressly instructs district courts to consider summary judgment motions in light of multiple types of evidence and pleadings: “The judgment sought shall be rendered . . . if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, . . . show that there is no genuine issue as to any material fact . . . .” Fed. R. Civ. P. 56(e). Thus, unlike 12(b)(6) motions, summary judgment proceedings in federal court do not give any deference to the plaintiff’s allegations but require the court to essentially preview what a trial might look like to determine if a trial is necessary. See Celotex Corp. v. Catrett, 477 U.S. 317, 323–24 (1986) (“One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses . . . .”).

211 See Underwood, supra note 138, at 611 (“Recognizing that it had not always been consistent in articulating the standard for fraudulent joinder, the Fifth Circuit in Travis attempted to clarify the standard.”).

212 326 F.3d 644 (5th Cir. 2003).

213 Id. at 646; see supra text accompanying notes 53–62.
and the Mississippi engineer.\textsuperscript{214} Plaintiff alleged state law claims for negligence against the two defendants.\textsuperscript{215} Defendants served the plaintiff with interrogatories asking about the factual basis for the claims against the engineer.\textsuperscript{216} When plaintiff answered the interrogatories admitting that she was aware of no specific facts supporting any of her allegations of wrongdoing against the nondiverse engineer, the defendant railroad immediately filed a notice of removal alleging fraudulent joinder.\textsuperscript{217} The district court denied the plaintiff’s motion to remand based upon her failure to “provide even cursory evidence which gives the Court reason to believe that there is a potential that [the engineer] may be found liable.”\textsuperscript{218} The district court’s subsequent grant of summary judgment to the railroad resulted in an appeal to the Fifth Circuit.\textsuperscript{219}

On appeal, the Fifth Circuit conceded that under a Rule 12(b)(6) inquiry, there was no doubt that the plaintiff’s claims against the engineer stated a cause of action under Mississippi law.\textsuperscript{220} The court observed that, to the extent that both Rule 12(b)(6) and fraudulent joinder seek to identify whether a possible claim exists, the two analyses “appear similar.”\textsuperscript{221} However, the Fifth Circuit stated that, in fact, the “scope of the inquiry is different.”\textsuperscript{222} Therefore, the matters to be considered by the district court are different:

For Rule 12(b)(6) motions, a district court may only consider the allegations in the complaint and any attachments. For fraudulent joinder, the district court may, as it did in this

\textsuperscript{214} 326 F.3d at 646.
\textsuperscript{215} Id.
\textsuperscript{216} Id. at 649.
\textsuperscript{217} See id. at 646, 649.
\textsuperscript{218} Id. at 649 (internal quotation marks omitted) (quoting the district court opinion).
\textsuperscript{219} Id. at 646.
\textsuperscript{220} Both the court and the parties were in agreement that the plaintiff alleged a cause of action against the engineer:
As all parties acknowledge, Travis clearly stated a claim against Irby. Under Mississippi law, Irby owed a duty to exercise reasonable care to avoid injuring Michael Travis at the railroad crossing. Irby can be held personally responsible for negligent acts committed within the scope of his employment for Illinois Central. Plaintiff Travis alleges facts in her complaint attributable to defendant Irby that constitute negligence, including failing to make a proper and timely application of the brakes of the train, failing to keep a proper and reasonable lookout, and failing to take proper precautions under the circumstances existing at the time of the accident.
\textsuperscript{221} Id. at 649 (citations omitted).
\textsuperscript{222} Id. at 648.
\textsuperscript{223} Id.
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... case, “pierce the pleadings” and consider summary judgment-type evidence in the record, but must also take into account all unchallenged factual allegations, including those alleged in the complaint, in the light most favorable to the plaintiff.\(^{223}\)

While the “burden of persuasion” still rests upon the removing party to establish fraudulent joinder,\(^{224}\) in the Fifth Circuit the plaintiff may not simply rest upon the unsubstantiated allegations of her complaint in the face of evidence offered by the defendant negating the existence of a claim against the nondiverse defendant. Thus, the Fifth Circuit in *Travis* clearly rejected the 12(b)(6) analysis and opted for a summary judgment-type scope of examination, finding no fault with the district court’s piercing of the plaintiff’s pleadings.

The second issue the Fifth Circuit considered in *Travis* was whether the procedure for undertaking the fraudulent joinder inquiry would also be the same as in summary judgment practice. Specifically, what are the relative burdens of production when fraudulent joinder is alleged as a basis for removal? In *Travis*, the defendant railroad company had not actually offered any evidence negating the plaintiff’s negligence claim against the engineer.\(^{225}\) Rather, the railroad had engaged in a “no evidence” attack on the plaintiff’s claim similar to that authorized in summary judgment practice by the Supreme Court in *Celotex Corp. v. Catrett*.\(^{226}\) *Celotex* authorizes defending parties to move for summary judgment without any supporting evidence merely by pointing out the elements of the claims that lack evidentiary support from the claimant.\(^{227}\) At that point, the burden shifts to the claiming party—who would bear a similar burden at trial—to offer evidence by which a rational jury might find in favor of the claimant.\(^{228}\) Failure to come forth with such evidence in response to a “no evidence”

\(^{223}\) Id. at 648–49 (citation omitted).

\(^{224}\) Id. at 649.

\(^{225}\) The Fifth Circuit found that “[t]he defendants did not point to any evidence that would negate Irby’s fault as alleged in the complaint. Under these circumstances, the defendants have not negated the possibility that Irby could be held liable to Travis on the claims alleged.” Id. at 650.

\(^{226}\) See id. at 650–51. See generally Celotex Corp. v. Catrett, 477 U.S. 317, 322–23 (1986) (stating that a failure, after adequate discovery, to produce evidence supporting an element of a claim is sufficient to justify summary judgment against that party).

\(^{227}\) 477 U.S. at 323.

\(^{228}\) Id. at 322–323 (“[T]he standard [for granting summary judgment] mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a) . . . .” (alterations in original) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986)).
motion for summary judgment then permits a federal district court to enter summary judgment for the movant. According to the Fifth Circuit, however, this summary judgment procedure is different from the procedure that should be applied to claims of fraudulent joinder:

In this circumstance, in which the defendant has the burden of establishing fraudulent joinder and the plaintiff can clearly state a claim upon which relief can be granted as to the non-diverse defendant, the lack of substantive evidence as to the non-diverse defendant does not support a conclusion that he was fraudulently joined. In order to establish that Irby was fraudulently joined, the defendant must put forward evidence that would negate a possibility of liability on the part of Irby. As the defendants cannot do so, simply pointing to the plaintiff's lack of evidence at this stage of the case is insufficient to show that there is no possibility for Travis to establish Irby's liability at trial.

This statement by the Fifth Circuit is telling. While the Fifth Circuit is applying the same “no possibility” standard as the other circuits—created by the Supreme Court more than 100 years earlier—it has diverged from the law of some of the other circuits by authorizing district courts to use an expanded scope of review to consider all evidence either supporting or negating the possibility of such a claim against the nondiverse defendant.

On the other hand, the Fifth Circuit recognizes that with fraudulent joinder—unlike summary judgment practice—the removing party has the “burden of persuasion” and thus cannot meet this burden simply by accusing the plaintiff of having no proof. Instead, the removing party trying to establish fraudulent joinder must offer its own summary judgment-type evidence affirmatively negating the plaintiff's claims. To this extent, while the scope of review is the same for fraudulent joinder and summary judgment, the actual

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229 Id. at 323.
230 Travis, 326 F.3d at 650–51 (footnote omitted).
231 Earlier Fifth Circuit cases had reached somewhat different results, including cases that had endorsed a summary judgment-like procedure for evaluating fraudulent joinder claims. See, e.g., Carriere v. Sears, Roebuck & Co., 893 F.2d 98, 100 (5th Cir. 1989) (quoting B., Inc. v. Miller Brewing Co., 663 F.2d 545, 549 n.9 (5th Cir. Unit A Dec. 1981)).
232 Of course, the Fifth Circuit's opinion in Travis did not foreclose the possibility of a defendant supporting a fraudulent joinder removal by demonstrating that, on its face, the plaintiff's complaint against the nondiverse defendant fails to state a cause of action under Rule 12(b)(6). In Travis, the court observed that its holding was limited to situations where the complaint did state a cause of action. 326 F.3d at 650.
procedures differ somewhat, making it more difficult for the removing party to establish fraudulent joinder.233 “This result seems correct and is entirely consistent with the general rule that a party invoking the court’s jurisdiction has the burden of demonstrating the existence of jurisdiction.”234

One recent limitation on fraudulent joinder in the Fifth Circuit that bears mentioning is the decision by that court in Smallwood v. Illinois Central Railroad Co.235 In that case, the district court recognized fraudulent joinder because the claims against the local defendants were precluded by the doctrine of preemption.236 Because this same defense also precluded the remaining claims against the diverse defendants, the Fifth Circuit held that such a “common defense”237 made the doctrine of fraudulent joinder inapplicable.238

A very recent panel decision out of the Fifth Circuit shows that the holding in Smallwood may be somewhat limited. In Boone v. Citigroup, Inc., the Fifth Circuit affirmed a finding of fraudulent joinder where essentially the same defense used to show fraudulent joinder of the local defendants—the statute of limitations—was later used by the diverse defendants to obtain summary judgment.239 The Fifth Circuit rejected the plaintiff’s contention that Smallwood applied, based upon the court’s characterization that the statute of limitations arguments against the diverse defendants was not exactly the same as that applicable to the local defendants:

Although it is true that the district court denied remand and granted summary judgment on the basis of the same residual statute of limitations, it is not true that the statute of

233 As one scholar has noted: “The court in Travis recognized that the result would probably have been different had the summary judgment burdens applied. Thus, the analogy between fraudulent joinder and summary judgement [sic] practice is not complete. In both contexts, courts will look behind the pleadings and consider evidence.” Underwood, supra note 138, at 613 (footnotes omitted).
234 Id. (footnote omitted).
235 385 F.3d 568 (5th Cir. 2004) (en banc), cert. denied, 125 S. Ct. 1825 (2005).
236 Id. at 572.
237 The majority opinion never actually used the term “common defense,” but the several dissenters called the majority’s holding “a troublesome and unnecessary ‘common-defense’ rule.” See id. at 577 (Jolly, J., dissenting).
238 Id. at 574 (majority opinion) (“[W]hen . . . a showing that compels a holding that there is no reasonable basis for predicting that state law would allow the plaintiff to recover against the in-state defendant necessarily compels the same result for the nonresident defendant, there is no improper joinder; there is only a lawsuit lacking in merit.”).
239 416 F.3d 382, 388–89, 392 (5th Cir. 2005).
limitations defense assertion by the resident defendants “equally” and “necessarily” “compelled” dismissal of all claims against all the diverse defendants. . . . Therefore, though both the non-diverse and diverse appellees successfully asserted a defense based on the same residual statute of limitations, this was not a “common defense” in the particularized sense meant by Smallwood II. 240

The Fifth Circuit has not clearly explained how the “common defense” exception to fraudulent joinder furthers any principles of diversity jurisdiction, but the recent decision from that court at least suggests a very narrow reading of this exception.

Likewise, the Tenth Circuit has approved of a scope of review for fraudulent joinder similar to that for summary judgment. In Dodd v. Fawcett Publications, Inc., 241 the Tenth Circuit held that, “upon specific allegations of fraudulent joinder the court may pierce the pleadings, consider the entire record, and determine the basis of joinder by any means available.” 242 Using this standard, the Tenth Circuit further held that, under the applicable state law the plaintiff’s evidence “was insufficient to impose liability upon” the nondiverse defendant. 243 Therefore, fraudulent joinder allowed the court to disregard the citizenship of that party and affirm the trial court’s refusal to remand the case to state court. 244 The lower federal courts within the Tenth Circuit have generally 245 embraced this summary judgment-type scope of review for fraudulent joinder. 246

240 Id. at 390, 392.
241 329 F.2d 82 (10th Cir. 1964).
242 Id. at 85 (citations omitted). In a more recent opinion, the Tenth Circuit further elucidated these principles for fraudulent joinder explaining that the fraudulent joinder “standard is more exacting than that for dismissing a claim under Fed.R.Civ.P 12(b)(6)” and therefore requires a more rigorous inquiry. See Montano v. Allstate Indem., 211 F.3d 1278 (10th Cir. 2000) (unpublished table decision).
243 Dodd, 329 F.2d at 85.
244 Id.
245 Of course, one can always find examples of a district court simply applying the wrong standard in apparent ignorance of the applicable circuit court’s directions. See, e.g., Town of Freedom v. Muskogee Bridge Co., 466 F. Supp. 75, 78, 79 (W.D. Okla. 1978) (remanding the case and applying a scope of review similar to that used in motions to dismiss to the fraudulent joinder context). In addition, another district court within the Tenth Circuit suggested that the standard might include gauging the subjective intent of the plaintiff’s counsel in terms of the motivation for joining the nondiverse defendant. See City of Neechesa v. BP Corp. N. Am., 355 F. Supp. 2d 1182, 1188, 1190 (D. Kan. 2005) (granting motion to remand).
246 See, e.g., Jackson v. Philip Morris Inc., 46 F. Supp. 2d 1217, 1221 (D. Utah 1998) (“[U]pon allegations of fraudulent joinder designed to prevent removal, federal courts may look beyond the pleadings to determine if the joinder, although fair on its face, is a sham or
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The Eleventh Circuit also appears to have adopted a fraudulent joinder analysis that permits the “piercing of the pleadings” and the consideration of extrinsic evidence negating a plaintiff’s properly pleaded cause of action. In Crowe v. Coleman,247 the Eleventh Circuit issued a thoughtful statement of the preferred fraudulent joinder analysis:

While “the proceeding appropriate for resolving a claim of fraudulent joinder is similar to that used for ruling on a motion for summary judgment under [Rule 56],” the jurisdictional inquiry “must not subsume substantive determination.” Over and over again, we stress that “the trial court must be certain of its jurisdiction before embarking upon a safari in search of a judgment on the merits.” When considering a motion for remand, federal courts are not to weigh the merits of a plaintiff’s claim beyond determining whether it is an arguable one under state law.248

In effect, the Eleventh Circuit has opted for a summary judgment scope of review—piercing the pleadings—but has cautioned the district courts not to confuse this scope of review with actual summary judgment practice:

[The plaintiff need not show that he could survive in the district court a motion for summary judgment filed by that in-state defendant. For a remand, the plaintiff’s burden is much lighter than that: after drawing all reasonable inferences from the record in the plaintiff’s favor and then

247 113 F.3d 1536 (11th Cir. 1997).
248 Id. at 1538 (citations omitted) (quoting B., Inc. v. Miller Brewing Co., 663 F.2d 545, 548–49, 549 n.9, 550 (5th Cir. Unit A Dec. 1981)). Recently, in Legg v. Wyeth, the Eleventh Circuit reaffirmed that such a summary judgment approach to fraudulent joinder was appropriate. 428 F.3d 1317, 1322–23 (11th Cir. 2005). In that case, the district court had wrongly remanded a case removed on fraudulent joinder grounds by ignoring the affidavit proving any liability on the party of the nondiverse defendant. Even though review of the remand was not possible, see 28 U.S.C. § 1447(d) (2000), the case came to the Eleventh Circuit on appeal of the order assessing attorney’s fees against the defendant for having improvidently removed the case. Id. at 1319. In connection with review of that order, the Eleventh Circuit found that the removal had been appropriate. Id. at 1325. Ironically, the case remains in state court notwithstanding the district court’s erroneous remand.
resolving all contested issues of fact in favor of the plaintiff, there need only be “a reasonable basis for predicting that the state law might impose liability on the facts involved.” Because the procedures are similar while the substantive standards are very different, district courts must exercise extraordinary care to avoid jumbling up motions for remand and motions for summary judgment that come before them.

In the remand context, the district court’s authority to look into the ultimate merit of the plaintiff’s claims must be limited to checking for obviously fraudulent or frivolous claims. Although we have said that district courts may look beyond the face of the complaint, we emphasize that the district court is to stop short of adjudicating the merits of cases that do not appear readily to be frivolous or fraudulent.249

The Eleventh Circuit’s directive seems to be that, while courts should pierce the pleadings and utilize a summary judgment scope of review, the courts should not confuse their task. While summary judgment practice is designed to avoid unnecessary trials by adjudicating one-sided claims,250 fraudulent joinder analysis is simply supposed to determine whether a possible claim exists against the local defendant. Close cases, or ones where state law is not clear,251 should be resolved in favor of remanding to the state courts. While controversy still exists among the district courts of the Eleventh Circuit—most notably in applying the admonition from the Eleventh Circuit to decide against fraudulent joinder in the face of uncertain state law252—the lower courts have at least

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249 Crowe, 113 F.3d at 1541–42 (citation omitted) (quoting B., Inc. v. Miller Brewing Co., 663 F.2d 545, 550 (5th Cir. Unit A Dec. 1981)).
251 Crowe, 113 F.3d at 1538 (stating that the court “must resolve any uncertainties about state substantive law in favor of the plaintiff”).
252 The issue of how to rule on fraudulent joinder motions in the face of uncertain state substantive law has arisen in several cases in Florida in the context of an insurance company’s decision to deny coverage for a claim. Much of the confusion surrounding this issue arises out of the Florida Supreme Court’s opinion in Blumberg v. USAA Casualty Insurance Co., 790 So. 2d 1061 (Fla. 2001), which addressed the question of when a claim against an insurance agent for negligence accrues. While some parts of the opinion indicate that the claim does not accrue until the resolution of the underlying claim against the insurer, other portions suggest that the insured’s claim may be brought against the agent at the same time as the claim against the insurer. See id. at 1065–66. In the face of this uncertainty, several opinions from Florida federal district courts have emerged, going both ways on whether claims against local agents joined with claims against diverse insurers are fraudulently joined. Compare Ocean Towers of Hutchinson Island Condo. Ass’n v. Nationwide Mut. Fire Ins. Co., No. 02-14083-CIV-MIDDLEBROOKS (S.D. Fla. July 9, 2002) (granting
fairly consistently utilized a summary judgment scope of review in ruling upon fraudulent joinder motions. However, as discussed below, several district judges within the Eleventh Circuit have also suggested an alternative analysis embodying Rule 11 considerations as well.

The circuits authorizing district courts to pierce the pleadings to evaluate whether a “possible” claim exists in light of evidence submitted by the parties may fairly be summarized as utilizing a summary judgment scope of review that is not exactly a summary judgment procedure. The difference in procedure seems to be twofold. First, unlike summary judgment practice—where a court often has to make an “Erie guess” as to the contours of the state substantive law—the courts seem to emphasize that in a fraudulent joinder inquiry, the trial court need not make this guess. Instead, in instances of doubtful state law, the court should simply conclude that the claim against the nondiverse defendant is “possible” and should remand the case to state court. Second, unlike summary judgment practice—where the defendant may make a Celotex-style “no evidence” motion essentially placing the burden of production on

See, e.g., Pritchard v. Hancock Fabrics, Inc., 198 F. Supp. 2d 1288, 1290–91 (N.D. Ala. 2002) (recognizing that the appropriate standard for determining whether a nondiverse defendant was fraudulently joined is similar to that which would be used in a summary judgment motion, but nonetheless remanding the case despite the court’s recognition that the case against the nondiverse defendant appeared “quite weak”); El Chico Rests., Inc. v. Aetna Cas. & Sur. Co., 980 F. Supp. 1474, 1480, 1485 (S.D. Ga. 1997) (accepting defendant’s affidavits to conclude that “there is no possibility that Plaintiff [could] prevail” against the non-diverse defendant, but allowing the plaintiff to destroy diversity by amending the complaint to add additional, non-diverse parties).

See infra Part III.B.4.

See, e.g., Atrium Assoc., No. 8:03-CIV-876-T-17MAP, slip op. at 6.
the plaintiff to offer at least some evidence in support of each element of the challenged claim—\(^{256}\)—in the fraudulent joinder context, the burden of production remains solely upon the removing defendant to offer evidence affirmatively negating a “possible” claim against the local defendant.

One other timing issue should be mentioned concerning when this summary judgment-type analysis should be employed. The Fifth Circuit has suggested that in ruling on fraudulent joinder, courts should consider the plaintiff’s opportunity, or lack thereof, to obtain discovery and develop its claims against the local defendant.\(^{257}\) As ATLA suggests, this precedent “opens the door for plaintiffs to request discovery and the opportunity to develop their claims against local defendants.”\(^{258}\)

3. Confusing Circuits—The Indecipherable Proxy

The Sixth, Seventh, Eighth, and Ninth Circuits are all very confusing for practitioners attempting to analyze fraudulent joinder.\(^{259}\) Each of those circuit has failed address the issue of the appropriate scope of review for a fraudulent joinder claim definitively or consistently. As a result, one can find persuasive precedents among these four circuits for both a pleadings-restricted Rule 12(b)(6) analysis and a summary judgment analysis that permits the pleadings to be pierced.

In *Jerome-Duncan, Inc. v. Auto-By-Tel, L.L.C.*,\(^ {260}\) the Sixth Circuit stated that to determine whether fraudulent joinder has occurred, the district court must engage in an “inquiry [of] whether [the plaintiff] had at least a colorable cause of action” under state law.

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\(^{257}\) McKee v. Kansas City S. Ry. Co., 358 F.3d 329, 334 (5th Cir. 2004) (relying on Travis v. Irby, 326 F.3d 644, 649–51 (5th Cir. 2003)).


\(^{259}\) Dividing up the circuits based upon the analytical approach taken in each one is a difficult and certainly subjective task:

In addition to a split amongst the circuits, some circuits are internally split regarding the method of analysis to be used in determining if a party has been fraudulently joined.

The “pleadings only” approach is applied by the Third and Eleventh Circuits as well as some courts in the First, Second, Sixth, Seventh, and Eighth Circuits. . . .

The Fourth, Fifth, Ninth, and Tenth Circuits have adopted the “pierce the pleadings” approach, as have some courts in the First, Second, Sixth, Seventh, and Eighth Circuits.


\(^{260}\) 176 F.3d 904 (6th Cir. 1999).
against the nondiverse defendant. In that case, the Sixth Circuit resolved the issue solely by resort to the allegations in the plaintiff's complaint, though the court did not discuss the possibility of resort to extrinsic evidence. In addition to the suspicious timing of the joinder of the nondiverse defendant, the plaintiff's amended complaint adding the nondiverse defendant never even attempted to assert a claim against that party, nor did it request any relief whatsoever from that party. The nondiverse defendant was merely a stranger to the contract dispute who, at best, might have been tangentially affected by the court's adjudication of the primary claims in the case.

A few months later, a different panel of the Sixth Circuit applied the doctrine of fraudulent joinder in a similar fashion. In Coyne v. American Tobacco Co., a case brought by public officials against the defendant tobacco companies, the Sixth Circuit affirmed a decision by the district court denying a motion to remand based upon a finding of fraudulent joinder. The court said that “[t]o prove fraudulent joinder, the removing party must present sufficient evidence that a plaintiff could not have established a cause of action against non-diverse defendants under state law.” Although the court's statement was perhaps suggestive of a summary judgment-like inquiry, the court resolved the issue solely by resort to the plaintiff's failure to adequately plead a claim against the local defendant.

More recently, the Sixth Circuit addressed the issue of fraudulent joinder in the context of a claim for defamation arising out of a rap album. In Boladian v. UMG Recordings, Inc., the plaintiff added to his defamation claims against the recording artist and record companies a claim for defamation against Meijer, Inc., a retail
establishment in Michigan.\textsuperscript{270} Citing to its prior decision in \textit{Coyne},
the Court searched for a “colorable basis” for the claim against the
nondiverse defendant.\textsuperscript{271}

The Court first discussed the contents of a declaration filed by a
Meijer employee in response to the motion to remand, which
indicated that the retailer had no idea what lyrics were contained
on the compact disc in question.\textsuperscript{272} This approach would be entirely
consistent with a summary judgment inquiry, though the court
never acknowledged this. Instead, the court proceeded to analyze
the allegations in the plaintiff’s complaint—which did not contain
any claim that the nondiverse defendant had any familiarity with
the contents of the compact disc—and determined that they were
inadequate to state a claim for defamation against the retailer:
“[T]hese allegations are not enough to satisfy the requirements of
Michigan law, which requires that the elements of a claim of
defamation be specifically pleaded, and that the publisher of
statements alleged to be defamatory knew or should have known of
their content.”\textsuperscript{273} Accordingly, the court found that fraudulent
joinder had occurred,\textsuperscript{274} and, in so doing, left the door open to both a
pleadings-only and a summary judgment-like inquiry. District
courts within the Sixth Circuit have similarly reflected this lack of
clarity, with both 12(b)(6) and summary judgment approaches being
used.\textsuperscript{275}

\begin{footnotes}
\item[270] \textit{Id.} at 167.
\item[271] \textit{See id.} at 168 (citing \textit{Coyne}, 183 F.3d at 493).
\item[272] \textit{Id.}
\item[273] \textit{Id.} at 169 (citations and footnote omitted).
\item[274] \textit{Id.} at 169–70 (“For these reasons, we hold that plaintiffs ‘could not have established a
cause of action against the non-diverse defendant[] under state law.’” (quoting \textit{Coyne}, 183
F.3d at 493)).
\item[275] \textit{Compare City of Jackson v. Marty Golf Mgmt., Inc., No. 02-1016, 2002 WL 1398542, at
*2 (W.D. Tenn. Apr. 23, 2002) (“Of course, the complaint alone does not resolve the issue of
fraudulent joinder. When attempting to prove fraudulent joinder, a removing party is allowed
to present evidence to prove that the plaintiff does not have a colorable basis for recovery
against the non-diverse defendants.”), with Sprowls v. Oakwood Mobile Homes, Inc., 119 F.
Supp. 2d 694, 697 (W.D. Ky. 2000) (“Summary judgment standards do not apply to the
question [of fraudulent joinder]. Rather, this Court must examine the pleadings for
allegations, which if proven, would provide a reasonable basis for a finding of liability against
[the nondiverse defendant].”), and \textit{In re Ford Motor Co. Crown Victoria Police Interceptor
(relying upon cases from the Third and Fourth Circuits and stating that “the underlying
inquiry into fraudulent joinder is similar to the inquiry into a motion to dismiss under Fed. R.
Civ. P. 12(b)(6), but is even more deferential to the Plaintiffs.”). \textit{See also In re Welding Rod
(suggesting in an MDL proceeding that if a plaintiff could \textit{either} come forward with “specific
allegations” of wrongdoing \textit{or} “adduce evidence giving color to his claims . . . then joinder of
that defendant is clearly proper.”). In light of the lack of direction from the Sixth Circuit,
In the Seventh Circuit, lawyers are left perplexed not because of a failure of the circuit court to address the standard squarely, but just the opposite—two different panels of the Seventh Circuit adopted different standards at essentially the same time. The Seventh Circuit’s first foray into fraudulent joinder occurred in 1992 in *Poulos v. Naas Foods, Inc.*[^276] in which it held that, for a defendant to establish fraudulent joinder, it had to show that based on the complaint, “the plaintiff [could not] establish a cause of action against the [nondiverse] defendant.”[^277] Following this guidance from *Poulos*, some district courts within the Seventh Circuit have limited fraudulent joinder analysis to a review of the plaintiff’s complaint.[^278] However, exactly two weeks after *Poulos* was decided, a different panel of the Seventh Circuit, in *Faucett v. Ingersoll-Rand Mining & Machinery Co.*[^279] opted for the summary judgment approach. In *Faucett*, the Seventh Circuit relied upon the nondiverse defendant’s affidavit to establish that the plaintiff had no possibility of recovering against that defendant.[^280] *Faucett* was a products liability case arising out of a coal mine accident.[^281] The plaintiff sued the diverse manufacturer as well as a local

[^276]: 959 F.2d 69 (7th Cir. 1992). The court noted that the Seventh Circuit Court of Appeals “has never before addressed fraudulent joinder, and the parties dispute the meaning and application of the doctrine.” *Id.* at 73.

[^277]: *Id.* at 73–74. The court stated:

> Based on the allegations in his complaint, Poulos had no chance of recovering damages from RHM in a Wisconsin court. Moreover, at no point in the state or federal proceedings did Poulos attempt to fill the gaps in his complaint. Thus we may conclude that the joinder of RHM was fraudulent without deciding whether Poulos could have cured the problem with his complaint by amending it while in federal court. The finding of fraudulent joinder was correct, and jurisdiction was proper.

[^278]: See, e.g., *Inman v. Daimler-Chrysler Corp.*, No. 00 C 0134, 2000 WL 283016, at *4 (N.D. Ill. Mar. 9, 2000) (holding that a plaintiff’s complaint failed to allege a claim under state products liability law against a nondiverse defendant); *Lynch Ford, Inc. v. Ford Motor Co.*, 934 F. Supp. 1005, 1007 (N.D. Ill. 1996) (stating that fraudulent joinder analysis is “limited to the factual assertions of [the] complaint” and refusing to consider other facts offered to the court (citing *Poulos*, 959 F.2d at 74)).

[^279]: 960 F.2d 653 (7th Cir. 1992).

[^280]: *Id.* at 655.

[^281]: *Id.* at 654.
With regard to the repairman, the plaintiff had alleged in his complaint that the repairman was negligent. After removal, the removing defendant filed an affidavit from the repairman “essentially stating that he . . . had absolutely nothing to do with any roof-bolters at the Peabody Mine” where the plaintiff was injured. The Seventh Circuit found “sufficient to establish fraudulent joinder” the uncontradicted contents of the repairman’s affidavit, thereby “employ[ing] full-blown summary judgment-type procedures, requiring [the] plaintiff[] to respond to affidavits with counter-affidavits.”

Faucett made no reference to the earlier panel’s decision in Poulos, nor to any argument that piercing the pleadings might be improper.

As a result of these conflicting messages from their mother court, district judges in the Seventh Circuit have been left to try to sort out the jurisdictional morass themselves. One district judge, after recognizing the differing standards employed by other courts, tried to reach a compromise by allowing the “limited use of affidavits” in the course of making a “fine distinction between considering summary judgment-type evidence (which the court can do) and making a summary judgment-type determination (which it cannot).” Interestingly, the district court suggested a difference in this regard between using “substantive” and “jurisdictional” facts:

Since the defendants in Faucett . . . came forward with jurisdictional facts that would have warranted summary dismissal of the nondiverse defendant, it was proper to expect the plaintiffs to respond with affidavits of their own. This case is different, however, because the removing defendants have submitted affidavits that go to substantive facts—not jurisdictional facts. Since the court is not concerned with the merits of this case, plaintiffs need not submit counter-affidavits.

Unfortunately, the district court failed to offer an explanation of the difference between “substantive” and “jurisdictional” facts. One might wonder, what is it about an affidavit from a defendant saying

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282 Id.
283 Id.
284 Id. at 655.
285 Id.
287 Id. at *3, *4.
288 Id. at *4.
that it had “nothing to do with” the plaintiff’s injury.\textsuperscript{289} That makes such evidence in the nature of a “jurisdictional fact” rather than a “substantive fact?” The “fine distinction” appears arbitrary, particularly in light of the Supreme Court’s mandate to find fraudulent joinder when a plaintiff has “no possibility” of prevailing—a merits-based inquiry. Indeed, this district court’s proposed standard is reminiscent of the early First Amendment cases involving pornography—courts are presumably expected to know a jurisdictional fact when they see it.\textsuperscript{290}

Interestingly, district courts in the Eighth Circuit are all over the analytical map with only minimal guidance from the Eighth Circuit itself\textsuperscript{291}—and that guidance coming only very recently. In \textit{Filla v. Norfolk Southern Railway Co.},\textsuperscript{292} the Eighth Circuit provided the clearest glimpse yet of its view of fraudulent joinder. In doing so, the court noted that “[n]either [this] circuit nor other circuits have been clear in describing the fraudulent joinder standard.”\textsuperscript{293} The court also acknowledged that “[w]hile fraudulent joinder . . . is rather easily defined, it is much more difficult [sic] applied.”\textsuperscript{294} \textit{Filla} was another railroad collision case, involving the alleged fraudulent joinder of individuals owning property adjacent to the railway who allegedly failed to maintain their property reasonably.\textsuperscript{295} Of course, the property owners were not of diverse citizenship from the plaintiff.\textsuperscript{296} The railroad defendant attempted to support its removal by arguing that there was no possible claim

\textsuperscript{289} See supra text accompanying notes 279–86 (discussing \textit{Faucett}, 960 F.2d 653).
\textsuperscript{290} Without attempting to justify peeking at extrinsic evidence by resort to a substantive-versus-jurisdictional fact distinction, another district court within the Seventh Circuit has stated that it is appropriate to consider affidavit evidence on a motion to remand—at least when offered by a plaintiff to add some meat to skeletal allegations contained in its pleading. See \textit{Conk v. Richards & O’Neil, LLP}, 77 F. Supp. 2d 956, 964 (S.D. Ind. 1999).
\textsuperscript{291} Given the relatively ancient origins of fraudulent joinder—dating back to the latter part of the nineteenth century—one might wonder why there is not a more clear resolution of the issue of the appropriate standards, at least from the appellate courts. One reason might be that only a small percentage of the removed cases raising the issue of fraudulent joinder are capable of being reviewed “by appeal or otherwise.” See \textit{28 U.S.C. § 1447(d)} (2000); \textit{see also \textit{Whittley v. Burlington N. & Santa Fe R.R. Co.}}, 395 F.3d 829, 830 (8th Cir. 2005) (dismissing appeal from order of remand). Thus, only in the relatively rare instances that a district court finds that fraudulent joinder has occurred in “a statutorily excepted civil rights case” or where “the decision to remand is based on grounds other than subject matter jurisdiction or defects in removal procedure” will there be any chance of appellate review of the fraudulent joinder issue. \textit{Id.}
\textsuperscript{292} 336 F.3d 806 (8th Cir. 2003).
\textsuperscript{293} \textit{Id.} at 809 (quoting Travis v. Irby, 326 F.3d 644, 647 (5th Cir. 2003)).
\textsuperscript{294} \textit{Id.}
\textsuperscript{295} \textit{Id.} at 808.
\textsuperscript{296} \textit{Id.}
against the landowners because Missouri courts had never found any duty on the part of such rural property owners to maintain their land for the benefit of any adjoining railway. The Eighth Circuit introduced the fraudulent joinder issue by quoting the district court, which had stated that “[t]he burden is upon the removing party to demonstrate that the facts pleaded by Plaintiff cannot possibly create liability [on the part of the local defendant(s)].” Later in the opinion, the Eighth Circuit recognized the intra-circuit confusion by referring to seemingly differing opinions, one of which approved of something “close to a dismissal standard, approving a removal to federal court, if ‘on the face of plaintiff’s state court pleadings, no cause of action lies against the resident defendant.” The court, finding “a common thread in the legal fabric guiding fraudulent-joinder review,” believed that, in implementing this standard, courts should apply a standard of reasonableness: “[A] proper review should give paramount consideration to the reasonableness of the basis underlying the state claim.” Of course, in Filla, whether there was any possibility of recovery depended solely upon an issue of law—whether Missouri imposes a legal duty on the landowners—and the case involved no attempt by either party to offer any extra-pleading evidence for or against fraudulent joinder. Although the Eighth Circuit affirmed the remand order in light of the uncertain nature of Missouri substantive law, the opinion does not actually address whether a summary judgment standard may be applied when the parties seek to offer evidence negating a possible recovery against the local defendant. In a subsequent case, the Eighth Circuit was presented with precisely the scope of review issue—whether a district court may consider extra-pleading evidence negating a plaintiff’s claim against a local defendant—but did not reach the issue because the appeal being taken from a remand order was not permitted.

297 Id.
298 See id.
299 Id. at 810 (quoting Anderson v. Home Ins. Co., 724 F.2d 82, 84 (8th Cir. 1983)).
300 Id.
301 Id.
302 Whittley v. Burlington N. & Santa Fe R.R. Co., 395 F.3d 829, 830 (8th Cir. 2005) (dismissing appeal from remand order following district court’s refusal to consider evidence offered by the removing defendant that negated the plaintiff’s cause of action against the local individual defendant by demonstrating that the individual was “not the train master.
In a bit of an understatement, the *Filla* court observed, “[w]ithin our own circuit the fraudulent-joinder standard has been stated in varying ways.” As another legal observer characterized fraudulent joinder law in the Eighth Circuit: “No one standard is applied consistently; and the courts sometimes articulate multiple standards within the same opinion.” For example, some district courts within the Eighth Circuit, similar to the *Peters* case out of the Seventh Circuit discussed above, have suggested that a distinction might be made between jurisdiction-based and merit-based inquiries, with only the former permitting the consideration of extrinsic evidence. In *Scientific Computers, Inc. v. Edudata Corp.*, the district court held that it was acceptable to “pierce the pleadings and consider the entire record” when specific allegations of fraudulent joinder are made. However, the extrinsic evidence considered by the district court consisted of statements made by the plaintiff’s counsel to the defense counsel suggesting a joinder motive of avoiding removal jurisdiction rather than evidence going to the merits of the claims. Some other subsequent district court decisions have characterized the *Scientific Computers* holding as being limited to considering extrinsic evidence regarding jurisdictional issues unrelated to the merits. In *Schwenn v. Sears, Roebuck & Co.*, a sexual harassment case, the court refused to consider evidence refuting the merits of the claims:

In the Court’s view, this method of resolving a claim of fraudulent joinder does violence to the basic principle that a court should not resolve the merits of a plaintiff’s claim in determining whether an action was properly removed. In addition, defendants’ proposed method has the potential to vastly expand removal jurisdiction; under defendants’ theory, removal would be proper in any case in which the removing defendants could establish that the non-diverse

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303 *Filla*, 336 F.3d at 809–10.
305 *See supra* text accompanying notes 286–89.
307 *Id.* at 1292 (citing *Dodd v. Fawcett Publ’ns*, Inc., 329 F.2d 82, 85 (10th Cir. 1964)).
308 *Id.* at 1292–93 (explaining that the record showed that the nondiverse defendant “was singled out to avoid federal diversity jurisdiction rather than to obtain full relief,” and that the nondiverse defendant “was a straw defendant set up for plaintiff’s convenience”).
defendant was entitled to summary judgment.\textsuperscript{310} The court distinguished \textit{Scientific Computers}, where the court merely “pierce[d] the pleadings to aid resolution of the jurisdictional issue,” and believed that the defendants—in asking the court to essentially “rule for them on the merits”—stretched the use of extrinsic evidence too far.\textsuperscript{311}

Another more recent district court decision in the Eighth Circuit makes an attempt to further delineate the possible limitation of piercing the pleadings analysis to so-called jurisdictional facts. In \textit{Wells’ Dairy, Inc. v. American Industrial Refrigeration, Inc.},\textsuperscript{312} the issue of the appropriate analysis arose in the context of a request for discovery by the removing defendants to support their fraudulent joinder contention. The plaintiff dairy filed suit in state court against two diverse refrigeration companies and a non-diverse construction company.\textsuperscript{313} After removing the case on fraudulent joinder grounds, one of the diverse defendants asked for discovery to demonstrate that the construction company had no responsibility for the construction of the defective ventilation system in question.\textsuperscript{314} The court responded to this request, first, by analyzing the adequacy of the plaintiff’s pleadings against the construction company, concluding that plaintiff adequately stated a claim against it.\textsuperscript{315} Then, turning to the issue of whether the requested discovery was appropriate, the court elaborated at length on the possibility of piercing the pleadings only in instances when the evidence offered was of jurisdictional facts:

There are at least two species of “fraudulent joinder”: (1) “fraud in the recitation of jurisdictional facts”; and (2) the more common allegation of the absence of any possibility that the plaintiff has stated a claim against the resident defendant. The court finds that whether or not discovery is warranted before the court rules on the fraudulent joinder issue may depend upon which species of fraudulent joinder is alleged in a particular case, and may also depend upon what is alleged to be the nature of the particular failing under that species.\textsuperscript{316}

\textsuperscript{310} \textit{Id.} at 1457.
\textsuperscript{311} \textit{Id.} at 1456.
\textsuperscript{312} 157 F. Supp. 2d 1018 (N.D. Iowa 2001).
\textsuperscript{313} \textit{Id.} at 1022–23.
\textsuperscript{314} \textit{Id.} at 1023.
\textsuperscript{315} \textit{Id.} at 1029–31.
\textsuperscript{316} \textit{Id.} at 1036 (citations and footnote omitted).
Thus, the court believed that if the evidence negated the alleged “status” of a local defendant, it was a “jurisdictional fact” and the court could pierce the pleadings (and permit discovery on the matter). On the other hand, if the evidence negated the alleged “conduct” of a local defendant, such evidence is considered to go to the merits of the case, and the court believed that it must ignore such evidence and assume the truth of the plaintiff’s complaint—in other words, not pierce the pleadings.

So the issue of the scope of review of a fraudulent joinder claim turns on the characterization of the evidence as tending to negate either the status or the conduct of the defendant. This ingenious distinction is based upon an expanded definition of the first context for fraudulent joinder—misstating jurisdictional facts. However, it is lacking in rationale for making a theoretical distinction, and it offers much ambiguity in terms of determining if evidence relates to the defendant’s status or conduct. In Wells’ Dairy, the court decided that whether or not the local defendant was involved in the construction of the defective ventilation system went to the party’s conduct and, therefore, represented an improper attack on the merits of the plaintiff’s claim. Accordingly, the court refused the discovery and remanded the case based upon a 12(b)(6) analysis of the plaintiff’s complaint against that party.

Nevertheless, other district courts within the Eighth Circuit display no qualms whatsoever about piercing the pleadings to consider evidence of fraudulent joinder—whether a jurisdictional or a merits-related fact is in question. In Federal Beef Processors, Inc.

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517 Id. at 1038–39. The court stated:
Although there may be underlying fact issues concerning the defendant’s “status” that are susceptible to discovery prior to ruling on the fraudulent joinder issue, the facts at issue in such cases can still properly be described as “jurisdictional,” because they go to the question of whether the purportedly non-diverse defendant is a proper party to the action, rather than going to the “merits” of the plaintiff’s allegations concerning the defendant’s allegedly wrongful conduct. Discovery of such “jurisdictional” facts is more likely to be necessary before the court rules on the question of fraudulent joinder of the non-diverse defendant, because the facts concerning the non-diverse defendant’s “status” may not be apparent on the face of the complaint. Discovery may also be more appropriate in such cases, because the factual issues generally do not go to the “merits” of the plaintiff’s claim, i.e., to the plaintiff’s allegations concerning the wrongful conduct of the non-diverse defendant, which the standards applicable to fraudulent joinder questions indicate must be taken as true.

518 Id. at 1039–40.
519 Id. at 1041.
520 See id.
v. CBS Inc.,\textsuperscript{321} a business disparagement case arising out of an employee’s secret taping of processing operations within the plaintiff’s slaughterhouse, the decisive issue in the motion to remand was what evidence the court could consider regarding fraudulent joinder.\textsuperscript{322} The removing defendant submitted affidavits exonerating the local defendant-employee of being involved with the illicit videotaping, supporting its fraudulent joinder argument.\textsuperscript{323} The district court believed that the scope of review for the fraudulent joinder analysis was outcome determinative:

> If the Court may consider the affidavits submitted by both parties, it is clear that [the plaintiff] has no possibility of recovering . . . on its stated claims and that [the employee defendant] was fraudulently joined. If, however, the Court is limited to considering [the] complaint, it must accept as true the facts alleged therein and hold that [the employee defendant] was appropriately joined.\textsuperscript{324}

The court decided that “piercing the pleadings” was proper and, therefore, denied the plaintiff’s motion to remand\textsuperscript{325} even though the court believed that plaintiff had at the time of filing suit a “good faith belief that it might recover against [the nondiverse employee].”\textsuperscript{326} The court never attempted to justify its decision to pierce the pleadings using any jurisdictional-versus-merits distinction.

One is left wondering about the analytical distinction between the exonerating evidence rejected from consideration in Wells’ Dairy and that permitted in Federal Beef Processors. The answer can only be that different district courts within the Eighth Circuit apply different analytical modes for fraudulent joinder—some believing summary judgment-type piercing the pleadings should always be permitted and some believing that a 12(b)(6) analysis should be the norm. Until either the Eighth Circuit or the United States Supreme Court resolves this analytical conundrum, practitioners within that circuit are left wondering what standard will apply to their case.

If a lawyer wanders across the continental divide into the Ninth

\textsuperscript{322} Id. at 1432, 1435.
\textsuperscript{323} Id. at 1435.
\textsuperscript{324} Id.
\textsuperscript{325} Id. at 1436 (citing In re Bus. Men’s Assurance Co. of Am., 992 F.2d 181, 183 (8th Cir. 1993) (per curiam) (dealing only generally with a motion to remand in a federal preemption context, not fraudulent joinder)).
\textsuperscript{326} Id. at 1435.
Circuit, she will find no more certainty regarding the fraudulent joinder inquiry than in the Eighth Circuit. One of the most important Ninth Circuit cases to apply the doctrine occurred in *McCabe v. General Foods Corp.*, 327 a case alleging wrongful discharge of the plaintiff. The plaintiff sued the diverse employer corporation as well as the two local managers. 328 The employer removed the case to federal court arguing that the two managers’ presence in the case should be ignored due to their fraudulent joinder. 329 The Ninth Circuit’s entire fraudulent joinder analysis was rather succinct:

Fraudulent joinder is a term of art. If the plaintiff fails to state a cause of action against a resident defendant, and the failure is obvious according to the settled rules of the state, the joinder of the resident defendant is fraudulent. The defendant seeking removal to the federal court is entitled to present the facts showing the joinder to be fraudulent. Here the district court had before it the pleadings plus the sworn declaration of Moltz and Ladson that they had acted in the interests of their employer and not to benefit themselves and, in addition, there was a relevant declaration of McCabe. On the basis of the complaint alone, the district court could rightly conclude that no cause of action had been stated against Moltz and Ladson. Their actions, according to the complaint, had been in their managerial capacity. Their actions, according to the complaint, had been ratified by General Foods. They were not alleged to have acted on their own initiative. McCabe’s own declaration alleged that they were motivated “in part” by ill will. But it is clear that “if an advisor is motivated in part by a desire to benefit his principal,” his conduct is, under California law, privileged. Under California law no wrongful discharge case was stated against them.330

*McCabe* is a fairly good representation of the internal confusion within the Ninth Circuit over the correct scope of review and standard. While the Ninth Circuit stated that the test is whether the complaint stated a cause of action—a 12(b)(6) standard—the court also said the removing party had the right to offer factual

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327 811 F.2d 1336 (9th Cir. 1987).
328 Id. at 1337.
329 Id. at 1337–38.
330 Id. at 1339 (citations omitted).
Evidence in support of its claim of fraudulent joinder. Ultimately, the Ninth Circuit ruled solely based upon the allegations in the complaint. This confusion is manifest in subsequent Ninth Circuit cases as well as in the district court decisions in that circuit.

Ten years later, in *Ritchey v. Upjohn Drug Co.*, the Ninth Circuit addressed fraudulent joinder again. The removing defendant claimed that the plaintiff’s fraudulent joinder of two local defendants was demonstrated because those claims were barred by the statute of limitations. Regarding what evidence should be considered, the Ninth Circuit offered the following internally inconsistent pronouncements:

In deciding whether a cause of action is stated we have declared that we will “look only to a plaintiff’s pleadings to determine removability.” And, we have commented that we will determine the “existence of federal jurisdiction . . . solely by an examination of the plaintiff’s case, without recourse to the defendant’s pleadings.” At least that is true when there has not been a fraudulent joinder. Where fraudulent joinder is an issue, we will go somewhat further. “The defendant seeking removal to the federal court is entitled to present the facts showing the joinder to be fraudulent.”

The court in that case went on to decide that, from the face of the plaintiff’s own pleadings, the claims against the local defendants were barred by the statute of limitations and that they were, therefore, fraudulently joined.

In the most recent Ninth Circuit opportunity to address the fraudulent joinder standard, in *Mercado v. Allstate Insurance Co.*, the court again failed to offer a clear analysis of the proper standards. *Mercado* was a bad faith insurance action filed against the diverse insurer and one local insurance agent. The court

331 139 F.3d 1313 (9th Cir. 1998).
332 Id. at 1314.
333 Id. at 1318 (alteration in original) (quoting Gould v. Mut. Life Ins. Co. of N.Y., 790 F.2d 769, 773 (9th Cir. 1986), Self v. Gen. Motors Corp., 588 F.2d 655, 657 (9th Cir. 1978), and McCabe, 811 F.2d at 1339).
334 Id. at 1319–20 (“In this case, when the strobe of judicial notice is played upon Ritchey’s pleading, it appears perfectly clear that the statute of limitations is a defense . . . . The action against [the local defendants] is barred by the statute of limitations.”). The court also observed that it was “slightly peculiar” to find fraudulent joinder based upon a statute of limitations defense when this defense also applied to the primary defendant, yet the court concluded that it was “beyond peradventure that they were sham defendants for purposes of removal.” Id.
335 340 F.3d 824 (9th Cir. 2003).
336 Id. at 825.
mentioned the *McCabe* decision, saying that fraudulent joinder in that case was premised upon “sworn declarations” exonerating the local defendants—an summary judgment scope of review—but then went on to affirm the district court’s fraudulent joinder finding in the case before it based solely upon the allegations in the plaintiff’s own complaint—a 12(b)(6) standard.

As a result of the Ninth Circuit’s failure to offer clear insight on the appropriate scope of review for fraudulent joinder, the district courts within that circuit have also been imprecise in their application of the doctrine. The recent case of *Knutson v. Allis-Chalmers Corp.* is a good illustration of the confusion that reigns. *Knutson* was a products liability case brought by a Nevada mesothelioma victim and her husband in state court arising out of her asbestos exposure. Defendants were all entities with citizenship outside of Nevada with the exception of three affiliated defendants. After the local defendants obtained summary judgment from the state court, the remaining diverse defendants removed the case to federal court. Because of the voluntary/involuntary dismissal rule, and the fact that the state court order dismissing the case by itself could not make the case removable, the federal court was “in the interesting position of being asked to determine whether the claims which were already dismissed by the state court were obviously not viable according to well-settled rules of state law.” Ultimately, the court found that the claims were not fraudulently joined—that the claims presented possibly viable causes against the local defendants—even though the state court had already granted summary judgment on them.

What is most interesting about the opinion is the following baffling statement by the court about fraudulent joinder analysis:

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337 Id. at 826.
338 See id.
340 Id. at 986.
341 Id. at 986–87.
342 Id. at 987.
343 As the court correctly observed that, [b]ecause of the voluntary/involuntary rule, Defendants cannot—and presumably do not attempt to—assert that this case became removable solely by virtue of the state court’s grant of summary judgment in favor of the [nondiverse] Defendants. The grant of summary judgment was not a voluntary act on the part of Plaintiffs and cannot serve as the basis for removal. However, Defendants remain entitled to argue and prove that this case is removable due to the fraudulent joinder of the [nondiverse] Defendants.
344 Id. at 993–94 (citing Ritchey v. Upjohn Drug Co., 139 F.3d 1313, 1318 (9th Cir. 1998)).
345 Id. at 996.
In sum, because the expressed standard for fraudulent joinder is whether there is any possibility that a claim can be stated against the allegedly “sham” defendants, the standard is necessarily similar to that of motions to dismiss, with two exceptions: (1) this Court may pierce the pleadings to make factual determinations, and (2) the Court may not make final determinations with regard to questions of state law that are not well-settled. As it is clear from [Ritchey and McCabe], it is possible to establish liability against an employer of a contractor. Plaintiff’s complaint, therefore, pleads sufficient facts to survive a motion to dismiss. Defendants have not provided this Court with any evidence to “pierce the pleadings” and allow a more detailed analysis of the law as it is relevant to the facts of this case. Though Defendants are entitled to make a showing of facts which indicate a fraudulent joinder, Defendants have not done so.\(^{346}\)

Thus, within the same paragraph, the court in *Knutson* states both that the issue of fraudulent joinder will be treated like a 12(b)(6) motion and that the removing defendants may “pierce the pleadings” and offer evidence that the claims are not viable—a summary judgment scope of review. Indeed, both 12(b)(6) motions and summary judgment motions involve a similar inquiry—is there any possible claim? The primary distinction between the two is that the former is solely a test of the adequacy of the pleading of the claim while the latter involves a test of the factual foundation for a claim sufficient for a rational fact finder to possibly decide in favor of the claimant.\(^{347}\) Therefore, it makes no sense for the court to say that the issue is essentially a 12(b)(6) inquiry that involves the right to offer evidence negating the claim. The problem seems to be that, because the fraudulent joinder general standard is reminiscent of a 12(b)(6) motion—whether the plaintiff presented a claim that is “possible” against the local defendant—even courts that permit evidence to be offered on the issue tend to equate the inquiry with a 12(b)(6) analysis. A more correct description of the analysis the court in *Knutson* actually employed is that it involves a summary judgment-type scope of review—permitting evidence to be offered

\(^{346}\) *Id.* at 995–96 (citations and footnote omitted).

\(^{347}\) *See* BAICKER-MCKEE ET AL., supra note 95, at 310, 813 (explaining that the purpose of Rule 12(b)(6) “is to permit trial courts to terminate lawsuits ‘that are fatally flawed in their legal premises and destined to fail,’” while the competing purpose of summary judgment “is to isolate, and then terminate, claims and defenses that are factually unsupported”).
negating a claim sufficient on its face—but without permitting a
removing defendant to establish fraudulent joinder essentially by
making a “no evidence” type of motion. If so, Knutson is similar to
the Fifth Circuit’s decision in Travis. Unfortunately, Knutson
does not recognize this, and it is not the only district court within
the Ninth Circuit to demonstrate such confusion on this standard.

4. An Emerging Alternative—Rule 11 Proxy

After many decades of courts seemingly coming to grips with the
idea that fraudulent joinder requires no “fraud” and that the words
“are not pejorative but are simply terms designed to meet one of the
mechanical tests of diversity,” some federal judges have come full
circle by beginning to equate the doctrine with at least some
component of bad faith. Perhaps in recognition that neither the
Rule 12(b)(6) nor the Rule 56 proxy is fully up to the task of
supplying an appropriate analysis for fraudulent joinder, some
federal district court judges have engrafted another proxy—a Rule
11 search for bad faith on the part of the plaintiff’s attorney—onto
the fraudulent joinder analysis.

The first case to apply expressly Rule 11 to fraudulent joinder was
Katz v. Costa Armatori, S.P.A., out of the Southern District of
Florida in 1989. That was a case brought by a plaintiff for personal
injuries occurring on a cruise ship when the plaintiff fell, breaking
her arm and who then became dissatisfied with the medical care she
received on board. The plaintiff—a Floridian—sued the diverse
ship’s owner and physician but also joined the owner’s disclosed
agent, Costa Cruises, Inc., which was a New York corporation with
principal place of business in Florida. The Florida state court
ultimately granted summary judgment to the local agent for the

348 See supra text accompanying notes 212–234 (discussing Travis).
656808, at *1, *11 (C.D. Cal. May 12, 2000) (holding that the fraudulent joinder analysis is
“similar to that employed in deciding motions to dismiss under Rule 12(b)(6),” while
simultaneously holding that the “courts may take into account affidavits and other evidence
proffered by the parties to determine whether remand is appropriate” (citing Bedford v. Conn.
139 F.3d 1313, 1319 (9th Cir. 1998)).
Harrell v. Reynolds Metals Co., 599 F. Supp. 966, 967 (N.D. Ala. 1985)).
351 Id. at 1508.
352 Id. at 1509.
353 Id. See generally 28 U.S.C. § 1332(c) (2000) (deeming a corporation to be a “citizen” for
diversity purposes in the state of incorporation, and in the state of it principal place of
business).
owner, and within ten days of this order’s entry, the remaining defendants removed the case to federal court arguing that the agent had been fraudulently joined.\textsuperscript{354} The federal district judge, in ordering remand, began by invoking the voluntary/involuntary dismissal rule for the proposition that the state court’s action was irrelevant to creating federal diversity jurisdiction.\textsuperscript{355} Of course, recognizing that the agent’s fraudulent joinder would permit the removal, the court began an exegesis of the fraudulent joinder analysis, noting the difference of opinions on the topic: “A precise parameter for this ‘fraudulent joinder’ exception has not conclusively been surveyed, and today the court lends its voice to the debate over this exception’s scope.”\textsuperscript{356} The court discussed both the 12(b)(6) and the summary judgment approaches to fraudulent joinder,\textsuperscript{357} dismissing each as flawed: “[T]his court cannot chauvinistically follow these cases. These authorities, as well as the two schools of thought, are plagued with major theoretical problems, whose cure is necessary in order to entirely promote the congressional intent behind removal.”\textsuperscript{358}

The new and improved analysis Katz fashioned for fraudulent joinder was to create a two-step approach. First, the court believed that the state court complaint should be reviewed under a Rule 12(b)(6) standard to determine if a possible claim was stated.\textsuperscript{359} The “second prong”\textsuperscript{360} of the analysis—should the first fail to establish a fraudulent joinder—”is a review of the state court record pursuant to the spirit of Fed. R. Civ. P. 11 . . . [to] determine whether the plaintiff’s attorney has satisfied the ‘continuing duty’ obligation of not maintaining a frivolous suit.”\textsuperscript{361} Taking into account the voluntary/involuntary dismissal rule, the court theorized the legitimacy of this approach: “If the obligation is not satisfied, then the case should be removed. The removal would be tantamount to finding that the plaintiff’s attorney ‘should have’ voluntarily dismissed the action against the nondiverse defendant. Pursuant to

\textsuperscript{354} Katz, 718 F. Supp. at 1509.
\textsuperscript{355} See id. at 1509–10.
\textsuperscript{356} Id. at 1509.
\textsuperscript{357} Id. at 1511–1513.
\textsuperscript{358} Id. at 1513.
\textsuperscript{359} Id. at 1515 (“For the first prong of this analysis, a federal court should utilize the mechanics of Fed. R. Civ. P. 12(b)(6). . . Only if no cause of action is stated can the federal court conclude that the joinder of the nondiverse defendant was fraudulent and, thus, permit removal.”).
\textsuperscript{360} Id.
\textsuperscript{361} Id. (citations and footnote omitted).
the voluntary/involuntary rule, this fictitious dismissal makes the case removable.\footnote{Id. at 1516 (footnotes omitted). In researching for this Article and reading the foregoing portion of the Katz opinion, it dawned upon this author that not a single case discussing, or finding, fraudulent joinder even hinted at the possibility of sanctioning the plaintiff's attorney pursuant to Rule 11 for bringing a claim that could "not possibly" prevail. See generally G. Wayne Merchant, II, \textit{Student Commentary, At What Point Does an Attorney Have a Duty to Dismiss a Lawsuit That May Be a Meritless Claim?}, 27 \textit{J. LEGAL PROF.} 233, 237 (2003) ("Whether the court is applying Rule 11, Model Rule 3.1, or a similarly drafted state rule, the message is the same: lawyers have duties to the judicial system that are just as important as those duties owed to the client, and although the courts do not wish to hamper creative litigation, they have a legitimate interest in barring frivolous suits.").}

Because this jurisdictional two-step consists of both pleadings-only and pierce-the-pleadings components, the \textit{Katz} court believed that there were "[w]ell-reasoned precedents [to] support both prongs of [the] test."\footnote{\textit{Katz}, 718 F. Supp. at 1516.} Applying this new two-prong test for fraudulent joinder, the district court found that (a) the state court complaint did state an adequate cause of action against the shipowner's agent under state law,\footnote{Id. at 1517.} and (b) "the plaintiff's attorney satisfied the spirit of [Rule 11] in pursuing the cause of action against Costa Cruises."\footnote{Id.} On the second prong, even though the state court had granted the nondiverse agent summary judgment "because the plaintiff could not overcome the disclosed principal argument with competent evidence,"\footnote{Id.} the district court believed that the plaintiff's arguments against Costa Cruises were made in a "good faith [belief] that the question whether the ticket adequately disclosed the principal [owner] was an issue of fact."\footnote{Id.} The court never pointed to any evidence supporting its conclusion of good faith, instead simply concluding that the claim was "not frivolous" and, therefore, there was no fraudulent joinder.\footnote{Id.} One might surmise that what \textit{Katz} really added to fraudulent joinder analysis was simply the possibility that, even under a summary judgment scope of review, a court might find that no fraudulent joinder occurred even though the nondiverse defendant was entitled to summary dismissal so long as the court believed the claim was made in good faith. How a court should analyze good faith for the claim presumably should be made utilizing Rule 11 precedents.

A handful of other district courts have also utilized Rule 11 in analyzing fraudulent joinder, with a slight twist. In \textit{Anderson v.}
Allstate Life Insurance Co., the district court analyzed fraudulent joinder by noting the Eleventh Circuit's summary judgment scope of review, but then it added a Rule 11 standard to the inquiry: "That standard is whether the plaintiffs have made 'some showing that the allegations and other factual contentions have evidentiary support or... are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.'" The court expressly referred to Rule 11, noting that no discovery had yet occurred at the time of removal. In Anderson, the court refused remand, observing that the evidence offered in support of the claims was "simply not enough, without allegations and evidentiary support, or likely evidentiary support following a reasonable opportunity for further investigation or discovery..." Two other district court judges in the Eleventh Circuit—both sitting in Alabama—also utilize the Rule 11 standard in cases where fraudulent joinder is being analyzed early in the case before the plaintiff has the chance to obtain full discovery in support of its claims:

The court believes that, because a fraudulent-joinder charge based on lack of evidence raises a concern already addressed by Rule 11—that is, that a plaintiff may have good reason to believe that a fact is true but may need discovery to confirm the fact—Rule 11's standard should apply to such a charge. Therefore, to block a fraudulent-joinder charge based on lack of evidence, a plaintiff who has not been able to engage in full discovery must be able to provide some showing that her claim against the resident defendant has evidentiary support or is likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.

370 Id. at *8 (internal quotation marks omitted) (quoting Wright v. Metro. Life Ins. Co., 74 F. Supp. 2d 1150, 1153 (N.D. Ala. 1999)).
371 Id.
372 Id. at *9.
373 Sellers v. Foremost Ins. Co., 924 F. Supp. 1116, 1119 (M.D. Ala. 1996) (Thompson, C.J.); see also Ruffin v. Cong. Life Ins. Co., No. CA 00-0124-C, 2000 WL 718813, at *15-*19 (S.D. Ala. May 11, 2000) (applying Rule 11 test to a case "where there has been no discovery as of the time of removal"); Wright v. Metro. Life Ins. Co., 74 F. Supp. 2d 1150, 1153–54 (N.D. Ala. 1999) ("[T]o block a fraudulent-joinder charge... a plaintiff who has not been able to engage in full discovery must be able to provide some showing that her claim against the resident defendant has evidentiary support... or is likely to have evidentiary support after a reasonable opportunity for further investigation or discovery."); Clay v. Brown & Williamson Tobacco Corp., 77 F. Supp. 2d 1220, 1224 (M.D. Ala. 1999) (citing Sellers, 924 F. Supp.
In effect, what these other cases have done is different from the two-pronged inquiry of *Katz*. Rather than utilize Rule 11 as the second prong of a two-step analysis that starts with 12(b)(6) review, these other courts utilize Rule 11 as an alternative to the typical Rule 56 review in the Eleventh Circuit in instances when summary judgment review seems inappropriate because the plaintiff has not yet had an opportunity to discover facts that support the questionable claim. These courts use a Rule 11 inquiry—asking whether it appears likely that the plaintiff may discover helpful facts during discovery supporting the claim—as a proxy for determining whether the accusation against the local defendant involved a fraudulent joinder. Thus, there are examples of courts utilizing Rule 11 in conjunction with Rule 12(b)(6) or as an alternative to Rule 56.\(^\text{374}\)

### IV. A SUGGESTED NEW PARADIGM

All prevailing proxy methods, whether taken alone or used in combination with another, fail to serve significantly any bona fide purpose underlying federal court diversity jurisdiction. Moreover, the voluntary/involuntary rule’s primary accomplishment is the federal courts’ trampling upon the toes of federalism through the forced proxy-led adjudication of state law claims. The Supreme Court or Congress ought to eliminate the voluntary/involuntary rule and simply let state courts do what they do best—adjudicate purely state law claims involving nondiverse citizens. To the extent this state court pretrial adjudication eliminates the local defendant from the controversy prior to a trial and within the time-frames established by Congress, it is at this point only that the case should

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\(^{1118–19}\) (“Rule 11 recognizes that a Plaintiff may need additional discovery to establish an evidentiary basis for an allegation.”). These cases seem to shift the burden from the defendant to affirmatively negate the claim against the local defendant to the plaintiff to offer evidence supporting the claim, which the Fifth Circuit found to be an inappropriate practice in the fraudulent joinder context. *See Travis v. Irby*, 326 F.3d 644, 649 (5th Cir. 2003) (imposing the “heavy” burden on the removing party to show fraudulent joinder).

\(^{374}\) Outside of the Eleventh Circuit, research has revealed one other district court judge who has seen fit to utilize a Rule 11 prong in the fraudulent joinder inquiry. *See Davis v. Prentiss Props. Ltd.*, 66 F. Supp. 2d 1112, 1113–14 (C.D. Cal. 1999) (suggesting that courts “should bear in mind the standards of Federal Rule of Civil Procedure 11” in dealing with fraudulent joinder, and then reasoning that “[t]he problem with the fraudulent joinder inquiry is that the Court must consider the validity of a claim that defeats diversity, a claim over which the Court has no jurisdiction”). The district court in that case recognized that Rule 11 might help courts “walk a very fine line,” supplying a blended analysis by adding “what [the court] hopes will be a helpful inquiry when considering fraudulent joinder.” *Id.* at 1114, 1116.
become removable to federal court for any remaining adjudication involving the nonlocal, diverse defendant(s). Under this proposed new model for diversity removal jurisdiction, there would be no need to recognize the “no possibility” variant of fraudulent joinder, and the lower federal courts would no longer have to worry about trying to come up with putting the analytical flesh on an empty doctrine.

A. The Failings of the Proxies

From the preceding rather exhaustive review of the circuit and district court opinions across the federal system, one might perceive the lack of any truly emerging or analytically “correct” approach. To the extent a particular circuit or district court has adopted a model of fraudulent joinder analysis, that model relies upon one of three proxies—or substitutes—for finding fraudulent joinder. Each of these proxies is flawed and fails to implement any underlying purpose behind federal diversity jurisdiction. One thoughtful federal district court judge concluded upon reviewing both the cases supporting a summary judgment approach and those cases adhering to a pleadings-only review: “Nonetheless, this court cannot chauvinistically follow these cases. These authorities, as well as the two schools of thought, are plagued with major theoretical problems, whose cure is necessary in order to entirely promote the congressional intent behind removal.”

The Rule 12(b)(6) analytical model was the first model employed by the intermediate and lower federal courts, arguably in conformity with some of the early Supreme Court precedents. While the 12(b)(6) approach offers the appeal of simplicity and speed—as neither any discovery nor any probing of the actual facts is needed—it does not offer much of a screening mechanism to avoid fraudulent joinder. The rather obvious weakness with a court applying a general “no possibility” standard with an inquiry limited to the face of the plaintiff’s state court complaint is that it is easy for a plaintiff to frustrate the fraudulent joinder inquiry. If the court can only look to the face of the complaint, fatal deficiencies with the claim that will make it nearly impossible for the claim to survive early summary judgment or directed verdict are overlooked. In other words:

375 Katz v. Costa Armatori, S.P.A., 718 F. Supp. 1508, 1513 (S.D. Fla. 1989). Katz was the first district court to propose, and apply, an alternative using both Rule 12(b)(6) and Rule 11 as proxies. See supra text accompanying notes 351–68.
[T]he problem with the “pleadings only” approach reflects its underinclusiveness. The limited inquiry under the “pleadings only” approach simply fails to discover many instances of “bad faith” fraudulent joinder. As the court warned in *Quinn v. Post*, a complaint may state an adequate claim on its face that is completely unrelated to factual reality. Because a “pleadings only” court does not look beyond the complaint when fraudulent joinder is alleged, a strategic plaintiff’s lawyer seeking to stay in state court need only devise a plausible cause of action for the complaint. He need not fear that the facts underlying the cause of action will be investigated.\(^{376}\)

As one district court put it, this “limited approach”\(^{377}\) to analyzing fraudulent joinder leads to a “frustrat[ion] [of] federal jurisdiction.”\(^{378}\)

When examining the petition for removal, the federal court that adheres to the limited review would remand, even though the action against the nondiverse party was essentially a sham. Without this sham party, diversity jurisdiction in fact exists. The order of remand, therefore, has the effect of frustrating federal jurisdiction, for the federal courts should not be completely prevented “from protecting the litigant’s right to diversity jurisdiction when the controversy really is between parties on one side who are all from different states than those on the other side.”\(^{379}\)

The Supreme Court admonished long ago, “Federal courts should not sanction devices intended to prevent a removal to a Federal court where one has that right . . . .”\(^{380}\) There can be little doubt that plaintiffs’ attorneys employ the device of joining local defendants solely to deprive the diverse, target defendant of its right to remove the case and obtain the federal forum contemplated by Article III of the Constitution and by Congress in enacting § 1332. Any experienced trial lawyer is familiar with this phenomenon, and the Association of Trial Lawyers of America, by way of example, fairly candidly exhorts its members to use this

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\(^{376}\) Archibald, supra note 26, at 1399 (footnotes omitted).

\(^{377}\) *Katz*, 718 F. Supp. at 1514.

\(^{378}\) Id.

\(^{379}\) Id. (quoting Lowell Staats Mining Co. v. Philadelphia Elec. Co., 651 F. Supp. 1364, 1365 (D. Colo. 1987)).

\(^{380}\) *Wecker v. Nat’l Enameling & Stamping Co.*, 204 U.S. 176, 185, 186 (1907) (permitting removal based upon affidavit proof of nonliability on the part of the local defendant).
strategy, taking advantage of this ineffective analytical screening device.\textsuperscript{381}

Further, the other problem with the 12(b)(6) analysis being applied to fraudulent joinder is that it is a proxy having nothing to do with the purposes behind federal diversity jurisdiction. Rule 12(b)(6) is simply a tool intended to determine which claims should not be permitted to proceed to discovery and other facets of pretrial litigation.\textsuperscript{382} Federal diversity jurisdiction, on the other hand, is designed primarily to provide out-of-state litigants the opportunity for a fair trial. As one legal historian noted recently, “the national court system was [created] in large part because state courts could not be trusted to handle [nonlocal] creditors’ suits against debtors.”\textsuperscript{383} Another scholar has echoed this review of legal history:

Supporters of a strong federal judiciary . . . specifically supported the inclusion of diversity jurisdiction in Article III, as a means of addressing the problem of local prejudice. Madison, for example, argued that “a strong prejudice may arise, in some states, against the citizens of others, who may have claims against them.” Hamilton similarly argued that cases between citizens of different states should be assigned to a federal court “likely to be impartial between the different states and their citizens, and which, owing its official existence to the union, will never be likely to feel any bias inauspicious to the principles on which it is founded.” Nor was it irrational for participants in pre-ratification debates to entertain fears regarding either the reliability or impartiality of state courts. Indeed, under the Articles of Confederation, some state courts simply declined to enforce federal admiralty decisions. State courts, particularly those in the South, also were notoriously hostile to out-of-state creditors.\textsuperscript{384}

Chief Justice Marshall reiterated long ago that the Constitution is predicated upon at least an “apprehension” of unfairness in the state courts toward nonlocal litigants:

However true the fact may be, that the tribunals of the

\textsuperscript{381} See supra text accompanying notes 139–42.
\textsuperscript{382} See supra text accompanying notes 148–53.
\textsuperscript{383} Wythe Holt, “To Establish Justice”: Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts, 1989 DUKE L.J. 1421, 1518 (1989) (noting that one goal of the founding fathers was to create a “federal judiciary [capable of serving as] the true guardian of a nationalizing and creditor-conscious Constitution”).
\textsuperscript{384} Haiber, supra note 72, at 614–15 (footnotes omitted).
states will administer justice as impartially as those of the nation, to parties of every description, it is not less true that the constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states.  

Similarly, the Supreme Court has stated that the purpose behind diversity jurisdiction is to make the people think and feel, though residing in different States of the Union, that their relations to each other were protected by the strictest justice, administered in courts independent of all local control or connection with the subject-matter of the controversy between the parties to a suit.

The implicit belief behind the complete diversity requirement of § 1332 is that having at least some degree of common citizenship between the adverse sides of a case will offer protection from bias. As the Supreme Court stated in its most recent explanation of the purposes behind diversity jurisdiction and the complete diversity requirement in *Exxon Mobil Corp. v. Allapattah Services, Inc.*:

The Court, nonetheless, has adhered to the complete diversity rule in light of the purpose of the diversity requirement, which is to provide a federal forum for important disputes where state courts might favor, or be perceived as favoring, home-state litigants. The presence of parties from the same State on both sides of a case dispels this concern, eliminating a principal reason for conferring § 1332 jurisdiction over any of the claims in the action.

Surely such protection underlying the purposes of diversity jurisdiction is virtually eliminated by a standard that permits a plaintiff to simply plead a claim that sounds meritorious when such claim is unlikely to be present by the time of trial because it is factually unfounded. By the time of trial, the nonlocal defendant facing the local judge and jury doubtless feels little solace in its

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388 Id. at 2617–18. As the Supreme Court also more succinctly stated this purpose: “[T]he presence of nondiverse parties on both sides of a lawsuit eliminates the justification for providing a federal forum.” Id. at 2622.
knowledge that, at least at one early stage of the case, it had the
company of a local defendant. If this was the cause for
“apprehension” in the eighteenth and nineteenth centuries, surely
the problem is greater today with the extension of “minimum
contacts” personal jurisdiction,\footnote{See Int’l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945); see also McGee v. Int’l Life
Ins. Co., 355 U.S. 220, 222 (1957).} the technological ease of travel
and conducting interstate commerce, and the increasing amounts at
stake in modern litigation. And because the vast majority of cases
settle rather than go to trial, it is the apprehension itself that
becomes truth in the form of settlement leverage.\footnote{See supra note 3 and accompanying text.} Because the
12(b)(6) standard is not linked whatsoever with identifying claims
that will still be present at the time of trial, it does not implement
faithfully a fraudulent joinder standard that seeks to identify claims
having “no possibility” of success. Cases where courts have
remanded suits to state court using this standard, despite the fact
that it was certain that the diverse defendant would go to trial
alone, illustrate this weakness clearly.\footnote{See, e.g., Boyer v. Snap-On Tools Corp., 913 F.2d 108, 113 (3d Cir. 1990) (reversing
district court which had used undisputed facts to find local defendant had good “release”
defense and requiring district court to instead merely analyze claim based upon plaintiff’s
pleadings regardless of the actual facts); Harrell v. Reynolds Metals Co., 599 F. Supp. 966,
968–70 (N.D. Ala. 1985) (remanding case to state court finding that Plaintiff did not
fraudulently join the individual nondiverse defendants even though Plaintiff’s claims against
such defendants “may well prove to be without merit.”); Saylor v. Gen. Motors Corp., 416 F.
Supp. 1173, 1174, 1175–76 (E.D. Ky. 1976) (remanding case to state court utilizing 12(b)(6)
standard despite fact that state court had granted nondiverse defendant’s motion for
summary judgment).} As the 12(b)(6) standard
does nothing to ensure that the diverse defendant receives any of
the protections of the federal forum that Congress created, it is ill-
suited to be adopted as a proxy in any fraudulent joinder analysis.

While the 12(b)(6) standard is certainly underinclusive, the
summary judgment proxy suffers from its own significant problems.
In terms of this standard’s critics, some suggest that it is
overinclusive by casting as fraudulently joined any defendant who
can succeed on summary judgment.\footnote{See, e.g., Archibald, supra note 26, at 1399 (“[T]he problems with ‘piercing the pleadings’
reflect its overinclusiveness . . . .”).} A related indictment is that
an approach that pierces the pleadings may “eviscerate the voluntary/involuntary rule.”\footnote{Katz v. Costa Armatori, S.P.A., 718 F. Supp. 1508, 1513–14 (S.D. Fla. 1989).} The Katz court continued:

Every time a state court issues summary judgment in favor
of a nondiverse defendant, the plaintiff in fact can never
prove the cause of action against that defendant. Accordingly, in an action with only one remaining diverse defendant, that defendant could automatically remove the action. This conclusion necessarily renders the voluntary/involuntary distinction meaningless, for an involuntary dismissal via a state court summary judgment makes the case as removable as when the plaintiff voluntarily dismisses the nondiverse defendant.\textsuperscript{394}

To the extent that the criticism of the summary judgment model is based upon its harm to the voluntary/involuntary rule, of course, one must ask whether that rule is worth saving. As discussed above, the answer is no.\textsuperscript{395} Further, one could attack the “pleadings only” standard using the same logic; every time a state court were to dismiss a claim against a nondiverse defendant on the pleadings (using a state court equivalent to 12(b)(6)), the remaining diverse defendant could presumably remove the case despite the voluntary/involuntary rule.

Another criticism directed at a Rule 56 analysis is that it is inconsistent with a general rule of determining subject matter jurisdiction from the plaintiff's pleading alone, as with the well-pleaded complaint doctrine for federal question jurisdiction under 28 U.S.C. § 1331. As the \textit{Katz} court explained:

\begin{quote}
The major problem with the courts supporting a review of the entire state court record[—the Rule 56 standard—]is that their methodology differs greatly from that used to determine removal in the federal question area. . . . Essentially, whether a claim contained in a state court complaint “arises under” federal law is governed by whether the plaintiffs [sic] “well-pleaded complaint” raises federal issues. The theory supporting this rule is that the plaintiff is the master of the complaint and may avoid federal jurisdiction by relying exclusively upon state law. . . .

The need for the difference between this limited review for federal question removal and an expanded analysis for diversity removal is mysterious, for the essential questions presented in both instances are similar.\textsuperscript{396}
\end{quote}

The two premises behind this criticism are simply wrong. First, this argument assumes that the “essential questions” behind federal

\textsuperscript{394} Id. at 1514.

\textsuperscript{395} See \textit{supra} Part II.

\textsuperscript{396} \textit{Katz}, 718 F. Supp. at 1513 (citations omitted).
question and diversity jurisdiction “are similar.” In fact, federal question and diversity jurisdiction serve very different purposes, with the former being predicated upon uniform interpretation of federal laws from the federal government’s perspective\(^{397}\) and the latter being concerned with fair adjudication of the rights of nonlocal litigants.\(^{398}\) Determinations of federal question jurisdiction consist of characterizing the nature of the claims raised by the plaintiff,\(^{399}\) while diversity determinations consist primarily of finding the citizenship of the litigants—very different matters indeed. The second mistake in this criticism is the suggestion that courts do not pierce the pleadings when trying to determine if diversity jurisdiction exists. In fact, there is a long history of federal courts considering matters beyond the pleadings in order to make final determinations of the parties’ citizenship for purposes of analyzing whether subject matter jurisdiction lies under § 1332.\(^{400}\) Thus, none of the primary criticisms leveled at the summary judgment proxy are well reasoned.

While the above criticisms have no merit, there is a truly significant drawback with the summary judgment model of analysis for fraudulent joinder; its use is tantamount to authorizing federal courts to adjudicate the merits of state law claims between nondiverse citizens. For example, when a defendant removes a state law action in the Fifth Circuit invoking fraudulent joinder, in order to determine its jurisdiction, the federal court will pierce the pleadings, consider the evidence for and against the claim, and determine—in effect—whether a trial is necessary on that claim. If the claim cannot survive the summary judgment standard—whether a rational jury might possibly decide for the plaintiff based upon the evidence offered by the parties—the court will deny the motion to remand, retain the case, and grant a summary judgment in favor of the nondiverse defendant. The court has, in effect,

\(^{397}\) See Christopher A. Cotropia, Counterclaims, the Well-Pleaded Complaint, and Federal Jurisdiction, 33 Hofstra L. Rev. 1, 37–38 (2004) (“The original purpose behind federal question jurisdiction is twofold: to address the fear of state hostility and bias against federal laws and the need for uniformity in the application and interpretation of federal law. While concerns of state hostility against federal law may now be unwarranted, concerns for uniformity in the treatment of federal law still ring true.” (footnotes omitted)).

\(^{398}\) See supra note 381 and accompanying text.

\(^{399}\) See Merrell Dow Pharms. Inc. v. Thompson, 478 U.S. 804, 808 (1986); Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149, 152 (1908).

adjudicated the merits of the state law claim between nondiverse citizens and entered a binding judgment on that claim.

While the defendants in such an example are no doubt enthusiastic about what has happened, and perhaps the plaintiff has no right to complain, our legal system might be less pleased. Such conduct encroaches rather heartily upon the careful balancing act embodied by principles of federalism which dictate that it is better to let state courts adjudicate such claims. As one scholar noted recently, “federalism is about the appropriate allocation of power between the federal and state governments.” While other problems may be associated with the Rule 56 model for fraudulent joinder, this federalism concern surely carries the most weight.

If neither the Rule 12(b)(6) nor the Rule 56 models are free of significant problems, one might wish to consider the Rule 11 alternative being used by some of the district judges in the Eleventh Circuit. The Rule 11 proxy, however, offers only false illusions of principle. Rather than truly create a new analysis for fraudulent joinder more faithful to the purposes for federal diversity jurisdiction, the Katz court, for example, merely combined the two prevailing “schools of thought” by first using a 12(b)(6) approach and then piercing the pleadings to look for an evidentiary foundation for the claim. Worse than either standard, in the final analysis, the Rule 11 standard involves a possibly arbitrary “guess”

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401 Erwin Chemerinsky, Federalism Not as Limits, But as Empowerment, 45 U. Kan. L. Rev. 1219, 1219 (1997). Professor Chemerinsky noted that, beginning with the Supreme Court’s decision in Erie Railroad Co. v. Tomkins, the Supreme Court during the twentieth century has used federalism as a basis for restricting federal judicial power:

Indeed, in numerous decisions over the past thirty years, the Court has used federalism to limit federal judicial power. For example, the Court has ruled that the Eleventh Amendment broadly bars suits against state governments in federal courts. Similarly, the Court has invoked concerns about state sovereignty and autonomy as justifications for restricting the scope of federal habeas corpus review. In Younger v. Harris, the Court proclaimed that “Our Federalism,” and its assumption of comity between federal and state courts, prevented federal courts from interfering with pending state court proceedings. Indeed, in Rizzo v. Goode, the Supreme Court held that considerations of federalism limited the ability of federal courts to hear allegations of abusive practices by a local police department.

Id. at 1223–24 (footnotes omitted).

402 For example, one difficult issue that exists with this standard concerns the plaintiff’s access to discovery in federal court before having to offer its evidentiary support for the claim against the local defendant. While courts using the summary judgment proxy have shown some sensitivity to the plaintiff’s plight, see, e.g., Travis v. Irby, 326 F.3d 644, 650 (5th Cir. 2003) (noting, in rejection of defendant’s charge of fraudulent joinder, that plaintiff cited a need for additional discovery to find evidentiary support for its claims), it is also true that most federal courts will not want to linger over the issue of their subject matter jurisdiction. This issue would not exist if the case was left before the state court unless and until the nondiverse defendant establishes a right to be dismissed.
by the district court about the plaintiff’s attorney’s good faith or the likelihood that further discovery might yield some evidentiary basis for the questionable claims. If that were not bad enough, such an approach seems to clearly contradict the Supreme Court’s pronouncement long ago in *Mecom v. Fitzsimmons Drilling Co.* that the “motive of a plaintiff in joining defendants is immaterial . . . .”

The primary problem with all of the proxies, is that they do not resort to the purposes behind diversity jurisdiction in trying to create a formula for identifying instances of fraudulent joinder.

B. The Lack of Justification for the Voluntary/Involuntary Rule

Similarly, and perhaps not coincidentally, the voluntary/involuntary dismissal rule itself is fundamentally flawed in that it fails to serve any purpose associated with federal diversity jurisdiction, and worse, it necessarily leads to an inquiry that infringes on the sovereignty of the states and their courts.

The only rationale the Supreme Court has offered for its creation of the voluntary/involuntary rule is the “obvious principle . . . [that] the plaintiff may by the allegations of his complaint determine the status with respect to removability of a case . . . .” There may be room for recognition of such a principle of plaintiff autonomy over the forum, through the allegations of her complaint, when the issue involves federal question jurisdiction and the inquiry is focused upon the nature of the claim. However, the whole logic behind removal jurisdiction based upon diversity of citizenship is that the plaintiff’s autonomy must yield to the protection of the diverse defendant’s right to a fair and impartial forum. Because the voluntary/involuntary rule is a mere corollary to the complete diversity requirement, its continued vitality must be weighed in terms of its utility to serving the principles behind diversity
jurisdiction. As another scholar remarked regarding judicial interpretation of removal procedures, “[t]he root of the problem appears to lie in collective amnesia regarding the origin and purpose of removal jurisdiction.”

The Supreme Court adopted the voluntary/involuntary rule without demonstrating any concern for upholding the principles behind diversity jurisdiction. It should not be surprising, therefore, to find lower courts describing the rule as “antiquated” and “arbitrary.”

The weakness of the Supreme Court’s only stated justification for the voluntary/involuntary rule fuels speculation that the Court was guided not by principles of diversity jurisdiction, but instead by a concern that the growing federal court docket must be stemmed by artificially crafted rules engrafted onto the removal statutes in order to limit diversity removals. One scholar has offered the following critique of such court-created devices to curtail removal rights:

When we recall the true nature and purpose of removal, judicial hostility toward the use of this device becomes difficult to justify. Removal does not deprive plaintiffs of any “right,” but merely affords defendants an equal opportunity to litigate in federal court. Removal does not affront fundamental principles of federalism. On the contrary, it forms an integral component of the original federal scheme created by the Framers. Additionally, removal does not expand federal jurisdiction, but merely allows cases involving federal jurisdiction to be heard in a federal court. Therefore, rather than treating removal as the redheaded stepchild of federal jurisdiction, federal courts should interpret and apply removal statutes in a strictly neutral manner. . . . Such a judicial change of heart would help to reconcile the practice of removal with its underlying purpose. A less hostile judicial view of removal could also arrest, and might even begin to roll back, the proliferation of judicially created procedural obstacles to removal. This, in turn, would reduce abusive procedural gamesmanship and the cynicism that goes with it.

As “obnoxious [a] form of federal jurisdiction” as diversity

407 Haiber, supra note 72, at 610–11.
409 Haiber, supra note 72, at 611–12 (footnotes omitted).
410 Id. at 611.
removals may seem to some courts, both the Framers of the Constitution and Congress believed that they were important to preserve and promote. As such, any “artificial procedural barriers to removal” that interfere with the exercise of such removal rights and frustrate the purposes behind diversity removal jurisdiction should be examined for possible elimination.

Plaintiff autonomy is not some supreme ideal to strive toward at the expense of fundamental rights recognized by the Constitution. Rather, the Supreme Court should recognize, as it once did, the defendant’s equal right to obtain a federal forum when sued in a remote local court by a citizen of that state. Nowhere is diversity jurisdiction more important than in such cases when removal is the defendant’s only path to a perceived fair adjudication. One exceptional recent judicial statement demonstrates that this notion is not entirely dead among the federal judiciary: “Litigation is not intended to be a game of chess. Congress did not intend plaintiffs, through gimmicks and artful maneuvering used in connection with the one year bar to removal, to straightjacket or deprive nonresident defendants of their legitimate entitlements to removal.”

Surely the perceptions of the forum are just as important in the twenty-first century, with the modern advances in travel, communications, and interstate commerce making suits between citizens of different states much more likely to occur, as they were in the eighteenth century when Congress enacted the first removal statutes.

In recognition of these failures in the original justification for the voluntary/involuntary rule, there has emerged a recent trend of the lower federal courts to find an alternative rationale rooted in efficiency: “Furthermore, one of the reasons underlying the voluntary/involuntary distinction is the practical one of allowing the state court to resolve finally the status of the non-diverse defendant . . . .” Another court offered a similar view, with the twist of considering the finality of a state court determination as a “fundamental right” of the state court plaintiff: “The expedient of removal to a federal court cannot be allowed to cut off such a fundamental right of judicial review. It goes without saying that if the [state] Supreme Court . . . should ultimately enter an order setting aside [the lower court ruling] . . . there would be no complete

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411 Id.
diversity in [the] case.\textsuperscript{414}

This rationale suffers in several respects. First, it is merely a post hac attempt to rationalize an ill-conceived rule, as the Supreme Court never embraced this principle when creating the rule.\textsuperscript{415} Second, efficiency is hardly a prize to be valued at the expense of a fair tribunal of constitutional proportions. Third, the premise of the efficiency rationale wrongfully presumes that most interlocutory summary judgment dismissals in the state courts are subject to immediate appeal. However, as in the federal system, most states do not permit appeals from interlocutory summary judgments until a “final judgment” has been rendered in the case.\textsuperscript{416} Finally, this rationale also is being used to support a rule that, in operation, results in the wholesale loss of any state court adjudication of the claims involving nondiverse litigants. For example, if the voluntary/involuntary rule were suspended, litigants could wait and permit the state court where the case is first filed to rule on the summary judgment motion of the local defendant and then, if such motion were granted, remove the remainder of the case to federal court. At least in this instance the local court would make the preliminary ruling on the merits of the local dispute.

In contrast, by virtue of the voluntary/involuntary rule and the doctrine of fraudulent joinder, the diverse defendant must now generally remove the newly filed lawsuit within the first thirty days and ask the federal trial court to rule that the claim against the


\textsuperscript{415} As one district judge in Pennsylvania noted in a well-reasoned opinion:

What emerges from an examination of the Supreme Court cases on the voluntary-involuntary rule is the conclusion that the rule is not based upon an appealability/finality rationale but upon a policy favoring the plaintiff’s “power to determine the removability of his case.” It could perhaps be argued that the policy is antiquated or arbitrary, but the Supreme Court has never expressed dissatisfaction with the only justification it ever offered for the voluntary-involuntary rule.

Abels v. State Farm Fire & Cas. Co., 694 F. Supp. 140, 145 (W.D. Pa. 1988); See also, e.g., Jenkins v. Nat’l Union Fire Ins. Co., 650 F. Supp. 609, 614 (N.D. Ga. 1986) (“Though most of the Supreme Court cases discussing the voluntary-involuntary rule contain no discussion of the rule’s rationale, the few cases that do contain such a discussion point to a policy much different from the appealability/finality rationale.”); Strasser v. KLM Royal Dutch Airlines, 631 F. Supp. 1254, 1258 (C.D. Cal. 1986) (“[F]inality considerations fail to satisfactorily explain the voluntary/involuntary rule because so long as the state appellate process is complete, it makes no functional difference whether dismissal was secured voluntarily or involuntarily.”).

\textsuperscript{416} See Jack H. Friedenthal et al., Civil Procedure § 13.1, at 618 (4th ed. 2005) (“In most jurisdictions today the question of when an appeal can be taken is governed by the so-called ‘final-judgment rule.’ As the name suggests, under this rule appeals are allowed only after all the issues involved in a particular lawsuit have been finally determined by the trial court.” (footnote omitted)).
local defendant has “no possibility” of success. In this instance, there is never any state court review of the nondiverse claim unless and until the federal court has remanded the case to the state court. Accordingly, the eradication of the voluntary/involuntary rule would actually permit greater state court involvement at the outset in the adjudication of the local dispute.

The voluntary/involuntary rule is not just antiquated, but lacking any principled bases. It acts as merely another court-created doctrine designed to limit the ability of litigants to utilize the services of the federal tribunals, trampling on principles of federalism.

C. A New Paradigm

In considering the lack of a compelling justification for the Supreme Court’s adoption of a voluntary/involuntary rule at the inception of the twentieth century, one can at least surmise that it reflects less sound doctrine, and more emerging bias against federal court diversity jurisdiction, bias which itself is not appropriate:

Reviewing the history of federal removal practice reveals a few items that might surprise many federal litigators. First, for at least a century after the ratification of the Constitution, statutes governing removal procedure were construed liberally to avoid a remand based on a procedural defect. Second, during this same period, federal courts viewed a defendant’s removal right as constitutionally based and certainly no less important than a plaintiff’s “right” to select the initial forum. Third, judicial hostility toward removal appears to have developed, at least in part, as a byproduct of a more general hostility to diversity jurisdiction.417

The federal courts’ doctrine of fraudulent joinder, particularly in circuits where a piercing of the pleadings is permitted, amounts to a rather aggressive assault on principles of federalism. That is, the doctrine allows federal courts to take it upon themselves to engage in a merits-based adjudication of the purely state law claims of nondiverse citizens of the forum state. Of course, sometimes one principle must yield to another, directly inconsistent principle.

But this is not the case with the doctrine of fraudulent joinder. Rather, it is only the voluntary/involuntary rule—premised solely

417 Haiber, supra note 72, at 612–13 (footnotes omitted).
Upon the myth of plaintiff autonomy or the rather pedestrian and hypothetical concept of efficiency—that requires this antifederalism inquiry into the merits of state law claims. Moreover, Congress has never legislatively approved the concept of fraudulent joinder. Interestingly, Congress has enacted legislation on the opposite side of the jurisdictional coin—where fraud or collusion is used to create federal court jurisdiction. This congressional ban on falsely creating jurisdiction does not apply where a plaintiff in bad faith alleges a claim against a nonresident solely to defeat federal court jurisdiction. In this vacuum, the federal courts have come up with a doctrine that is unwieldy, is unprincipled, and in practice, deprives many deserving litigants of a federal forum because findings of fraudulent joinder are so rare.

A much better paradigm would hold that any pretrial dismissal by a state court of a claim against a local defendant can create complete diversity needed for removal. The dismissal should necessarily involve a pretrial dismissal because it would be nonsensical to interrupt a pending state court trial when the state court grants a directed verdict to the local defendant and, further, so long as the diverse defendant did not have to begin the trial on its own, one can assume that the risk of biased proceedings is too remote to justify federal jurisdiction. In addition, federal courts should turn the voluntary/involuntary rule on its head and instead require the state court to have dismissed the local defendant in order to find that “no possible” claim exists against that defendant. This change would involve the state courts in the adjudication of pure state claims—those involving state law and nondiverse litigants—while permitting diversity jurisdiction where the only viable claims involve diverse litigants. Is such a change possible for the Supreme Court, or did Congress codify the

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419 See 14 Charles Alan Wright et al., Federal Practice & Procedure § 3641, at 152 (3d ed. 1998) (“Section 1359 of Title 28 ‘expresses a policy against the creation of federal jurisdiction and not against its avoidance.’” (quoting McSparran v. Weist, 402 F.2d 867, 875 (3d Cir. 1968))).

420 While adoption of such a new paradigm-shift would, in effect, nullify any need for the “sham defendant” variety of fraudulent joinder, one might still have occasion to attempt a fraudulent-joinder based removal where, for example, there is collusion between the plaintiff and the local defendant. In such instances, the local defendant might have no motive for seeking a summary dismissal of the plaintiff’s claim, relying instead on an agreement by the plaintiff to simply dismiss the local defendant prior to trial. This scenario, where the plaintiff has no intention to prosecute the local defendant, is already recognized as a separate variety of fraudulent joinder, see supra note 32, and would likely need to remain a possible option.
voluntary/involuntary rule with its 1949 revision to § 1446(b)?
Some courts have held that the 1949 revision to the removal statutes—to expressly permit cases to be removed within thirty days of becoming removable due to some post-complaint event—did not intend to disrupt prior case law concerning the voluntary/involuntary rule, but these cases do not hold that Congress actually codified the rule. Indeed, there is nothing in the language of the statute to suggest any intent to require federal courts to continue utilizing the voluntary/involuntary rule—the bare language of the statute at least hinting at the inverse.

If Congress needs to act to restore principles to the arena of fraudulent joinder, it should bear in mind that the primary aim of any revision to the removal statutes “should be to evaluate the rationale for various rules that presently restrict the right of removal and to incorporate the deserving ones into the express text of section 1446.”

The Seventh Circuit showed much insight when it remarked that if federal courts were to just use the state court dismissal of the nondiverse defendant as a basis for finding fraudulent joinder of that party, this would “swallow up the voluntary/involuntary rule.” This is exactly what needs to happen. Indeed, the Eleventh Circuit took a step in this direction in one case when it cited as a basis for fraudulent joinder the fact that the state court had dismissed the claim against the local defendant on the merits. Such deference to a state court adjudication of the merits of the state law claim between the nondiverse litigants, while perhaps a step toward the doom of the voluntary/involuntary rule, seems consistent with the spirit of federalism. Further, as the fraudulent joinder standard mirrors that of either a 12(b)(6) or summary judgment analysis—and to the extent the state court had used a similar standard in its dismissal decision—one might wonder why principles of law of the case or res judicata do not make that decision binding on the federal court doing its fraudulent joinder

421 See Weems v. Louis Dreyfus Corp., 380 F.2d 545, 547–48 (5th Cir. 1967).
422 See Comment, The Effect of Section 1446(b) on the Nonresident’s Right to Remove, 115 U. Pa. L. Rev. 264, 269 (1966). However, this law review comment argues that Congress did codify the voluntary/involuntary rule. Id. at 272–73. If that view were correct, Congress would need to legislatively adopt the current proposal.
423 See Oakley, supra note 27, at 1002–03.
425 See Insinga v. LaBella, 845 F.2d 249, 254 (11th Cir. 1988) (indicating that state court dismissal of nondiverse defendant supported a finding of fraudulent joinder).
analysis. The answer is that fraudulent joinder analysis is an issue for the federal court—to determine its subject matter jurisdiction. But if this analysis requires federal courts not only to determine essentially the merits of state claims between nondiverse parties, but also to ignore possibly contrary decisions by the state court where the case was first filed, it is hard to reconcile such a practice with any federalist principles.

By removing the court-created voluntary/involuntary rule, the federal courts can embrace a view of diversity removal jurisdiction that accomplishes its purpose in a principled manner. As another observer has noted:

The decision [of the Supreme Court in Murphy Brothers that rejected the lower federal courts’ strict requirement that the 30-day removal clock could begin to run even before formal service of a state court complaint] . . . demonstrated that federal courts need not allow self-created presumptions to spawn artificial barriers to removal. This case reveals how federal courts, after unshackling themselves from their self-imposed presumptions, can achieve results that are both sensible and consistent with the underlying purpose of removal. Although this case was a step in the right direction, there remain many other areas of removal practice that need a comparable overhaul.

Such movement from proxy to principle surely would bring more consistency to this important area of federal jurisdiction and keep federal courts from adjudicating claims Congress never intended for the federal trial courts. Further, the added benefit of this proposed new paradigm, which would inject much needed certainty into the jurisdictional quandary, cannot be overstated. As Justice Thomas

Federal courts have stated that fraudulent joinder analysis is a question of federal law and that, therefore, they need not defer to any state court dismissal. See Archibald, supra note 26, at 1387 & n.62; Katz v. Costa Armatori, S.P.A., 718 F. Supp. 1508, 1510–12 (S.D. Fla. 1989) (discussing one view of fraudulent joinder that calls for an examination of only the pleadings and not “state court proceedings”); see also Poulos, 959 F.2d at 73 n.4 (referring to this dilemma as presenting a “potential problem with res judicata” but concluding that “a federal court considering fraudulent joinder . . . is not bound by the state court’s decision”). The apparent rationale is that the federal court is deciding the unique issue of federal court jurisdiction while the state court was not concerned with that issue—even if both involve the same essential merits-based determination. See Filla v. Norfolk S. Ry. Co., 336 F.3d 806, 811 (8th Cir. 2003) (stating that “fraudulent joinder ‘is an Erie problem in part, but only part’” and discussing the fact that the federal courts’ task is merely to determine what claims may be possible under state law, rather than actually adjudicating those issues (quoting Badon v. RJR Nabisco Inc., 236 F.3d 282, 285–86 (5th Cir. 2000)).
stated, “clear, bright-line [jurisdictional] rule[s] ensure[] that judges and litigants will not waste their resources in determining the extent of federal subject-matter jurisdiction.”

If either the Supreme Court or Congress were to abolish the voluntary/involuntary rule and require fraudulent joinder issues to be—in effect—litigated in the state courts, the biggest remaining obstacle for many such cases being removed will be Congress’ 1988 revision to § 1441 that requires any diversity removals to occur within one year of the filing of the original lawsuit. Thus, if the defendants could not persuade the state court to dismiss the local defendant within the first year of the case life, any subsequent dismissal of that party would have no effect on removal despite the fact that the case might well proceed to trial solely between diverse litigants. This relatively new feature of the removal statute is one reason why most defendants currently choose to attempt removal immediately upon being named to a lawsuit in conjunction with a questionable local defendant. Of course, there are two other reasons for removing immediately under the current paradigm. First, because of the voluntary/involuntary rule, there is at least theoretically no significance to obtaining state court summary adjudication against the merits of the claim involving the local defendant. Second, there is the additional 30-day window to remove a claim under § 1446 once a case becomes removable. Because some courts have correctly observed that instances of fraudulent joinder make the case removable immediately, there is no time to wait on

429 28 U.S.C. § 1446(b) (2000) provides that “a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.”
430 See, for example, Poulos, 959 F.2d at 73 n.4, where the court observed:
In this case, Naas [the diverse defendant] could have discerned that the joinder of RHM [the local defendant] was fraudulent when Poulos served his complaint. It should have removed within 30 days following service of the complaint, not within 30 days following the entry of summary judgment. But Poulos did not notice the error, and the 30-day limit in section 1446(b) can be waived.
See also Knutson v. Allis-Chalmers Corp., 358 F. Supp. 2d 983, 996–97 (D. Nev. 2005) (holding that fraudulent joinder removal was untimely since defendants waited until after state court summary judgment instead of removing within thirty days of the service of the original state court complaint). One article has commented on this same timing issue, observing that a procedural advantage exists for the removing defendant if it is not required to seek removal until after obtaining summary dismissal of the local defendant. See Jay S. Blumenthal et al., Fighting Fraudulent Joinder: Proving the Impossible and Preserving Your Corporate Client’s Right to a Federal Forum, 24 AM. J. TRIAL ADVOC. 297, 305–06 (2000) (“Using this [wait and see] option, there is a risk that a court may find that the defendant should have removed within thirty days of the complaint’s service if, under the applicable
state court adjudication of a questionable claim. Under the proposed new paradigm for fraudulent joinder, where the case would not be considered removable until the state court had dismissed the local defendant, having found no possible claim against that party, neither of these other two reasons for immediate removal would exist. The remaining question is whether this one-year provision in the current removal statute would need to be revised or deleted.

At least for some courts, there is already some flexibility not to apply the one year diversity removal limit in instances involving fraudulent joinder. In the Fifth Circuit’s 2003 decision in Tedford v. Warner-Lambert Co., the plaintiff voluntarily signed and postdated a “Notice of Nonsuit” dismissing the only nondiverse defendant right before the expiration of the one year removal limitation but failed to notify the remaining diverse defendant of that dismissal until later. The Fifth Circuit held, after agreeing with the district court’s conclusion that the local defendant had been fraudulently joined, that the one-year limit on diversity removals did not apply because of an equitable exception to that provision:

Section 1446(b) is not inflexible, and the conduct of the parties may affect whether it is equitable to strictly apply the one-year limit. In the present case, Tedford timely moved to remand. Nevertheless, we are convinced that if Barnes’s sleeping on his rights justified application of an equitable exception in the form of waiver, Tedford’s forum manipulation justifies application of an equitable exception in the form of estoppel. In enacting § 1446(b), Congress intended to “reduc[e] opportunity for removal after substantial progress has been made in state court.” Congress may have intended to limit diversity jurisdiction, but it did not intend to allow plaintiffs to circumvent it altogether. Strict application of the one-year limit would encourage plaintiffs to join nondiverse defendants for 366 days simply to avoid federal court, thereby undermining the very purpose of diversity jurisdiction.

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state law, the allegations against the resident agent were patently defective. This option, however, may prove advantageous in some cases because it permits additional time, up to one year, for defense counsel to discover evidence of fraudulent joinder.”).

431 327 F.3d 423 (5th Cir. 2003).
432 Id. at 425.
433 Id. at 426–27 (footnotes omitted).
Some have suggested that this equitable exception should be recognized broadly by other circuits. 434 While subsequent decisions within the Fifth Circuit appear to be applying this equitable exception, 435 other lower courts outside the Fifth Circuit have not universally embraced the Fifth Circuit’s invitation to recognize this equitable exception. 436

In terms of whether an equitable exception is necessary, one could go in either direction. On the one hand, eliminating the application of this provision in cases of “fraudulent joinder” would help to ensure that the diverse defendants get the fairest possible forum at trial. On the other hand, if what courts are trying to do is deter plaintiffs from manipulating joinder and jurisdiction to wrongfully avoid federal forums, one could assume that a local defendant sued for spurious reasons ought to have a good chance at obtaining summary judgment dismissal in front of a local, state court within one year of being sued. 437

One court has commented that the one year limit on diversity removals was added by Congress to deal with a perceived problem in diversity cases being removed to federal court after substantial investment of time at the state court level:

Congress voiced concerns about late removal when it amended the statutory language governing timing of removal, 28 U.S.C. § 1446(b), in 1988, stating: “The

434 See, e.g., Haiber, supra note 72, at 647–48 (arguing strongly that other circuits need to follow the Fifth Circuit’s lead in Tedford and permit equitable exception to one-year removal when the basis for the removal is the elimination of a party fraudulently joined in the first instance).

435 See, e.g., Brooks v. Am. Bankers Ins. Co., No. Civ.A. 401CV00008-PB, 2003 WL 22037730, at *1 (N.D. Miss. Aug. 20, 2003) (holding that when plaintiff’s motive to defeat diversity jurisdiction is clear, federal court may retain case removed outside the one-year limit provided by § 1446(b)).


437 Of course, if the joinder of the local defendant involves actual collusion whereby the local defendant would agree not to seek dismissal for the first year and then be voluntary dismissed, it would seem that in such instances the equitable exception to the application of the one-year limit on diversity removals should still be available as one of the two remaining true instances of “fraudulent” joinder. The other remaining form of fraudulent joinder would be where the plaintiff falsely states jurisdictional facts in its pleading. See supra text accompanying note 29. In these instances of true fraud, it is only logical that the thirty-day limit on removals should run from the date that the defendants discovered, or should have discovered, that the jurisdictional statements were false or that there was collusion between the plaintiff and the local defendant.
amendment addresses problems that arise from a change of
departies as an action progresses toward trial in state court. . . .
Removal late in the proceedings may result in substantial
delay and disruption.”

The fact that this concern does not pertain to federal question
cases demonstrates an anti-diversity bias on the part of Congress.
However, it would be unrealistic to believe that Congress would
remove the one-year removal provision on its own so soon after
enacting the provision in an attempt to minimize the number of late
removed diversity actions to federal court.

V. CONCLUSION

There is much at risk for both sides when a plaintiff adds an
additional defendant to its initial pleadings in order to defeat
removal by destroying complete diversity of citizenship. Other
litigators have offered the following helpful summary of the
risk/benefit analysis that must be conducted before a defendant
attempts removal based upon the fraudulent joinder doctrine:
Defense counsel should carefully advise clients of the
potential costs and benefits of removing a case to federal
court prior to doing so. The pros and cons will, of course,
very depending upon the circumstances. The most obvious
disadvantage of removal is the reality that fighting
fraudulent joinder requires reasonable preparation and, as a
consequence, can substantially raise litigation costs. The
process easily can be as expensive or more so than preparing
a motion for summary judgment, and efforts will probably
fail under the “no possibility” standard. Apparently
erroneous decisions by the district court, moreover, are final
because remand orders are generally not reviewable by
appeal or writ of mandamus. Even worse, there is a
possibility that the corporate client will have to pay opposing
counsel’s attorneys’ fees under 28 U.S.C. § 1447(c) in the
event that the district court determines that the removal was
improvident. Finally, accusing the plaintiff and opposing
counsel of fraudulent joinder can precipitate animosity,
compromise settlement negotiations and raise litigation costs

even further. Of course, the benefits to a successful invocation of the fraudulent joinder doctrine—chiefly obtaining a federal forum—make the risks worthwhile for many defense lawyers. But is the foregoing litigation gamble necessarily required either by the Constitution or by any act of Congress? The answer is no, because the only thing that creates this atmosphere of uncertainty is the antiquated and unprincipled voluntary/involuntary rule that the Supreme Court created more than a century ago. The time is ripe for the Supreme Court to abandon the voluntary/involuntary rule and the convoluted proxies created by the federal courts to administer the unnecessary fraudulent joinder doctrine. Failing such a paradigm shift by the High Court, Congress can rather easily do so itself through slight modifications to the federal removal statute. The result will be good for federalism and will ensure the fairest possible adjudications of disputes between diverse combatants.

439 Blumenkopf et al., supra note 430, at 310–11 (footnotes omitted).
440 These benefits have been summarized as follows: Conversely, there are some potential benefits to standing up for the corporate client’s right to a federal forum. First, if the plaintiff’s attorney is unfamiliar with federal practice, removal can provide a tactical advantage provided the lawsuit is not remanded. In some cases, removal may also neutralize any political or local advantage that opposing counsel enjoys before the presiding state court judge. Likewise, the possibility that the federal court will issue an order finding opposing counsel “guilty” of fraudulent joinder can cause him or her great trepidation in the instant case as well as in future cases. Such a decision, moreover, could be distributed among the local defense bar and exploited to foil future attempts to confine diverse defendants to a state court forum. Both of these factors can, under the right circumstances, provide corporate clients with leverage in settlement negotiations which they might not enjoy otherwise. Last, even if a remand order is ultimately rendered, the federal courts have national subpoena power. Therefore, in a case where discovery must be conducted nationwide, the federal court’s subpoena power can provide an edge in conducting early pre-remand discovery which enables avoidance of the procedural hurdles that many state procedural rules create for conducting discovery across state lines. Id. at 311 (footnote omitted).