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# IMPROPER JOINDER: CONFRONTING PLAINTIFFS’ ATTEMPTS TO DESTROY FEDERAL SUBJECT MATTER JURISDICTION

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## INTRODUCTION

A civil case commences when a plaintiff files a complaint in the forum of his choice. By winning the proverbial “race to the courthouse,” the plaintiff earns the first choice of where a claim will

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be contested.<sup>1</sup> While state courts have general jurisdiction, federal courts have only limited jurisdiction.<sup>2</sup> It is good legal strategy for parties to seek redress in the forum that is most favorable to their claims. In general, plaintiffs prefer state courts for their claims, especially when suing large, out-of-state corporations.<sup>3</sup>

In state court, defendants are not without recourse if they are unsatisfied with a plaintiff's choice of forum. Even before addressing the merits of a claim, defendants may attempt to change the forum through, *inter alia*, declaratory judgment from a federal court,<sup>4</sup> venue transfer,<sup>5</sup> *forum non conveniens*,<sup>6</sup> or, of most significance to this Article, removal to federal court.<sup>7</sup> If a federal court would have original jurisdiction over the claim, the case is eligible for removal.<sup>8</sup>

Plaintiffs anticipating defendants' removal motion can structure their state court complaints to increase the chances of remaining in

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1. A plaintiff may file his claim in any court that has jurisdiction over the parties and subject matter involved. *See infra* Part I.A (discussing a plaintiff's choice of forum when filing a case).

2. 28 U.S.C. § 1332 (2006); *see infra* Part I.A (describing how federal jurisdiction is limited to controversies that either deal with a federal question or involve an amount in question that exceeds \$75,000 and is between citizens of different states).

3. *See infra* Part I.B.2 (explaining why plaintiffs might choose a particular forum).

4. *See* 28 U.S.C. § 2201 (2006) (allowing a federal district court to "declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought").

5. 28 U.S.C. §§ 1404(a), 1406(a). Section 1404 allows a change of venue "[f]or the convenience of parties and witnesses, [or] in the interest of justice" to another court "where [the case] might have been brought." *Id.* § 1404(a). Section 1406 allows a change of venue "in the interest of justice" or where the filing court is "in the wrong division or district." *Id.* § 1406(a). However, venue transfer is available only within the same judicial system, so inter-system transfer cannot occur. *See, e.g.,* *Rogers v. Rogers*, 688 So. 2d 421, 422 (Fla. Dist. Ct. App. 1997) (reversing an interstate transfer order that was not authorized under state law); *United Carolina Bank v. Martocci*, 610 A.2d 484, 487–88 (Pa. Super. Ct. 1992) (holding that Pennsylvania's intrastate transfer law does not authorize interstate transfers). For a proposal allowing inter-state venue transfer, see UNIF. TRANSFER OF LITIG. ACT § 104, 14 U.L.A. 670–72 (2005) (approved and recommended for enactment by the 100th Annual Conference of the National Conference of Commissioners on Uniform State Laws, but not yet adopted by any state).

6. BLACK'S LAW DICTIONARY 726 (9th ed. 2009) ("The doctrine that an appropriate forum . . . may divest itself of jurisdiction if, for the convenience of the litigants and the witnesses, it appears that the action should proceed in another forum in which the action might also have been properly brought in the first place."). Because of the lack of inter-state transfer, the court can grant an outright dismissal, usually after extracting a waiver of personal jurisdiction and any statute of limitations defenses to ease the filing in the more convenient forum. *See, e.g.,* *Piper Aircraft v. Reyno*, 454 U.S. 235, 260–61 (1981) (dismissing a suit in Pennsylvania for refiling in Scotland, where all witnesses and pertinent evidence were located and where the plane crash in dispute occurred).

7. 28 U.S.C. § 1446; *see infra* Part I.C (describing how a defendant removes a case from state to federal court).

8. *See infra* Part I.C.

state court.<sup>9</sup> By strategically drafting facially non-removable complaints, plaintiffs can improve the chances of staving off removal or succeeding with motions to remand.<sup>10</sup> This Article will focus on one such strategy: the ways plaintiffs can structure their defendants.<sup>11</sup> Specifically, plaintiffs can join a non-diverse defendant, join an in-state defendant, or join a defendant who will not consent to removal.<sup>12</sup>

A plaintiff's control over case structure is not unlimited.<sup>13</sup> If one defendant suspects that a co-defendant has been joined solely for the purpose of defeating diversity jurisdiction,<sup>14</sup> that one defendant may consider basing its remand defense on a claim of "fraudulent joinder."<sup>15</sup>

Fraudulent joinder is a judicial term of art referring to the inclusion of a defendant "solely to deprive the [federal] court of

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9. See *Russell Corp. v. Am. Home Assurance Co.*, 264 F.3d 1040, 1050 (11th Cir. 2001) ("There are several such bright line limitations on federal removal jurisdiction . . . that some might regard as arbitrary or unfair. Such limitations, however, are an inevitable feature of a court system of limited jurisdiction that strictly construes the right to remove.").

10. See *Great N. Ry. Co. v. Alexander*, 246 U.S. 276, 282 (1918) (acknowledging a plaintiff's ability to structure his complaint so as to hinder the removability of his case).

11. In addition to strategies concerning defendants, plaintiffs can, *inter alia*, plead an amount-in-controversy under the statutory minimum required for diversity jurisdiction, 28 U.S.C. § 1332 (2000 & Supp. IV 2004), or fail to assert viable claims arising under federal law, U.S. CONST. art. III, § 2. For the full text of Article III, section 2 of the Constitution, see *infra* note 22.

12. See *infra* Part I.D (outlining ways plaintiffs may attempt to defeat removal).

13. See, e.g., *Whitaker v. Am. Telecasting, Inc.*, 261 F.3d 196, 207 (2d Cir. 2001) ("[A] plaintiff may not defeat a federal court's diversity jurisdiction and a defendant's right of removal by merely joining as defendants parties with no real connection with the controversy.").

14. Plaintiffs can attempt to manipulate forum by strategically joining either plaintiffs or defendants. This Article will focus primarily on the latter situation. The joinder of additional plaintiffs in hopes of manipulating forum is usually referred to as "misjoinder." For a discussion of "fraudulent misjoinder," see Alan E. Rothman et al., *Advances in Protecting Defendants' Right to Remove From State to Federal Court*, PROD. LIAB. L. & STRAT., May 2002, at 4 ("A recent tactic has been to piggyback numerous plaintiffs onto the one plaintiff who has stated a claim against a nondiverse defendant, notwithstanding their lack of any connection to that defendant.").

15. *But see Chi., Rock Island & P. Ry. Co. v. Dowell*, 229 U.S. 102, 114 (1913) (finding that the plaintiff's motive for deciding to sue joint tortfeasors in the same case was "unimportant"); *Arsenault v. Congoleum Corp.*, No. 01 Civ. 10657 (LLM), 2002 WL 472256, at \*5 (S.D.N.Y. Mar. 26, 2002) (citing *Ill. Cent. R.R. Co. v. Sheegog*, 215 U.S. 308, 316 (1909)) ("A motive to prevent removal, by itself, does not render the joinder of a defendant fraudulent for removal purposes."); *In re Maine Asbestos Cases*, 44 F. Supp. 2d 368, 374 n.2 (D. Me. 1999) ("If the plaintiffs had an objectively valid basis for joining [the defendant] in the complaint, their subjective motivations about jurisdiction are of no concern to this court.").

jurisdiction.<sup>16</sup> If a defendant can demonstrate fraudulent joinder, the federal court should ignore that party's citizenship in the diversity analysis.<sup>17</sup> Thus, a facially non-removable complaint may actually be removable.<sup>18</sup> Currently, courts apply a number of different tests to determine whether fraudulent joinder is present.<sup>19</sup> This Article argues that a clearly defined, universally applied standard could better protect federal subject matter jurisdiction and better ensure that eligible cases have access to federal courts.<sup>20</sup>

Part I of this Article develops the forum debate between plaintiffs and defendants. Examining the issues from the plaintiff's perspective, this Part addresses the limited scope of federal jurisdiction before turning to the reasons why that factor can influence the parties a plaintiff decides to sue. This Part then discusses three specific ways a plaintiff can prevent removal by including specific categories of defendants in any case. Part II turns to the options and opportunities defendants have to influence forum selection by making an allegation of fraudulent joinder. This Part discusses four approaches courts have taken when addressing fraudulent joinder claims. Finally, Part III proposes that courts refine these standards and implement a uniform, enhanced test to protect access to federal courts.

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16. *Kelly v. Drake Beam Morin, Inc.*, 695 F. Supp. 354, 355 (E.D. Mich. 1988); *see also* *Schwartz v. State Farm Mut. Auto. Ins. Co.*, 174 F.3d 875, 878 (7th Cir. 1999) (rejecting the plaintiff's ability to join an in-state defendant only to defeat diversity jurisdiction); *AIDS Counseling & Testing Ctrs. v. Group W Television, Inc.*, 903 F.2d 1000, 1003 (4th Cir. 1990) (acknowledging the role of fraudulent joinder in a plaintiff's crafting of a complaint); William D. Underwood, *Reconsidering Derivative-Venue in Cases Involving Multiple Parties and Multiple Claims*, 56 BAYLOR L. REV. 579, 601 (2004) ("Allowing litigants to sue all defendants in a county where any defendant resides, for example, encourages litigants to sue defendants who have done nothing wrong simply because they live in a county viewed as a favorable forum.")

17. *See* *Wecker v. Nat'l Enameling & Stamping Co.*, 204 U.S. 176, 186 (1907) ("[T]he Federal courts should not sanction devices intended to prevent a removal . . . [but] should be equally vigilant to protect the right to proceed in the Federal court as to permit the state courts, in proper cases, to retain their own jurisdiction."); *Balazik v. County of Dauphin*, 44 F.3d 209, 213 n.4 (3d Cir. 1995) (allowing removal where a defendant that did not agree to removal was found to be fraudulently joined); *Jernigan v. Ashland Oil Inc.*, 989 F.2d 812, 815 (5th Cir. 1993) ("[A]s a general rule, removal requires the consent of all co-defendants. In cases involving alleged improper or fraudulent parties, however, application of this requirement to improperly or fraudulently joined parties would be nonsensical . . ."); *Sellers v. Foremost Ins. Co.*, 924 F. Supp. 1116, 1117 (M.D. Ala. 1996) (ignoring the arguments of fraudulently joined defendants when determining diversity jurisdiction).

18. *See, e.g.,* *Triggs v. John Crump Toyota*, 154 F.3d 1284, 1287 (11th Cir. 1998) (recognizing fraudulent joinder as an exception to complete diversity).

19. *See infra* Part II.

20. *See infra* Part III.

## I. PLAINTIFFS' STRATEGIES FOR AVOIDING REMOVAL

A. *Federal Subject Matter Jurisdiction*

The federal courts are courts of limited jurisdiction.<sup>21</sup> Article III of the U.S. Constitution restricts federal jurisdiction to claims based on a federal question and claims that satisfy diversity jurisdiction.<sup>22</sup> The Supreme Court has interpreted the latter narrowly, requiring complete diversity and a minimum amount-in-controversy.<sup>23</sup>

Federal jurisdiction is restricted to limit the volume of cases that federal courts hear and to protect the right of state courts to determine questions of state law.<sup>24</sup> An additional concern over biased justice, however, influenced the constitutional framers to allow diversity actions to be heard in federal court regardless of subject

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21. See Stephen E. Abraham & William M. Hensley, *Remand: One Constitution, One Standard*, 27 PEPP. L. REV. 263, 263 (2000) (presuming that controversies are outside of a court's jurisdiction unless parties show proper jurisdiction (citing *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 182–83 (1936))).

22. See U.S. CONST. art. III, § 2 (“The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution . . . [and] to Controversies . . . between Citizens of different States.”); 28 U.S.C. § 1331 (2006) (granting federal district courts original jurisdiction over all controversies that raise a question of constitutional or federal law); see also *id.* § 1332 (granting federal district courts original jurisdiction over cases where the amount in controversy exceeds \$75,000 and is between citizens of different states).

To determine citizenship, the Constitution instructs that “[a]ll persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.” U.S. CONST. amend. XIV, § 1. The Supreme Court has combined the requirements of the Fourteenth Amendment and 28 U.S.C. § 1332 to establish a two-part test to determine citizenship. See *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 824, 828 (1989) (“In order to be a citizen of a State within the meaning of the diversity statute, a natural person must both be a citizen of the United States *and* be domiciled within the State.”). Domicile requires a combination of residency and intent to remain indefinitely. See, e.g., *Gordon v. Steele*, 376 F. Supp. 575, 577–78 (W.D. Pa. 1974) (considering both factors in determining a student’s domicile).

23. *Strawbridge v. Curtiss*, 7 U.S. 267, 267 (1806) (announcing a complete diversity rule); see also *Ruhrgas v. Marathon Oil Co.*, 526 U.S. 574, 580 n.2 (1999) (interpreting § 1332 to require complete diversity even though the Constitution permits federal courts to hear cases between citizens of different states); *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 377 (1978) (recognizing that Congress created a rule that diversity jurisdiction exists only when there is complete diversity (citing *Healy v. Ratta*, 292 U.S. 263, 270 (1934))). For further discussion, see text and notes *infra* Part I.D.1.

24. See *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 109 (1941) (quoting *Healy*, 292 U.S. at 270) (“Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined.”); see also *B., Inc. v. Miller Brewing Co.*, 663 F.2d 545, 548 (5th Cir. 1981) (citing *Am. Fire & Cas. v. Finn*, 341 U.S. 6, 18 (1951)) (admonishing that a federal court that proceeds without jurisdiction disrupts the judicial system).

matter.<sup>25</sup> While jurists and legal commentators debate whether such bias still exists today,<sup>26</sup> diversity jurisdiction remains “to shore up

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25. *United States v. Deveaux*, 9 U.S. 61, 87 (1809). In *Deveaux*, Chief Justice John Marshall observed:

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

*Id.*; see also *Burford v. Sun Oil Co.*, 319 U.S. 315, 336 (1943) (Frankfurter, J., dissenting) (explaining the belief that state courts would favor their own residents and show bias against outsiders); *Barrow S.S. Co. v. Kane*, 170 U.S. 100, 111 (1898) (identifying the Framers’ intent to secure a more impartial forum than a tribunal located in the state where a plaintiff resides). In Federalist No. 80, Alexander Hamilton stated,

[I]n order to [ensure] the inviolable maintenance of that equality of privileges and immunities to which the citizens of the Union will be entitled, the national judiciary ought to preside in all cases in which one state or its citizens are opposed to another state or its citizens. To secure the full effect of so fundamental a provision against all evasion and subterfuge, it is necessary that its construction should be committed to that tribunal which, having no local attachments, will be 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.

THE FEDERALIST No. 80, at 424 (J.R. Pole ed., 2005).

26. Compare 15 JAMES WM. MOORE ET AL., *MOORE’S FEDERAL PRACTICE—CIVIL* ¶ 102.03 (3d ed. 1999) (declaring that the main rationale for diversity jurisdiction is a need for impartiality in cases involving non-residents who might be prejudiced in state court (citing *Stüfel v. Hopkins*, 477 F.2d 1116, 1125–26 (6th Cir. 1973))), and *Class Action Fairness Act of 2003: Hearing on H.R. 1115 Before the H. Comm. on the Judiciary*, 108th Cong. 52 (2003) (statement of John H. Beisner, Partner, O’Melveny & Myers LLP), available at [http://commdocs.house.gov/committees/judiciary/hju87093.000/hju87093\\_of.htm](http://commdocs.house.gov/committees/judiciary/hju87093.000/hju87093_of.htm) (“[T]here can no longer be any question that some local judges are exhibiting bias against out-of-state defendants . . . the very type of bias that led to the creation of diversity jurisdiction in the first place.”), with *Chi. & A.R. Co. v. Wiggins Ferry Co.*, 108 U.S. 18, 24 (1883) (explaining that there is a presumption that state courts will abide by the Constitution and federal law and that fear of prejudice is not a sufficient basis for removal), and *Buffalo v. Plainfield Hotel Corp.*, 177 F.2d 425, 426 n.1 (2d Cir. 1949) (finding that local prejudice or influence is no longer a valid ground for removal under 28 U.S.C. § 1441).

Regardless of whether out-of-state litigants once had a justifiable fear of disparate treatment in the local state courts, such fears have likely diminished in modern times. Henry Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 497 (1928) (“[T]here was little cause to fear that the state tribunals would be hostile to litigants from other states”). Judge Friendly asserted “that the desire to protect creditors against legislation favorable to debtors was a principal reason for the grant of diversity jurisdiction, and that as a reason it was by no means without validity.” *Id.* at 496–97. Friendly based this conclusion on the reasonable fear that “courts of a state having laws favorable to debtors would apply these laws in favor of their own residents even though the debt was payable in another state.” *Id.* “The Federal Courts Study Committee, appointed by [then] Chief Justice Rehnquist, acknowledged that local bias ‘may be a problem in some jurisdictions’ but not sufficiently so to be a ‘compelling justification’ for retaining diversity jurisdiction in federal courts.” Victor E. Flango, *Litigant Choice Between State and Federal Courts*, 46 S.C. L. REV. 961, 965 (1995) (citing SUBCOMM. ON THE ROLE OF THE FEDERAL

confidence in the judicial system by preventing even the appearance of discrimination in favor of local residents.”<sup>27</sup>

### B. Plaintiff as Master of the Case

#### 1. Forum selection

Forum selection is often the most important strategic decision a party makes in a lawsuit.<sup>28</sup> Forum selection offers an opportunity to choose not just the geographic location of the proceedings, but also the substantive and procedural laws that will be applied.<sup>29</sup>

By winning the proverbial “race to the courthouse,” plaintiffs have the ability, within the confines of jurisdictional requirements, to select the forum in which they will attempt to vindicate their rights.<sup>30</sup> For a plaintiff to gain any advantage from forum selection, he must be able to bypass one court and select another more favorable to his interests.<sup>31</sup> The reality of modern litigation is that most cases settle,

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COURTS AND THEIR RELATION TO THE STATES, REPORT TO FEDERAL COURTS STUDY COMM. 38 (1990)).

27. John H. Beisner & Jessica Davidson Miller, *They’re Making a Federal Case Out of It . . . In State Court*, 25 HARV. J.L. & PUB. POL’Y 143, 146 (2001) (citing *Class Action Fairness Act of 1999: Hearing Before the Subcomm. on Admin. Oversight and the Courts of the S. Comm. on the Judiciary*, 106th Cong. 100 (1999) (statement of Prof. E. Donald Elliot, Yale Law School)).

28. See *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 38 (1998) (Scalia, J., dissenting) (viewing the increased number of venue cases and the desire to contractually define venue as evidence of the extreme importance of venue); Anthony L. Ryan, *Principles of Forum Selection*, 103 W. VA. L. REV. 167, 168 (2000) (“The forum in which a case is heard often has considerable influence on the outcome.”); see also Jennifer Anglim, *Crossroads in the Great Race: Moving Beyond the International Race to Judgment in Disputes over Artwork and Other Chattels*, 45 HARV. INT’L L.J. 239, 239 (2004) (suggesting that a comparison of jurisdictional laws demonstrates the outcome-determinative character of forums).

29. As one author stated,

The choice of favorable substantive law is the most dramatic prize for the successful forum-shopper, but there are also many important procedural distinctions among courts. Less tangible from a theoretical perspective, but just as real for the practicing lawyer, are differences in the quality and sympathies of the judge and in the pool from which the jury is drawn.

Ryan, *supra* note 28, at 200.

30. See *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392, 395 (1987) (“The rule makes the plaintiff the master of the claim . . .”); *Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913) (explaining that the one who brings a suit gets to choose what law courts will apply); *Parks v. N.Y. Times Co.*, 308 F.2d 474, 478 (5th Cir. 1962) (granting the plaintiff the right to choose a forum and whether to join co-defendants).

31. See Ryan, *supra* note 28, at 168–69 (comparing the “plaintiff’s choice” approach to forum selection with one of “judicial management”). “Judicial management” is a balancing approach arguing that “an appropriate court—rather than the plaintiff—should decide what is the proper place of suit.” *Id.* at 169. Rather than focusing on one party’s choice, the system is constructed to give both parties a voice in forum selection. See Recent Case, 83 HARV. L. REV. 465, 469 (1969) (explaining that diversity jurisdiction and removal jurisdiction work together to give

making a forum victory even more important.<sup>32</sup> In truth, some cases are worth pursuing in certain jurisdictions, but may lack all value in another courthouse.<sup>33</sup> Therefore, strategy concerning where to file, and when, can have serious repercussions for the success of a claim.<sup>34</sup>

The process of selecting the forum in which to file is often referred to as “forum shopping.”<sup>35</sup> Although forum shopping has a negative connotation,<sup>36</sup> good faith forum shopping is widespread, responsible,

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both a plaintiff and a defendant a role in forum selection). Though Ryan’s analysis suggests that some would prefer a more neutral decision regarding forum, our system has developed with a preference for the plaintiff as “master of the case.” See *supra* note 30 and accompanying text (describing how forum selection allows the plaintiff to select the applicable law); see also Ryan, *supra* note 28, at 202 (discussing the importance of litigating in a favorable jurisdiction).

32. Kevin Clermont & Theodore Eisenberg, *Exorcising the Evil of Forum-Shopping*, 80 CORNELL L. REV. 1507, 1508 (1995) (“In the American civil litigation system today, few cases reach trial. After perhaps some initial skirmishing, most cases settle. Yet all cases entail forum selection, which has a major impact on outcome.” (citation omitted)); see also Michael S. Wilk, *Mediation of a Bankruptcy Case*, 22 AM. BANKR. INST. J. 12, 12 (May 2003) (“Statistics show that well over 95 percent of all litigation settles.”).

33. See *Stewart Org., Inc.*, 487 U.S. at 39–40 (Scalia, J., dissenting) (asserting that plaintiffs might not pursue a suit in a less desirable forum); see, e.g., *Taco Bell Corp. v. Cracken*, 939 F. Supp. 528, 530 (N.D. Tex. 1996) (“Attorneys and others in the legal community viewed cases pending in Duval County as having a higher settlement value based on a higher probability of a large recovery at trial.”); John MacCormack, *Remote Venue: Plaintiffs’ Pick*, NAT’L L.J., Jan. 31, 1994, at 30 (quoting “a San Antonio defense lawyer” evaluating a particular Texas District by saying “[s]peaking from painful experience, once a case gets venue down there, its value just explodes”).

34. See Kevin M. Clermont & Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction*, 83 CORNELL L. REV. 581, 593 (1998) (comparing data on winning percentages for originally filed federal cases versus removed cases). While a plaintiff’s overall “win rate” in federal civil cases is about fifty-eight percent, Clermont and Eisenberg found that this number dropped to thirty-four percent in removed diversity cases, as opposed to the seventy-one percent “win rate” for original diversity cases. *Id.* Evidence shows that a steep decline also exists for a plaintiff’s chance of a favorable verdict after transfer of venue, lending further support to the proposition that forum selection is important. Clermont & Eisenberg, *supra* note 32, at 1511–12. Specifically, Clermont and Eisenberg found that, while plaintiffs are victorious in fifty-eight percent of non-transferred federal court cases, that number drops to twenty-nine percent after venue transfer. *Id.* at 1512.

35. See BLACK’S LAW DICTIONARY 726 (9th ed. 2009) (defining “forum shopping” as “[t]he practice of choosing the most favorable jurisdiction or court in which a claim might be heard”).

36. See Note, *Forum Shopping Reconsidered*, 103 HARV. L. REV. 1677, 1677–78 (1990) (noting “clear derogatory connotations” associated with forum shopping, and pointing out that “[t]he American legal system tends to treat [forum shopping] . . . as unethical and inefficient; parties who forum shop are accused of abusing the adversary system and squandering judicial resources”). Critics have denounced forum shopping because it “undermines the authority of substantive state law; . . . overburdens certain courts and creates unnecessary expenses as litigants pursue the most favorable, rather than the simplest or closest, forum; . . . [and] may create a negative popular perception about the equity of the legal system.” *Id.* at 1684; see also Mary Garvey Algero, *In Defense of Forum Shopping: A Realistic Look at Selecting a Venue*, 78 NEB. L. REV. 79, 81 (1999) (referring to forum shopping as “taboo”); Friedrich K. Juenger, *Forum Shopping, Domestic and International*, 63 TUL. L. REV. 553, 553 (1989) (“As a rule, counsel, judges, and academicians employ the term

and expected as a part of modern litigation.<sup>37</sup> In fact, every time a plaintiff selects a court to file in, they have engaged in some type of forum shopping.<sup>38</sup>

## 2. *Plaintiffs' preference for state courts*

So long as plaintiffs perceive state courts as more sympathetic forums, they will endeavor to keep their cases there.<sup>39</sup> In reality, a case does not receive the same treatment or have the same chance of success in federal court as it does in state court,<sup>40</sup> especially when local plaintiffs sue large, out-of-state corporations.<sup>41</sup> This is true

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'forum shopping' to reproach a litigant who, in their opinion, unfairly exploits jurisdictional or venue rules to affect the outcome of a lawsuit."); George M. Vairo, *Is Selection Shopping?*, NAT'L L.J., Sept. 18, 2000, at A16 (arguing that forum selection becomes "forum shopping" only when the choice of forum is "frivolous"). Courts in forum shopping cases sometimes exalt "the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws." See, e.g., *Hanna v. Plumer*, 380 U.S. 460, 468 (1965) (explaining that the "outcome-determination" test cannot be interpreted without referring to the *Erie* doctrine).

37. J. Skelly Wright, *The Federal Courts and the Nature and Quality of State Law*, 13 WAYNE L. REV. 317, 333 (1967) ("The lack of uniformity in state substantive law, compounded by proliferation of state long-arm statutes, has made forum-shopping, among both federal and state courts, a national legal pastime.").

38. See, e.g., *Gulf Oil Corp v. Gilbert*, 330 U.S. 501, 508 (1947) ("[U]nless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed."); see also *Iowa Pub. Serv. Co. v. Med. Bow Coal Co.*, 556 F.2d 400, 406 (8th Cir. 1977) (recognizing a plaintiff's right to join non-diverse defendants in order to defeat diversity); Ryan, *supra* note 28, at 168 ("Yet some forum shopping is considered legitimate—instances where a litigant is entitled to choose the place of suit."). Some commentators have taken this proposition a step further suggesting that "failure to select an advantageous forum may amount to malpractice." Juenger, *supra* note 36, at 572 (citation omitted); see also Algero, *supra* note 36, at 112 ("Expecting attorneys to ignore their clients' best interests by failing to select a favorable venue when it is available is asking attorneys to commit malpractice . . .").

39. See Heather R. Barber, *Developments in the Law: Federal Jurisdiction and Forum Selection: Removal and Remand*, 37 LOY. L.A. L. REV. 1555, 1555 (2004) ("The presumption is that federal courts are more defendant-friendly."). As one author stated,

Attorneys representing nonresidents overwhelmingly prefer to file in federal court (85 percent of the attorneys identified from a sample of state court cases and 96 percent of the attorneys identified from a sample of federal court cases filed in U.S. district court). Conversely, if the opposing client is not a state resident, most attorneys (70 percent in the state sample and 63 percent in the federal sample) who consider resident status to be important prefer to file in state courts.

Flango, *supra* note 26, at 966 (citing Victor E. Flango, *Attorney's Perspectives on Choice of Forum in Diversity Cases*, 25 AKRON L. REV. 41, 63 (1991)).

40. See *Forum Shopping Reconsidered*, *supra* note 36, at 1695 ("[F]orum shopping and its results force[] the legal system to confront the uncomfortable fact that the available forums have recognized biases and inadequacies."); see also *supra* notes 25–27 and accompanying text (discussing local bias).

41. It has been argued that local juries view such cases as an opportunity for wealth redistribution, taking money from large, foreign corporations and giving it to local plaintiffs. See, e.g., Jerry Mitchell, *Jefferson County Ground Zero for Cases*, CLARION-

despite the belief amongst some litigators that “clients receive a better quality of justice in federal court, even in the enforcement of state law.”<sup>42</sup> Aside from the advantage of litigating in a geographically convenient forum, plaintiffs filing in state court often hope to exploit this real or perceived bias.

The jurisdictional decision has its most dramatic impact when the state forum chosen is a so-called “magic jurisdiction.”<sup>43</sup> By filing in an extremely favorable jurisdiction, plaintiffs “[r]aise the stakes so high that [defendants] can’t afford to lose or can’t [even] afford to go to trial.”<sup>44</sup> Plaintiffs filing in these jurisdictions raise the value of their suits and can force defendants into settling even weak claims. Based on these real and perceived advantages, plaintiffs will strive to keep their cases in state courts.

### C. *The Removal Exception*

Although plaintiffs get first choice in the forum debate, defendants may also participate in forum shopping. If the case qualifies, the

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LEDGER (Jackson, Miss.), June 17, 2001, at 1A (noting that some lawyers have begun referring to the Jefferson County Courthouse as “the center for the redistribution of wealth”).

42. Martin H. Redish, *Reassessing the Allocation of Judicial Business Between State and Federal Courts: Federal Jurisdiction and “The Martian Chronicles,”* 78 VA. L. REV. 1769, 1800 (1992).

43. See Symposium, *A Novel Approach to Mass Tort Class Actions: The Billion Dollar Settlement in the Sulzer Artificial Hip and Knee Litigation*, 16 J.L. & HEALTH 169, 190 (2001–02) (explaining that magic jurisdictions are “venues where they are well-known for coming in with high plaintiff verdicts”); Jim Copland, *The Tort Tax*, WALL ST. J., June 11, 2003, at A16 (“[I]t’s almost impossible to get a fair trial if you’re a defendant in some of these places . . . . Any lawyer fresh out of law school can walk in there and win the case, so it doesn’t matter what the evidence or the law is.” (quoting Richard Scruggs)).

The American Tort Reform Association (“ATRA”) evaluated the country’s worst “magic jurisdictions” and placed the tag “judicial hellholes” on “places where judges systematically apply laws and court procedures in an unfair and unbalanced manner, generally against defendants in civil lawsuits.” AM. TORT REFORM ASS’N, JUDICIAL HELLHOLES 2007, at ii (2007), available at <http://www.atra.org/reports/hellholes/2007/hellholes2007.pdf>. ATRA’s list of “Judicial Hellholes” for 2007 includes: South Florida; Rio Grande Valley and Gulf Coast, Texas; Cook County, Illinois; West Virginia; Clark County, Nevada; and Atlantic County, New Jersey. *Id.* at 5–18. “Dishonorable Mention” went to Oklahoma; the District of Columbia; the Supreme Courts of Missouri and Georgia; and the Michigan Legislature. *Id.* at 25–27.

Knowledge of these jurisdictions is wide-spread; for example, eighty-five percent of the country’s asbestos cases are filed in just ten jurisdictions. See Lester Brickman, *On the Theory Class’s Theories of Asbestos Litigation: The Disconnect Between Scholarship and Reality*, 31 PEPP. L. REV. 33, 39 n.17 (2003) (explaining that Mississippi, Texas, and West Virginia have the highest numbers of asbestos cases (citing Robert J. Samuelson, *Asbestos Fraud*, WASH. POST, Nov. 20, 2002, at A25)).

44. Benjamine Reid et al., *Tobacco Lawyer’s Roundtable: A Report from the Front Lines*, 51 DEPAUL L. REV. 543, 545 (2001) (statement by Richard Scruggs). “So companies that . . . find themselves on the bull’s-eye of mass court litigation have very little choice . . . between bankruptcy . . . or trench warfare . . . in some of these magic jurisdictions.” *Id.*

defendants can remove it to federal court.<sup>45</sup> To qualify for removal, a case must satisfy all the requirements that would have allowed it to be filed originally in federal court.<sup>46</sup> Plaintiffs can attempt to return a removed case to state court by filing a motion for remand.<sup>47</sup> While the removal procedure itself is a fairly straightforward filing of papers,<sup>48</sup> a remand motion forces the federal court to examine the legal validity of federal jurisdiction.<sup>49</sup>

45. See 28 U.S.C. § 1441(a) (2006) (describing the statutory process of removal that allows defendants to move a qualifying case, originally filed in state court, to the corresponding federal court); *Hess v. Reynolds*, 113 U.S. 73, 81 (1885) (explaining that the removal statute requires that a suit go to the federal court in the district where the state case is pending). The Supreme Court has steadfastly protected the right of defendants to remove a qualifying case to federal court. See *infra* Part II (discussing defendants' ability to remove cases to federal court); see also 28 U.S.C. § 1446(b) (requiring that removal occur within thirty days of the time the removing party receives the document "from which it may first be ascertained that the case is one which is or has become removable").

46. See *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987) (stating that only cases that could have originally been filed in federal court may be removed by a defendant); *Triggs v. John Crump Toyota*, 154 F.3d 1284, 1287 (11th Cir. 1998) ("A civil case filed in state court may be removed by the defendant to federal court if the case could have been brought originally in federal court."); see also *Cochran v. Montgomery County*, 199 U.S. 260, 269 (1905) (noting that cases can only be removed where diversity of citizenship occurs). Supplemental jurisdiction over a claim is not sufficient on its own to satisfy this burden. 28 U.S.C. § 1367. Section 1441(c), however, permits that

[w]henever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.

28 U.S.C. § 1441(c).

47. See 28 U.S.C. § 1447 ("If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded."); *Russell Corp. v. Am. Home Assur. Co.*, 264 F.3d 1040, 1043 (11th Cir. 2001) (identifying the two specific grounds in § 1447(c) for remanding a removed case as "(1) lack of subject matter jurisdiction; or (2) procedural defect in the removal of the case"); see also *PAS v. Travelers Ins. Co.*, 7 F.3d 349, 357 (3d Cir. 1993) (upholding a remand back to state court upon a finding that the federal court only had supplemental jurisdiction of the case).

48. See 28 U.S.C. § 1446 (requiring a defendant requesting removal to file "a notice of removal signed pursuant to Federal Rule of Civil Procedure 11 and containing a short plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders" and serve such documents upon all other defendants).

49. 28 U.S.C. § 1447(c); see *La Flower v. Merrill*, 28 F.2d 784, 787 (N.D. Cal. 1928) ("Removal is a federal question under a federal statute, and 'a motion to remand is the proper and usual method of testing the sufficiency and regularity of removal proceedings.'" (quoting *Gopcevic v. Cal. Packing Corp.*, 272 F. 994, 998 (N.D. Cal. 1921))); see also *Cameron v. Hodge*, 127 U.S. 322, 326 (1888) (holding that where it can be found that removal was inappropriate, a federal court has a duty to remand the case back to a state court).

Although the Supreme Court has determined that the substantive rules of a decision in a diversity action should be determined by the state law of that forum, *Erie R.R. Co. v. Tompkins* 305 U.S. 64, 78 (1938), it is federal statutes, and not state law, that set the criteria for determining when cases may be removed from state to

Successful removal is difficult because the removing party must overcome a strictly construed burden<sup>50</sup> and a presumption that the case will be remanded.<sup>51</sup> Furthermore, plaintiffs often contest removal when possible because evidence shows that defendants fare better by removing their cases to federal court.<sup>52</sup>

#### D. *Strategies to Avoid Removal*

Since cases with specific structures of parties are, by rule, not removable, the savvy plaintiff can select its defendants in such a way that removal to federal court is impermissible. By including at least one non-diverse, in-state or non-removing defendant, the plaintiff creates a state court action that falls outside the limited jurisdiction of the federal courts and, thus, cannot be removed.

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federal court. *See* United States v. Mine Workers, 330 U.S. 258, 291 (1947) (holding that federal courts have jurisdiction to determine their own jurisdiction); Hyde v. Stone, 61 U.S. 170, 175 (1858) (emphasizing that the jurisdiction of federal courts cannot be hindered by state laws and that federal courts cannot abandon federal law in favor of state law regarding removal); *see also* Grubbs v. Gen. Elec. Credit Corp., 405 U.S. 699, 705 (1972) (declaring that the removal proceedings of a federal court are applicable nationwide, regardless of what a state decides).

50. *See* McNutt v. Gen. Motors Acceptance Corp., 298 U.S. 178, 189 (1936) (explaining that proper jurisdiction must be maintained throughout the entire litigation); Boyer v. Snap-On Tools Corp., 913 F.2d 108, 111 (3d Cir. 1990) (“[A] party who urges jurisdiction on a federal court bears the burden of proving that jurisdiction exists.”); Sherman v. A.J. Pegno Constr. Corp., 528 F. Supp. 2d 320, 325 (S.D.N.Y. 2007) (stating that a party seeking removal bears the burden of establishing that removal exists as a right). The defendant’s burden is analogous to the burden placed on the plaintiff who must establish the court’s jurisdiction when filing the original complaint. *See* FED. R. CIV. P. 8(a) (requiring, *inter alia*, “a short plain statement of the grounds upon which the court’s jurisdiction depends”). In *Hill v. Gen. Motors Corp.*, 654 F. Supp. 61, 62 (S.D. Fla. 1987), the court concluded that the standards for removal should be strictly construed because

- (1) [t]he exercise of removal is in derogation of state sovereignty;
- (2) jurisdictional allegations for removal are extremely simple for any lawyer to draft; (3) a liberal construction would promote uncertainty as to a court’s jurisdiction in marginal cases; [and] (4) 28 U.S.C. § 1446(b) is a statute of repose designed not to unduly delay trials.

51. *See* Russell Corp. v. Am. Home Assurance Co., 264 F.3d 1040, 1050 (11th Cir. 2001) (“[T]here is a presumption against the exercise of federal jurisdiction, such that all uncertainties as to removal jurisdiction are to be resolved in favor of remand.”); Abels v. State Farm Fire & Cas. Co., 770 F.2d 26, 29 (3d Cir. 1985) (“[T]he removal statute should be strictly construed and all doubts should be resolved in favor of remand.”); Jones v. Gen. Tire & Rubber Co., 541 F.2d 660, 664 (7th Cir. 1976) (“It is well established that the burden is on the party seeking to remove to establish his right and the case should be remanded if there is any doubt as to the right of removal in the first instance.”); *see also* McNutt, 298 U.S. at 189 (explaining that the party seeking jurisdiction carries the burden of establishing jurisdiction throughout the entire litigation).

52. Clermont & Eisenberg, *supra* note 34, at 599 (listing as benefits of removal: removing a plaintiff’s lawyer from his favored forum, reducing potential bias, and eliminating whatever reasons a plaintiff originally had for filing in state court).

1. *Joinder of a non-diverse defendant*

Federal diversity jurisdiction is limited to those cases where *all* plaintiffs are citizens of different states than *all* defendants.<sup>53</sup> Therefore, plaintiffs can prevent removal by joining any non-diverse defendant.<sup>54</sup>

This restrictive standard of “complete diversity” is not constitutionally required.<sup>55</sup> The Supreme Court, interpreting the Judiciary Act of 1789, refused to extend federal jurisdiction to cases with only minimal diversity.<sup>56</sup> Although critics argue that complete diversity is an arbitrary method of restricting access to federal courts,<sup>57</sup> the long-standing nature of its support from the Supreme Court has entrenched its place in diversity jurisdiction jurisprudence.

To avoid removal, “[p]laintiffs often join non-diverse defendants, such as local doctors, hospitals, pharmacies, employees and/or sales representatives, in an attempt to defeat diversity jurisdiction . . . .”<sup>58</sup>

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53. 28 U.S.C. § 1332; *see* *Strawbridge v. Curtiss*, 7 U.S. 267, 267 (1806) (limiting original federal jurisdiction to those cases where no defendant is a citizen of the same state as any plaintiff). Note that for the purposes of removal, “the citizenship of defendants sued under fictitious names shall be disregarded.” 28 U.S.C. § 1441 (a).

54. *See* James F. Archibald III, *Reintroducing “Fraud” to the Doctrine of Fraudulent Joinder*, 78 VA. L. REV. 1377, 1377 (1992) (“[A] plaintiff may thwart the efforts of a diverse defendant seeking removal simply by joining a nondiverse defendant to the suit.”); *see, e.g., B., Inc. v. Miller Brewing Co.*, 663 F.2d 545, 554 (5th Cir. 1981) (“If there is complete diversity between the adverse parties, the defendant is entitled to a federal forum; but, if the plaintiff and even one properly joined defendant are residents of the same state, the federal court has no business taking jurisdiction over the action.”).

55. *See* U.S. CONST. art. III, § 2; *see also* 14A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3723, at 311–12 (3d ed. 1990) (contending that when the basis of removal is diversity, complete diversity must exist both at the time the action is filed in state court and at the time of removal).

56. *See Strawbridge*, 7 U.S. at 267 (holding that, pursuant to the Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 78, circuit courts have jurisdiction where “the suit is between a citizen of the state where the suit is brought, and a citizen of another state.”); *see also* 15 MOORE ET AL., *supra* note 26, at ¶ 102.12 (explaining that minimal diversity “would require that only one plaintiff be a citizen of a different state from that of at least one defendant”).

57. *See* 15 MOORE ET AL., *supra* note 26, ¶ 102.12 (“Apart from its obvious historical pedigree, it is unclear that the complete diversity requirement is any more rational a means of curbing diversity jurisdiction than an approach premised on the basis of a litigant’s astrological sign.”).

58. Melissa R. Levin & Heather K. Hays, *Fraudulent Joinder: Successful Removal of Actions to Federal Court*, 4 PHARM. & MED. DEVICE L. BULL. 1, 1 (2004); *see, e.g.,* *Sherwin-Williams v. Holmes County*, 343 F.3d 383, 401 (5th Cir. 2003) (allowing a school district to join a local hardware store in a claim regarding lead paint abatement costs against an out-of-state paint manufacturer); *Dresser, Inc. v. Lowry*, 320 F. Supp. 2d 486, 496 (W.D. La. 2004) (permitting the plaintiff to join two local officers of an out-of-state corporation in an employment discrimination suit); *In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prods. Liab. Litig.*, 220 F. Supp. 2d 414, 426 (E.D. Pa. 2002) (allowing the plaintiff to join a local doctor in a case regarding the prescription drug Fen-Phen); *Lansdell v. Am. Home Prods. Corp.*, No. CV-99-S-2110-NE, 1999 U.S. Dist. LEXIS 22540, at \*29 (N.D. Ala. Oct. 26, 1999)

These categories of defendants, in extreme situations and in certain jurisdictions, can find themselves inundated by lawsuits.<sup>59</sup>

## 2. Joinder of an in-state defendant

A case may not be removed if any defendant is a citizen of the state in which the case is brought.<sup>60</sup> Therefore, even where complete diversity is present, if one defendant is a citizen of the state in which the case is filed, the case is not removable.<sup>61</sup>

This “hometown exception” is consistent with the goal of protecting the limited nature of federal subject matter jurisdiction.<sup>62</sup> Where a defendant is domiciled in the state or, in the case of a corporation, has its principal place of business there, such defendant theoretically will not suffer from the local bias and inconveniences that diversity jurisdiction was developed to confront.<sup>63</sup> By filing suit in a defendant’s home state, plaintiffs can ensure that a case will not be removed.

## 3. Joinder of a non-removing defendant

In order to remove a multi-defendant case, all defendants must join in the motion for removal.<sup>64</sup> Absent unanimity amongst the

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(permitting the plaintiff to join a local pharmacy in a case regarding the prescription drug Redux).

59. See, e.g., *Class Action Litigation: Hearing Before the S. Comm. on the Judiciary*, 108th Cong. 17–19 (July 31, 2002) (statement of Hilda Bankston), available at <http://www.access.gpo.gov/congress/senate/pdf/107hr/87640.pdf>. Bankston’s family owned and operated the only pharmacy in the once “magic jurisdiction” of Jefferson County, Mississippi, and was named as a local defendant in hundreds of lawsuits concerning, *inter alia*, Fen-Phen, Propulsid, Resulin, and Baycol. *Id.* at 17–18. Eventually, Bankston was forced to sell her pharmacy because of the cost of litigation and the stigma of being a permanent defendant. *Id.* at 18–19; see also *supra* note 43 and accompanying text (introducing the concept of “magic jurisdictions”).

60. See 28 U.S.C. § 1441(b) (2006) (“[An] 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.”); see, e.g., *Young & Simon, Inc. v. Bernstein*, 486 F. Supp. 1012, 1017 (D. Md. 1979) (stating that removal was not available to a defendant who had been sued in a state court in his state of residence, even if the plaintiff could have instituted a suit based on diversity of citizenship in federal court in the same state).

61. See, e.g., *Lyall v. AirTran Airlines, Inc.*, 109 F. Supp. 2d 365, 366, 374 (E.D. Pa. 2000) (remanding from federal court to Pennsylvania state court because one defendant was a corporation with its principal place of business in Pennsylvania).

62. See *supra* note 21 and accompanying text (discussing the limited nature of federal jurisdiction).

63. See *supra* note 25 and accompanying text (discussing local bias as a justification for federal jurisdiction).

64. See, e.g., *Chi., Rock Island & Pac. Ry. Co. v. Martin*, 178 U.S. 245, 247–48 (1900) (interpreting 28 U.S.C. § 1446(a) as requiring the unanimous consent of all defendants in order to remove a case); *Russell Corp. v. Am. Home Assurance Co.*, 264 F.3d 1040, 1049 (11th Cir. 2001) (“[T]he law is well settled that in cases involving multiple defendants, all defendants must consent to the removal of a case to federal court.”); *Lewis v. Rego Co.*, 757 F.2d 66, 68 (3d Cir. 1985) (“Section 1446 has been construed to require that when there is more than one defendant, all must

defendants, the case is remanded to state court.<sup>65</sup> “Like all rules governing removal, this unanimity requirement must be strictly interpreted and enforced . . . .”<sup>66</sup>

While one can conceive of legitimate strategy and convenience as motives for not agreeing to removal, forgoing the right of removal often has little to do with a defendant’s preference for state court.<sup>67</sup> Further, to ensure a lack of unanimity, plaintiffs may offer a defendant a Non-Removal Agreement.<sup>68</sup> Defendants may do more than block unanimity by making such agreements; to comply with Non-Removal Agreements, defendants may neglect to assert a legitimate affirmative defense, admit all the charges against them, or even change their domicile to establish venue.<sup>69</sup> In return, defendants have been offered a cap on damages, reduced liability based on the amount collected from other defendants, or even a promise not to pursue any judgment against them.<sup>70</sup> In some

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join in the removal petition[.]”); *Morganti v. Armstrong Blum Mfg. Co.*, No. 00-6343, 2001 U.S. Dist. LEXIS 2951, at \*11 n.4 (E.D. Pa. Mar. 19, 2001) (“The courts of this circuit, and the majority of courts nationwide, have interpreted *section 1446* to require that all defendants must expressly join in a notice of removal.”); *Williams v. Howard Univ.*, 984 F. Supp. 27, 28 (D.D.C. 1997) (adopting the “Three Musketeers Rule” that “multiple defendants must unambiguously and independently show that in seeking to remove a case from state court to federal court they are ‘all for one, one for all’” (citations omitted)).

65. 28 U.S.C. § 1447(c); *see also* *Balazik v. County of Dauphin*, 44 F.3d 209, 213 (3d Cir. 1995) (“[The] [f]ailure of all defendants to join is a ‘defect in removal procedure’ within the meaning of § 1447(c) . . . .” (citations omitted)).

66. *Russell Corp.*, 264 F.3d at 1049; *see also* *Sherman v. A.J. Pegno Constr. Corp.*, 528 F. Supp. 2d 320, 330 (S.D.N.Y. 2007) (remanding the case to state court and explaining that all defendants did not affirmatively agree to removal where one defendant did not join the removal motion, even though he did not object to removal).

67. For instance, forum selection and choice of law clauses in contracts dictate the courts in which potential future litigation is to be brought, and such clauses may function as a waiver of a defendant’s right of removal if the agreed upon location is a state court. *See Russell Corp.*, 264 F.3d at 1044 (describing cases where the unanimity requirement was contested).

68. “Non-Removal Agreement” is a term of art referring to any quid pro quo arrangement where one defendant in a multi-defendant suit agrees to assist a plaintiff in preventing removal in exchange for some benefit. *See id.* at 1048 (paving the way for the validity of non-removal agreements). As the Eleventh Circuit has explained, “The defendants’ right to remove a case is their right alone. They can waive it, exercise it, or bargain it away.” *Id.*

69. *See, e.g., Joe v. Minn. Life Ins. Co.*, 257 F. Supp. 2d 845, 847–48 (S.D. Miss. 2003) (explaining that the only party with standing to assert a statute of limitations affirmative defense declined to do so and “admitted all of the plaintiff’s allegations” to comply with a Non-Removal Agreement); *Taco Bell Corp. v. Cracken*, 939 F. Supp. 528, 530 (N.D. Tex. 1996) (involving an incarcerated defendant who had never been to the “magic jurisdiction” of Duval County, Texas but decided to select it as his residence and accordingly establish venue there).

70. *See, e.g., Hernandez v. Seminole County*, 334 F.3d 1233, 1235 (11th Cir. 2003) (describing an agreement between the plaintiffs and the defendant whereby the plaintiffs would limit any recovery against the defendant to \$250,000 if the defendant

instances, the defendant's only participation in the lawsuit is through his assistance to the plaintiffs.<sup>71</sup>

## II. DEFENDANT'S RESPONSE: THE "FRAUDULENT JOINDER" CLAIM

Presently, courts take divergent approaches when analyzing claims of fraudulent joinder.<sup>72</sup> Predicting what test a court will apply to determine fraudulent joinder is difficult, as the standards can shift, even within the same opinion.<sup>73</sup> In every court, the burden of proving fraudulent joinder rests with the removing party and is "one of the heaviest burdens known to civil law."<sup>74</sup> Where fraudulent joinder is shown, that party's citizenship will be ignored in determining whether there is diversity jurisdiction.<sup>75</sup>

Four of the standards developed to evaluate fraudulent joinder bear examination: (1) the "No Possibility" Test; (2) the Rule 11 Standard; (3) the Benefit-Burden Test; and (4) the Summary

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agreed to defeat removal from state court, and whereby the plaintiffs agreed not to pursue their claim against the defendant-doctor in the event that her insurance carrier refused to provide coverage); *In re Diet Drugs* (Phentermine, Fenfluramine, Dexfenfluramine) Prods. Liab. Litig., 220 F. Supp. 414, 421 (E.D. Pa. 2002) (describing an agreement by which the plaintiff promised to ultimately dismiss one group of defendants in exchange for their refusal to consent to removal); *Taco Bell*, 939 F. Supp. at 530 (describing the agreement between the plaintiff and the defendant as a "high-low" settlement agreement which limited [the defendant's] potential liability . . . contingent upon [plaintiff] obtaining a judgment" against the other defendants); *State Farm Fire & Cas. Co. v. Gandy*, 925 S.W.2d 696, 698 (Tex. 1996) (describing an agreement between a plaintiff-stepdaughter and a defendant-stepfather in a sexual abuse action where the plaintiff sued her stepfather for damages resulting from sexual abuse and agreed never to pursue him personally for the judgment in hopes of collecting from his insurance company). For additional examples, see discussion of Mary Carter Agreements *infra* notes 144–145.

71. *Joe*, 257 F. Supp. 2d at 849. In another instance, the plaintiff went so far as to pay \$150 per hour to the prisoner-defendant's attorney and gave a retainer of \$1,500, prior to signing the agreement. *Taco Bell*, 939 F. Supp. at 530.

72. See *Travis v. Irby*, 326 F.3d 644, 647 (5th Cir. 2003) ("Neither our circuit nor other circuits have been clear in describing the fraudulent joinder standard."); *Abraham & Hensley*, *supra* note 21, at 269 ("There is a schism in the federal courts regarding the standards used to determine whether joinder is fraudulent.")

73. See, e.g., *Travis*, 326 F.3d at 647 ("The test has been stated by this court in various terms, even within the same opinion.")

74. *Strange v. Crum Constr. LLC*, No. IP01-0789-C-H/G, 2001 WL 1160952, at \*1 (S.D. Ind. Aug. 28, 2001); see also *Wilson v. Republic Iron & Steel, Co.*, 257 U.S. 92, 97 (1921) ("[T]he petitioning defendant must take and carry the burden of proof, he being the actor in the removing proceeding." (citing *Carson v. Dunham*, 121 U.S. 421, 425–26 (1887))). For further discussion of the removal burden, see *supra* note 50 and accompanying text.

75. See, e.g., *Wilson*, 257 U.S. at 98–99 (upholding the district court's removal jurisdiction where the joinder of a local defendant was a sham); *Tedder v. F.M.C. Corp.*, 590 F.2d 115, 117 (5th Cir. 1979) (stating that if the claim against a local defendant is deemed fraudulent, lack of diversity will not prevent removal); *14A WRIGHT ET AL.*, *supra* note 55, § 3723 (discussing the diversity requirement for removal).

Judgment Standard.<sup>76</sup> Although some circuits continue without any clearly articulated test for fraudulent joinder, the “No Possibility” Test has received the widest acceptance.<sup>77</sup>

#### A. The “No Possibility” Test

In evaluating a claim of fraudulent joinder, many courts apply some form of what this Article refers to as the “No Possibility” Test.<sup>78</sup> This test requires that the removing party show “either that there is *no possibility* that the plaintiff would be able to establish a cause of action against the in-state defendant in state court[,] or that there has been outright fraud in the plaintiff’s pleadings of jurisdictional facts.”<sup>79</sup> This test, in either identical or similar form, has been

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76. See Farish Percy, *Making a Federal Case of It: Removing Civil Cases to Federal Court Based on Fraudulent Joinder*, 91 IOWA L. REV. 189, 216 (2005) (describing four tests used by the circuit courts to analyze allegations of fraudulent joinder: (1) the reasonable basis for the claim test; (2) the no possibility of recovery test; (3) the no reasonable possibility of recovery test; and (4) the failure to state a claim test).

77. See, e.g., *In re New Eng. Mut. Life Ins. Co. Sales Practices Litig.*, 324 F. Supp. 2d 288, 298 (D. Mass. 2004) (recognizing that “the Court of Appeals for the First Circuit has not articulated a standard for evaluating a claim of fraudulent joinder” but deciding to follow the “well-reasoned opinions” adopting the “No Possibility” Test); Abraham & Hensley, *supra* note 21, at 263 (“A few courts, however, have suggested that the standard for evaluating a remand motion should vary depending on the nature of the claim.”); Archibald, *supra* note 54, at 1387–88 (stating that although the circuits are split concerning the scope of the fraudulent joinder inquiry, “they agree that the removing party’s burden is to establish that there is ‘no possibility’ that the plaintiff would be able to establish a cause of action in state court against the nondiverse defendant”).

78. See, e.g., *In re Rezulin Prods. Liab. Litig.*, 133 F. Supp. 2d 272, 288 (S.D.N.Y. 2001) (applying the “No Possibility” Test); Jay S. Blumenkopf 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, 301–02 (2000) (describing the “no possibility” standard as requiring no possibility that the plaintiff can establish a cause of action against the defendant). Some courts and scholars refer to this approach as “the absolute standard.” See, e.g., *Wiacek v. Equitable Life Assurance Soc’y*, 795 F. Supp. 223, 226 (E.D. Mich. 1992) (“Some courts require that the defendant establish that there is absolutely no possibility that the plaintiff could state a cause of action . . . (the ‘absolute’ standard).”); Alexander O. Ekuo Akpodiete, *Reconciling Plaintiff’s Choice to Sue in State Court with Defendant’s Desire to Defend in Federal Court*, 69 FLA. B. J. 48, 53 (1995) (“This requirement has been dubbed the ‘absolute’ standard by some courts.”).

79. *B., Inc. v. Miller Brewing Co.*, 663 F.2d 545, 549 (5th Cir. 1981). Other courts have referred back to the *B., Inc.* opinion as a reference point for the “No Possibility” Test. See, e.g., *Crowe v. Coleman*, 113 F.3d 1536, 1538, 1542 (11th Cir. 1997) (citing *B., Inc.*, 663 F.2d at 549) (discussing the standards for removal and fraudulent joinder); *Henderson v. Ford Motor Co.*, 340 F. Supp. 2d 722, 724, 728 (N.D. Miss. 2004) (citing *B., Inc.*, 663 F.2d at 549) (holding that the defendant successfully demonstrated that there was no reasonable possibility of recovery against it); *Eckhart v. DuPuy Orthopaedics, Inc.*, No. 2:03-cv-1063, 2004 U.S. Dist. LEXIS 25211, at \*5–10 (S.D. Ohio Mar. 3, 2004) (citing *B., Inc.*, 663 F.2d at 549) (surveying the law of fraudulent joinder); *Fitzgerald Forest Prods., L.P. v. Durand Raute Corp. of Or.*, 932 F. Supp. 293, 295 (M.D. Ga. 1996) (citing *B., Inc.*, 663 F.2d at 549–50) (analyzing fraudulent joinder standards).

adopted as the prevailing test in a number of circuits.<sup>80</sup> While courts have made minor changes to the wording of this test, “they are meant to be equivalent because each is presented as a restatement of the other.”<sup>81</sup>

In *B., Inc. v. Miller Brewing Co.*,<sup>82</sup> the United States Court of Appeals for the Fifth Circuit laid out a model of the “No Possibility” Test.<sup>83</sup> Applying the test, the court found that it was not fraudulent for a Texas beer distributor to join the Wisconsin-based Miller Brewing Co. and its Texas-based regional manager.<sup>84</sup> Resolving all disputed questions of substantive fact in favor of the plaintiff, the court concluded that “insofar as *it is possible* that a state court might find that the Texas defendant(s) were subject to liability, the joinder of one or more of the defendants was not fraudulent.”<sup>85</sup> Wary of trespassing on the “judicial ‘turf’ of the state courts,” the Fifth Circuit remanded.<sup>86</sup>

### B. *The Rule 11 Standard*

Like all pleadings, a civil complaint must conform to, *inter alia*, Federal Rule of Civil Procedure 11 (“Rule 11”).<sup>87</sup> Rule 11 outlines the

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80. The United States Courts of Appeal for the Second, Third, Fourth, Fifth, Sixth, Seventh, Tenth, and Eleventh Circuits have all adopted the “No Possibility” Test. *See* Whitaker v. Am. Telecasting, Inc., 261 F.3d 196, 207 (2d Cir. 2001); Montano v. Allstate Indemn., No. 99-2225, 2000 U.S. App. LEXIS 6852, at \*5 (10th Cir. Apr. 14, 2000); Crowe v. Coleman, 113 F.3d 1536, 1538 (11th Cir. 1997); Alexander v. Elec. Data Sys. Corp., 13 F.3d 940, 949 (6th Cir. 1994); Gottlieb v. Westin Hotel Co., 990 F.2d 323, 327 (7th Cir. 1993); Boyer v. Snap-On Tools Corp., 913 F.2d 108, 111 (3d Cir. 1990); AIDS Counseling & Testing Ctrs. v. Group W Television, Inc., 903 F.2d 1000, 1003 (4th Cir. 1990); *B., Inc. v. Miller Brewing Co.*, 663 F.2d 545, 549 (5th Cir. 1981).

81. *Travis v. Irby*, 326 F.3d 644, 647 (5th Cir. 2003); *see, e.g.*, *Griggs v. State Farm Lloyds*, 181 F.3d 694, 699 (5th Cir. 1999) (referring at varying points in the opinion to “absolutely no possibility” and “whether there is any reasonable basis” of establishing liability against the nondiverse defendant); *Bronx Dough, LLC v. Dunkin’ Donuts, Inc.*, No. 03 Civ. 1398 (DC), 2004 U.S. Dist. LEXIS 920, at \*4 (S.D.N.Y. Jan. 22, 2004) (allowing either “any possibility” or “no reasonable possibility” to satisfy the “No Possibility” Test).

82. 663 F.2d 545 (5th Cir. 1981).

83. *Id.* at 549 (describing the “No Possibility” Test, holding that the defendant was not fraudulently joined and remanding to state court). For examples of cases in which other courts adopted a standard that is similar or identical, *see* cases cited *supra* notes 79–80.

84. *B., Inc.*, 663 F.2d at 555.

85. *Id.* The court was careful to note that its opinion should not be taken as a comment on the strength of the claims, even warning that a Texas court could find, as a matter of law, that no valid claim was stated. *Id.* However, because it was possible that a valid claim could be stated against the in-state defendants, the federal courts lacked subject matter jurisdiction. *Id.*

86. *Id.* at 554.

87. FED. R. CIV. P. 11(b). Rule 11 provides:

(b) By presenting to the court a pleading, written motion, or other paper . . . an attorney or unrepresented party certifies that to the best of the

proper standards for submitting papers to the court.<sup>88</sup> Based on these requirements, some federal courts, most notably the federal district courts of Alabama, have adopted Rule 11 as the “appropriate threshold standard” for determining fraudulent joinder.<sup>89</sup> In fact, these courts’ fraudulent joinder analyses are based directly on the language of Rule 11.<sup>90</sup>

For example, in *Sellers v. Foremost Insurance Co.*,<sup>91</sup> the Middle District of Alabama denied a motion for remand because the plaintiff’s counsel “admitted that he had no evidence whatsoever that supports, or is likely to lead to evidence that supports, a viable claim against the [in-state defendants].”<sup>92</sup> The court concluded that a failure to satisfy

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person’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

- (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
- (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;
- (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and
- (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

88. Rule 11 “require[s] litigants to ‘stop-and-think’ before initially making legal or factual contentions.” FED. R. CIV. P. 11 advisory committee’s note to 1993 amendment. It also requires an ongoing “duty of candor” towards the court. *Id.*

89. *Sellers v. Foremost Inc.*, 924 F. Supp. 1116, 1118 (M.D. Ala. 1996). “[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 that fact—Rule 11’s standard should apply to such a charge.” *Id.* at 1119; *see also* *Ruffin v. Cong. Life Ins. Co.*, No. CA 00-0124-C, 2000 U.S. Dist. LEXIS 7772, at \*45 (S.D. Ala. May 11, 2000) (adopting the Rule 11 Standard as the standard for analyzing fraudulent joinder). Not all of the Alabama federal judges, however, have accepted this standard. Judge William E. Cassady of the United States District Court for the Southern District of Alabama has twice cited *Sellers* for one portion of his remand evaluation but ignored the Rule 11 Standard in favor of the “No Possibility” Test adopted by the Eleventh Circuit in *Triggs v. John Crump Toyota*, 154 F.3d 1284, 1287 (11th Cir. 1998). *See* *Ison Logging, L.L.C. v. John Deere Constr. Equip. Co.*, No. CA 99-0979-MJ-C, 2000 U.S. Dist. LEXIS 316, at \*8–9 (S.D. Ala. Jan. 10, 2000); *Treher v. Wartsila NSD N. Am., Inc.*, No. CA 99-0016-P-C, CA 99-0549-P-C, 1999 U.S. Dist. LEXIS 15508, at \*11 (S.D. Ala. Aug. 4, 1999).

90. *Compare Sellers*, 924 F. Supp. at 1119 n.\* (“[T]o block a fraudulent-joinder charge based on lack of legal support, a plaintiff need only show that her claim against a resident defendant is warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.”), *with* FED. R. CIV. P. 11(b)(2) (“[T]he claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law.”).

91. 924 F. Supp. 1116 (M.D. Ala. 1996).

92. *Id.* at 1119.

such a threshold demanded a finding that the in-state defendants were fraudulently joined.<sup>93</sup>

This test is advantageous because of the case law that exists regarding Rule 11.<sup>94</sup> Courts, however, generally dislike imposing Rule 11 sanctions, and it is therefore unlikely that applying Rule 11 in a different context, such as fraudulent joinder, would engender judicial support or widespread influence.<sup>95</sup>

### C. *The Benefit-Burden Test*

To determine which parties should be considered for diversity purposes, some courts have recommended examining only those parties that truly stand to gain or lose from a possible verdict.<sup>96</sup>

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93. *See id.* (denying the plaintiff's motion to remand to state court and dismissing the in-state defendants).

94. *Id.* at 1118.

95. *See* Algero, *supra* note 36, at 108 (noting that Rule 11 sanctions are only imposed for forum shopping where attorneys have ignored an explicit ruling in one court by seeking an alternative forum); Underwood, *supra* note 16, at 608 (discussing the historical reluctance of trial courts to impose sanctions for taking frivolous positions in litigation); Georgene M. Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 191 (1988) (arguing that attorneys are reluctant to bring Rule 11 sanctions against an adversary because they probably would employ those tactics themselves). In fact, in 2004, the United States House of Representatives failed in its attempt to bolster Rule 11 to combat what it saw as an increasing trend in frivolous lawsuits. *See* Lawsuit Abuse Reduction Act of 2004, H.R. 4571, 108th Cong. (2004). The House's approach was to broaden the coverage and strengthen the sanctions imposed under Rule 11. *Id.* If enacted, LARA would:

- (1) restore mandatory sanctions for filing frivolous lawsuits in violation of Rule 11,
- (2) remove Rule 11's "safe harbor" provision that currently allows parties and their attorneys to avoid sanctions for making frivolous claims by withdrawing frivolous claims after a motion for sanctions has been filed,
- (3) allow monetary sanctions, including attorneys' fees and compensatory costs, against any party making a frivolous claim,
- (4) allow sanctions for abuses of the discovery process (the process by which lawyers on each side request information from the other side prior to trial),
- (5) apply Rule 11's provisions to state cases that a state judge finds affect interstate commerce,
- (6) require that personal injury cases be brought only where the plaintiff resides, where the plaintiff was allegedly injured, or where the defendant's principal place of business is located,
- (7) apply a "three strikes and you're out" rule to attorneys who commit Rule 11 violations in Federal district court, and
- (8) impose mandatory civil sanctions for willful and intentional document destruction intended to obstruct a pending court proceeding.

H.R. REP. NO. 108-682, at 3-4 (2004). After passing the House, LARA was referred to the Senate Judiciary Committee on Sept. 15, 2004, where no further action was taken. *See* H.R. 4571: Lawsuit Abuse Reduction Act of 2004, GovTrack, <http://www.govtrack.us/congress/bill.xpd?bill=h108-4571> (last visited Sept. 28, 2009).

96. *See, e.g.,* Ford Motor Co. v. Dep't of Treasury, 323 U.S. 459, 464 (1945) (considering those who would receive any economic benefit or burden from the verdict), *overruled in part on other grounds by* Lapidus v. Bd. of Regents, 535 U.S. 613 (2002); Bishop v. Hendricks, 495 F.2d 289, 293, 295 (4th Cir. 1974) (finding that, in order to satisfy § 1359, a party must have more of a stake in the litigation than just establishing diversity jurisdiction); Rose v. Giamatti, 721 F. Supp. 906, 915-22 (S.D. Ohio 1989) (disregarding nominal parties in determining diversity of citizenship); *see also* Peter G. Neiman, "Root, Root, Root for the Home Team": *Pete Rose*,

The Supreme Court has authorized the determination of party validity for diversity jurisdiction by examining only “those parties that stand to be benefited or burdened by the litigation.”<sup>97</sup>

By focusing on those who stand to lose or gain from the cause of action, this standard “insures that federal jurisdiction will be invoked only when necessary to protect the party whose personal interest in the suit might be prejudiced by the presence of local bias.”<sup>98</sup> The key is to “deny[] the use of federal courts in suits which d[o] not really and substantially involve a dispute or controversy properly within the jurisdiction of the federal courts.”<sup>99</sup>

In *Ford Motor Co. v. Department of Treasury of Indiana*,<sup>100</sup> the Supreme Court applied the Benefit-Burden Test to a jurisdictional question.<sup>101</sup>

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*Nominal Parties, and Diversity Jurisdiction*, 66 N.Y.U. L. REV. 148, 173 (1991) (analyzing the court’s description in *Rose v. Giamatti* of a nominal party as “either one who is not the benefited or the burdened party, or one who has no control over the litigation or the subject matter”). Many of the cases applying the Benefit-Burden Test to determine jurisdiction are in the context of appointment or assignment of representatives to create jurisdiction; however, the principles these cases stand for are equally applicable to party joinder to destroy jurisdiction. See 13F WRIGHT ET AL., *supra* note 55, § 3641.1 (“Similarly, . . . in cases in which the plaintiff attempts to defeat . . . jurisdiction by the joinder of a nondiverse plaintiff, the federal courts will allow the transaction . . . only if that person is deemed a *real party in interest*.” (emphasis added)).

97. Neiman, *supra* note 96, at 164 (citing *Ford Motor*, 323 U.S. at 464). Historically, courts applied this test to ignore citizenship of an assignee-plaintiff, where assignment was made solely to create diversity jurisdiction. See, e.g., *Hayden v. Manning*, 106 U.S. 586, 588–89 (1883) (concluding that the out-of-state plaintiff was only standing in for an in-state resident and that diversity jurisdiction was improperly created).

98. *Bishop*, 495 F.2d at 292 (“[This] has been the historical view of why diversity jurisdiction originated.” (citation omitted)). Essentially, according to the reasoning behind this standard, allowing parties to affect diversity, other than those who stand to benefit or lose, “would not advance any of the functions diversity jurisdiction was designed to serve.” *White v. Lee Marine Corp.*, 434 F.2d 1096, 1100 (5th Cir. 1970); see *supra* notes 25–27 and accompanying text (discussing local bias as a justification for diversity jurisdiction).

99. *Bishop*, 495 F.2d at 294 (internal quotation marks omitted). In the context of claim assignment and appointment, the Third Circuit has suggested that

[i]n determining whether or not diversity has been artificially created, the district court may consider, *inter alia*, such factors as the identity of the representative and his relationship to the party represented; the scope of the representative’s powers and duties; any special capacity or experience which the representative may possess with respect to the purpose of his appointment; whether there exists a non-diverse party . . . who might more normally be expected to represent the interests involved; whether those seeking the appointment of the representative express any particular reasons for selecting an out-of-state person; and whether, apart from the appointment of an out-of-state representative, the suit is one wholly local in nature.

*Groh v. Brooks*, 421 F.2d 589, 595 (3d Cir. 1970).

100. 323 U.S. 459 (1945).

101. *Id.* at 462–64. The plaintiff sued for a refund of allegedly overpaid gross income taxes, and the defendant asserted an absolute defense of sovereign immunity. *Id.* at 460, 462.

To destroy the State of Indiana's ability to obtain a dismissal based on sovereign immunity, the plaintiff joined the Governor, Treasurer, and Auditor of the State.<sup>102</sup> The Court ignored these parties for purposes of determining federal jurisdiction, finding that the State itself was the only "real substantial party in interest."<sup>103</sup>

While the logic of *Ford Motor* may be instructive on some propositions, it cannot be directly applied to questions of diversity jurisdiction. It is well-settled "that a state is not a citizen for purposes of diversity jurisdiction."<sup>104</sup> The determination of "real parties in interest" has great appeal but is unrealistically over-inclusive in some common situations. Most notably, where the defendant has the right to seek indemnity from a third party, the third party would be ignored as a "fraudulent" defendant under this standard.<sup>105</sup> Additionally, a defendant whose liability insurer would be accountable for any judgment is currently considered the "real party in interest" by the courts,<sup>106</sup> though this test would likely produce the opposite result.

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102. *Id.* at 460. Combined, these parties constituted the board of the State's Treasury Department. *Id.*

103. *Id.* at 464. The Court stated that any "[j]udgment obtained in such action is to be satisfied by payment out of any funds in the state treasury[]" and concluded that the other defendants were "joined as the collective representatives of the state, not as individuals against whom a personal judgment is sought." *Id.* at 463-64. The court in *Bishop* engaged in a similar analysis. *See* 495 F.2d at 291 (stating that the "federal courts on jurisdictional issues should assess the substantive relations between the parties to the controversy and . . . they should make a realistic determination with respect to the presence of diversity." (internal quotation marks omitted)). The Fourth Circuit has described a diversity-destroying party that should be ignored as a party "[w]ithout any real or substantial interest in the outcome of the litigation, [because the party] possesses no stake in the litigation. [The party] has nothing to gain by the suit . . . if successful, and, if the suit is lost, nothing to lose." *Id.* at 295 (internal brackets and quotation marks omitted).

104. *West Virginia v. Morgan Stanley & Co.*, 747 F. Supp. 332, 336 (S.D. W. Va. 1990) (citing *Postal Tel. Cable Co. v. Alabama*, 155 U.S. 482, 487 (1894)); *see also Moor v. County of Alameda*, 411 U.S. 693, 717 (1973) ("There is no question that a State is not a 'citizen' for purposes of the diversity jurisdiction.").

105. Regardless of whether an insurer is a co-defendant or a third party, the indemnified party would be deemed fraudulent under this test. The current approaches of some courts conflict with this conclusion. *See, e.g., Soper v. Kahn*, 568 F. Supp. 398, 403 (D. Md. 1983) (stating that third-party claims for indemnification and contribution are not separate and independent for purposes of granting removal jurisdiction). *American Fire & Casualty Co. v. Finn* established the standard for determining whether a claim is "separate and independent." 341 U.S. 6 (1951). Other courts have interpreted this as "a rule which virtually has sounded the death knell for removal of 'separate and independent' claims in the diversity context." *Motor Vehicle Cas. Co. v. Russian River County Sanitation Dist.*, 538 F. Supp. 488, 494 (N.D. Cal. 1981). Therefore, indemnity cases are rarely removable for diversity of citizenship. *Soper*, 568 F. Supp. at 403.

106. *See, e.g., Saylab v. Harford Mut. Ins. Co.*, 271 F. Supp. 2d 112, 116 (D.D.C. 2003) (finding that an insurance company does not take on the residence of its insured for diversity of citizenship analysis).

*D. The Summary Judgment Standard*<sup>107</sup>

Some courts have tied fraudulent joinder analysis directly to the question of summary judgment.<sup>108</sup> While superficially appealing, a summary judgment investigation looks too deeply to the merits of the claim rather than merely investigating the reasonableness of the claim.<sup>109</sup>

The fact that a claim is ultimately unsuccessful in one court does not mean that it was invalid to bring the claim in that court. For one thing, the fraudulent joinder standard is much more deferential to plaintiffs.<sup>110</sup> In addition, because fraudulent joinder is a jurisdictional

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107. Within this context, the courts treat dismissal, under Rule 12(b)(6), and summary judgment, under Rule 56(b), identically. For that reason, this Article will discuss the two standards as one approach under the heading of “Summary Judgment Standard.” Rule 56(b) sets the standard for summary judgment in favor of a defendant by providing that “[a] party against whom relief is sought may move at any time, with or without supporting affidavits, for summary judgment on all or part of the claim.” FED. R. CIV. P. 56(b). Alternatively, Rule 12(b)(6) asks the court to dismiss for “failure to state a claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). Courts use these two terms interchangeably when discussing a summary judgment approach to fraudulent joinder analysis. See *In re Avandia Mktg., Sales Practices and Prod. Liab. Litig.*, 624 F. Supp. 2d 396, 418 (E.D. Pa. 2009) (finding that when fraudulent joinder is considered in the 12(b)(6) context, the motion must be treated as one for summary judgment under Rule 56); *Stallworth v. Robinson*, No. 1:06CV537, 2006 U.S. Dist. LEXIS 81579, at \*5–6 (S.D. Miss. Nov. 6, 2006) (applying both tests to determine whether joinder was fraudulent).

108. See, e.g., *Jernigan v. Ashland Oil Inc.*, 989 F.2d 812, 816 (5th Cir. 1993) (“[T]he proceeding is similar to that used for ruling on a motion for summary judgment under Fed. R. Civ. P., Rule 56(b).” (citations and internal quotation marks omitted)); *Davis v. Prentiss Prop. Ltd.*, 66 F. Supp. 2d 1112, 1115–16 (C.D. Cal. 1999) (stating that “while courts have attempted to clearly restate the fraudulent joinder standard, . . . [i]t is difficult to identify the distinction between the standard under Rule 12(b)(6) and some of the earlier-cited formulations of the fraudulent-joinder inquiry”); see also *Batoff v. State Farm Ins. Co.*, 977 F.2d 848, 852 (3d Cir. 1992) (criticizing the district court because “while the court did not characterize its analysis as being the same as it would make on a ruling on a motion to dismiss under Fed. R. Civ. P. 12(b)(6), that is exactly what it was”).

109. See *Batoff*, 977 F.2d at 852 (stating that the analysis under Rule 12(b)(6) “is more searching” than the fraudulent joinder analysis, and that it is possible that a court may find that a party is not fraudulently joined, but still dismiss that party’s claim under Rule 12(b)(6)); *Lyall v. AirTran Airlines, Inc.*, 109 F. Supp. 2d 365, 367–68 (E.D. Pa. 2000) (“[O]ur inquiry must not be too deep. Simply because we come to believe that, at the end of the day, a state court would dismiss the allegations against a defendant for failure to state a cause of action does not mean that the defendant’s joinder was fraudulent.”).

110. See *Montano v. Allstate Indem.*, No. 99-2225, 2000 U.S. App. LEXIS 6852, at \*5 (10th Cir. Apr. 14, 2000) (stating that the standard for fraudulent joinder is stricter than the standard for dismissing a claim under Rule 12(b)(6)); *Asperger v. Shop Vac Corp.*, 524 F. Supp. 2d 1088, 1096 (S.D. Ill. 2007) (declining to conduct a veil-piercing analysis to determine whether joinder was fraudulent, and observing that “the inquiry on a claim of fraudulent joinder is even more lenient than the inquiry on a motion for failure to state a claim . . . under Rule 12(b)(6)”; *Grennell v. W. So. Life Ins. Co.*, 298 F. Supp. 2d 390, 394 (S.D. W. Va. 2004) (finding the standard for fraudulent joinder “even more favorable to the plaintiff than the standard for ruling on a motion to dismiss under” Rule 12(b)(6) (citing *Hartley v.*

question, a court is free to consider information outside of the pleadings.<sup>111</sup> Summary judgment motions, on the other hand, are generally restricted to a facial analysis of the complaint.<sup>112</sup> Currently, the circuit courts are split on how deeply the court should look to determine the existence of fraudulent joinder.<sup>113</sup>

The Summary Judgment Standard can overstep the jurisdictional powers of the court. The test's evaluation of the substantive claim against a non-diverse party could go beyond the scope of the court's powers.<sup>114</sup> While it is well-established that federal courts have the power to determine their own jurisdiction, federal courts remain courts of limited jurisdiction.<sup>115</sup>

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CSX Transp. Inc., 187 F.3d 422, 424 (4th Cir. 1999)); Blumenkopf et al., *supra* note 78, at 303 (describing the standard for fraudulent joinder as being higher than that for dismissing a claim under Rule 12(b)(6)).

111. See, e.g., *Ross v. Citifinancial, Inc.*, 344 F.3d 458, 462–63 (5th Cir. 2003) (observing that for fraudulent joinder analysis, “it is well established that the district court may ‘pierce the pleadings’”); *Brantley v. Vaughan*, 835 F. Supp. 258, 261 (D.S.C. 1993) (“[T]he 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.” (citations and internal quotation marks omitted)). *But see* *Hill v. Olin Corp.*, No. 07-cv-0054-DRH, 2007 U.S. Dist. LEXIS 34955, at \*18, \*24 (S.D. Ill. May 14, 2007) (declining to pierce the pleadings when determining whether joinder was fraudulent because the remedy should be applied only in exceptional cases).

112. See, e.g., *Brantley*, 835 F. Supp. at 261 (explaining that on a motion to dismiss for failure to state a claim, the court does not resolve any dispute, but merely considers “whether the allegations constitute ‘a short and plain statement of the claim showing that the pleader is entitled to relief’”).

113. 13F WRIGHT ET AL., *supra* note 55, § 3641 (explaining the circuit split and giving an extensive list of cases arguing both sides of the “piercing the pleadings” debate). Currently, the Fourth, Fifth, Ninth, Tenth, and Eleventh Circuits allow courts to pierce, while the Second, Third, and Seventh Circuits restrict their examination to the original complaint. *Id.* Compare *Mayer v. Rapoport*, 198 F.3d 457, 464 (4th Cir. 1999) (applying the reasoning of the Tenth Circuit, allowing district courts to look beyond the pleadings to determine if joinder is fraudulent), *Smoot v. Chi., Rock Island & Pac. R.R. Co.*, 378 F.2d 879, 882 (10th Cir. 1967) (“[F]ederal courts may look beyond the pleadings to determine if the joinder, although fair on its face, is a sham or fraudulent device to prevent removal.”); *Dodd v. Fawcett Publ'ns, Inc.*, 329 F.2d 82, 85 (10th Cir. 1964) (“[U]pon 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.”), and *Underwood*, *supra* note 16, at 602 (arguing that courts should be permitted to pierce the pleadings in all fraudulent joinder cases), with *Ala. Great S. Ry. v. Thompson*, 200 U.S. 206, 216 (1905) (requiring that the removal decision be based solely on the plaintiff's complaint and other pleadings), and *Walton v. Tower Loan of Miss.*, 338 F. Supp. 2d 691, 694 (N.D. Miss. 2004) (“[I]t is plain . . . that the improper joinder standard is far more of a pleadings-based inquiry than had commonly been assumed as recently as a year ago.”).

114. See *Davis v. Prentiss Props. Ltd., Inc.*, 66 F. Supp. 2d 1112, 1114 (C.D. Cal. 1999) (“If a court were to apply the standard of Rule 12(b)(6) to the diversity-defeating claim, the court would be ignoring the fact that it has no jurisdiction over that claim.”).

115. See *supra* Part I.A (discussing the limits of federal jurisdiction); cf. *United States v. United Mine Workers*, 330 U.S. 258, 291 (1947) (admonishing that an order by a federal court that lacks jurisdiction need not be obeyed).

## III. ANALYSIS

Curiously, the use of tactical devices as a means to defeat federal jurisdiction is not expressly prohibited by any statute.<sup>116</sup> Rather than adopting one universal approach, courts attempt to discern fraudulent joinder by applying a collection of amorphous approaches.<sup>117</sup> To strengthen the protection of federal subject matter jurisdiction, courts must clarify and more consistently enforce any standard employed.<sup>118</sup>

First, “fraudulent joinder” is an inappropriate label for the analysis that courts are actually undertaking.<sup>119</sup> Defendants have adopted this title in an effort to cast a negative glare on joinder that destroys federal subject matter jurisdiction.<sup>120</sup> While the Supreme Court once required an actual showing of “bad faith” to prove fraudulent joinder,<sup>121</sup> as this Article has discussed above, the standard has shifted from one of motive to a more intrusive examination of the possibility of recovery from the allegedly “fraudulently joined” party.<sup>122</sup> The analysis does not, and should not, revolve around the

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116. See 13F WRIGHT ET AL., *supra* note 55, § 3641 (explaining that 28 U.S.C. § 1332(c)(2) defines specific appointment categories through which diversity of citizenship may be destroyed, but that there are no other rules, statutory or judicial, that discuss destruction of diversity through other devices).

117. See *Travis v. Irby*, 326 F.3d 644, 647 (5th Cir. 2003) (observing that the test courts apply can change, even within the same opinion); *Neiman*, *supra* note 96, at 156 (finding the present standards “poorly defined and thus subject to flexible and inconsistent interpretation and application”).

118. See *Wecker v. Nat’l Enameling & Stamping Co.*, 204 U.S. 176, 186 (1907) (warning that the federal courts should neither sanction tactics to prevent rightful removal nor be lax in preventing improper removal); 13F WRIGHT ET AL., *supra* note 55, § 3641 (explaining that judicial attitudes have shifted to make federal courts today more wary of transactions that prevent legitimate removal than in years past).

119. See *Addison v. Amonate Coal Co.*, No. 1:08-00221, 2008 U.S. Dist. LEXIS 54349, at \*5 n.3 (S.D. W. Va. July 16, 2008) (noting that the term “fraudulent joinder” is misleading because it does not involve a showing of either fraud or joinder).

120. This strategy of naming is not unlike that used by politicians pushing their agendas. See, e.g., Lizette Alvarez, *In 2 Parties’ War of Words, Shibboleths Emerge as Clear Winner*, N.Y. TIMES, Apr. 27, 2001, at A1 (comparing Democrats’ use of “vouchers” and “estate tax” with the Republicans’ “opportunity scholarships” and “death tax”). The label placed on a concept can craft the debate and influence its outcome. *Id.*

121. See, e.g., *Pullman Co. v. Jenkins*, 305 U.S. 534, 541 (1939) (noting that “[i]t is always open to the non-resident defendant to show that the resident defendant has not been joined in good faith”); *Chesapeake & Ohio Ry. Co. v. Cockrell*, 232 U.S. 146, 152 (1914) (finding that the removing party’s burden is only carried if its proof “compels the conclusion that the joinder is without right and made in bad faith”).

122. Compare cases cited *supra* note 121 (actual fraud standard), with *B., Inc. v. Miller Brewing Co.*, 663 F.2d 545, 545 (5th Cir. 1981) (“No Possibility” Test), *Sellers v. Foremost Ins. Co.*, 924 F. Supp. 1116, 1119 (M.D. Ala. 1996) (Rule 11 Standard), *Ford Motor Co. v. Dep’t of Treasury*, 323 U.S. 459, 459 (1945) (“Benefit-Burden” Test), and *Jernigan v. Ashland Oil Inc.*, 989 F.2d 812, 816 (5th Cir. 1993) (Summary Judgment Standard).

elements of common law fraud.<sup>123</sup> Thus, the name *fraudulent* joinder does a poor job of announcing what this standard is striving to prevent. Rather than joining parties through fraud, plaintiffs are joining parties through improper or collusive means.<sup>124</sup> It seems more appropriate, then, to refer to this action as one of “improper joinder.”<sup>125</sup>

#### A. *Defining One Clear Standard for Improper Joinder*

Adoption of a uniform test for improper joinder would allow the federal courts to operate more predictably and thus more fairly.<sup>126</sup> Plaintiffs would benefit from a clearly articulated test to serve as a guide for how to structure the claims and parties in their lawsuits. Defendants would also benefit, as such a test would offer clarity on when a valid removal exists within a facially non-removable case. In this area, the goal should be uniformity across the federal system.<sup>127</sup> If courts have any hope of creating a fair and effective approach, a case removable in Maine must also be removable in Georgia.

The uniform test for improper joinder should be based on the experience gained through use of the four current fraudulent joinder tests and the principles underlying 28 U.S.C. § 1359.<sup>128</sup> The new standard should require remand where: (1) there is no reasonable possibility that the plaintiff will be able to establish a cause

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123. Fraud is defined as “[a] knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment.” BLACK’S LAW DICTIONARY 731 (9th ed. 2009).

124. *Cf.* 28 U.S.C. § 1359 (2006) (offering an analogous rule pertaining to the fraudulent *creation* of jurisdiction: “A district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court.”).

125. The Fifth Circuit, en banc, suggested such a name change. *Smallwood v. Ill. Cent. R.R. Co.*, 385 F.3d 568, 571 n.1 (5th Cir. 2004); *see also* *Walton v. Tower Loan of Miss.*, 338 F. Supp. 2d 691, 694 (N.D. Miss. 2004) (referring to the doctrine as “improper joinder”; *Recent Case*, 118 HARV. L. REV. 1086, 1091 (2005) (explaining that a court faced with the question of fraudulent joinder considers whether to correct “wrongful” joinders, and not whether to punish “fraudulent” behavior).

126. *See* *Clow v. U.S. Dep’t of Hous. & Urban Dev.*, 948 F.2d 614, 628 (9th Cir. 1981) (O’Scannlain, J., dissenting) (cautioning that a court should not have the discretion to answer fraudulent joinder questions where that court has no authority or power to do so).

127. *See* *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 104 (1941) (“The removal statute, which is nationwide in its operation, was intended to be uniform in its application, unaffected by local law definition or characterization of the subject matter to which it is to be applied.”); *see also* *Forum Shopping Reconsidered*, *supra* note 36, at 1685 (“Consistency of outcomes is a fundamental tenet of virtually any legal system.” (citing ARISTOTLE, THE NICOMACHEAN ETHICS V.3 (D. Ross trans. 1925))).

128. *See* discussion *supra* Part II (identifying four fraudulent joinder tests). The principles underlying § 1359 are instructive with respect to attempts to destroy, as well as create, jurisdiction through artificial means. *See* *Read v. Phillips Petrol. Co.*, 441 F. Supp. 1184, 1185–86 (E.D. La. 1977) (“The aim of Section 1359 is to prevent improper attempts to manufacture jurisdiction through some artifice.”).

of action against the defendant; (2) there has been outright fraud in the plaintiff's pleading of jurisdiction;<sup>129</sup> or (3) there is clear and convincing evidence that the plaintiff does not intend to pursue the diversity-destroying defendant.<sup>130</sup>

One remaining question is what the court should do with an improper party once such a party is discovered. First, the court should determine the question of diversity of citizenship without regard to the improper party.<sup>131</sup> Beyond this, however, the court should determine whether the improperly joined party should be severed and remanded, dismissed, or simply retained as a party to the federal case.<sup>132</sup> If a non-diverse defendant is deemed improperly joined, the court should sever that party and remand so that the plaintiff can pursue his claim in state court.<sup>133</sup> Where there is no reasonable possibility that the plaintiff could establish a cause of action against the improper party in state court, however, severing the party would seem a waste of time and resources.<sup>134</sup> Because the improper joinder standard is more favorable to plaintiffs than the 12(b)(6) motion standard,<sup>135</sup> a claim failing to satisfy the "no possibility" prong can reasonably be dismissed.<sup>136</sup>

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129. Parts 1 and 2 are clear statements of the generally accepted "No Possibility" Test. See *supra* Part II.A. Because there is great confusion over what constitutes "no reasonable possibility," elaboration on this question is necessary. A good guidepost for the courts should be whether a plaintiff could make a non-frivolous response to a motion to dismiss. This would ensure that the claim satisfies Rule 11.

130. See *infra* Part III.B.

131. See, e.g., *Bohanan v. Atchison Topeka & Santa Fe Ry. Co.*, 289 F. Supp. 490, 492 (D. Okla. 1968) (finding that a court must be able to "summarily eliminate [a] fraudulently joined [d]efendant."); see also *supra* notes 18, 85 and accompanying text (discussing the courts' prior treatment of fraudulently joined defendants).

132. See *In re Rezulin Prods. Liab. Litig.*, 168 F. Supp. 2d 136, 146 (S.D.N.Y. 2001) ("Although misjoinder is a ground for dismissal or severance of an improperly joined party, the vast majority of courts confronting the issue on remand motions have found that misjoinder . . . is not alone a basis for remand.").

133. See *Joe v. Minn. Life Ins. Co.*, 257 F. Supp. 2d 845, 850 (S.D. Miss. 2003) (severing the diversity-blocking defendants, and suggesting that "[s]hould the plaintiff actually wish to pursue her claims against these defendants, she may do so in the courts of the State of Mississippi"). This position is consistent with the handling of cases of fraudulent misjoinder—the joining of unrelated claims of non-diverse parties to defeat removal—where the misjoined party is severed pursuant to Rule 21. See, e.g., *Stone v. Zimmer, Inc.*, No. 09-80252-CIV, 2009 WL 1809990, \*3–4 (S.D. Fla. June 25, 2009) (severing the claims against a misjoined party, pursuant to Rule 21).

134. See *supra* note 129 and accompanying text (discussing the "no reasonable possibility" standard). If the standard for the "no possibility" prong is an inability to make a non-frivolous response to a motion for 12(b)(6), then the plaintiff would never be able to pursue the severed claim, and it would be reasonable to have the district court dismiss it. See *Marshall v. Manville Sales Corp.*, 6 F.3d 229, 233 (4th Cir. 1993) ("A claim need not ultimately succeed to defeat removal; only a possibility of a right to relief need be asserted.").

135. See cases cited *supra* note 110 (comparing the fraudulent joinder standard with the motion to dismiss standard). Rule 12(b)(6) allows for dismissal of a cause of

The present fraudulent joinder analysis is weakened by a lack of repercussions for violators. Though statutes contain sanctions for abusing the removal process,<sup>137</sup> courts are wary of imposing them.<sup>138</sup> Following the rationale from the Lawsuit Abuse Reduction Act of 2004 (“LARA”),<sup>139</sup> these sanctions should be bolstered and better enforced to help deter plaintiffs from improperly joining defendants and thereby help ensure access to federal district courts where appropriate.

### B. *No Intention to Pursue*

Where it can be demonstrated that there is no intention to pursue a claim or judgment against a jurisdiction-destroying defendant, a court should find joinder of that party improper.<sup>140</sup> The Supreme Court has recognized that courts must protect the right of access to a federal forum for qualifying cases.<sup>141</sup> In addition, the Court has recognized that it could lighten the burden of litigation on

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action for “failure to state a claim upon which relief can be granted.” FED. R. CIV. P. 12(b)(6).

136. For an example of a court adopting this conclusion, see *Lyall v. Airtran Airlines, Inc.*, 109 F. Supp. 2d 365, 368 n.7 (E.D. Pa. 2000) (“[I]f we decide that the joinder is indeed fraudulent, then we must be prepared to dismiss all claims against [the improperly joined defendant].”).

137. See, e.g., 28 U.S.C. § 1447(c) (2006) (“An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal.”).

138. See *Underwood*, *supra* note 16, at 608 (“[T]he historical reluctance of trial courts to impose sanctions for taking frivolous positions in litigation means that the threat of sanctions does little to deter litigants from asserting unfounded claims . . .”).

139. H.R. 4571, 108th Cong.; see text of proposed law *supra* note 95.

140. The Supreme Court has included “no intention to pursue” in its fraudulent joinder analysis. See, e.g., *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 98 (1921) (“[T]he joinder was a sham and fraudulent—that is, . . . without any purpose to prosecute the cause in good faith against the [defendant]” and “with the purpose of fraudulently defeating the [other defendant’s] right of removal.”); *Chi., Rock Island & Pac. Ry. Co. v. Schwyhart*, 227 U.S. 184, 194 (1913) (explaining that courts faced with a fraudulent joinder question should evaluate “whether there was a real intention to get a joint judgment”). More recently, the Third Circuit, in discussing the Circuit’s fraudulent joinder standard, used the language “no real intention in good faith to prosecute the action against the defendant or seek a joint judgment.” *Boyer v. Snap-On Tools Corp.*, 913 F.2d 108, 111 (3d Cir. 1990).

141. See *Wecker v. Nat’l Enameling & Stamping Co.*, 204 U.S. 176, 182–83 (1907) (“[T]he Federal courts may, and should, take such action as will defeat attempts to wrongfully deprive parties entitled to sue in the Federal courts of the protection of their rights in those tribunals.”); see also *In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prods. Liab. Litig.*, 220 F. Supp. 2d 414, 425 (E.D. Pa. 2002) (“As long as Congress authorizes the federal district courts to exercise subject matter jurisdiction over diversity actions we must protect the right of parties to invoke it.”).

individuals and small businesses located in strategically advantageous forums.<sup>142</sup>

Non-Removal Agreements and similar agreements not to pursue should be per se evidence of improper joinder.<sup>143</sup> These agreements, like other collusive litigation agreements,<sup>144</sup> cast doubt on the integrity of the court's proceedings.<sup>145</sup> The best approach is to declare them void as against public policy.<sup>146</sup> These agreements are

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142. See *In re Diet Drugs*, 220 F. Supp. 2d at 425 (“What has been transpiring can only be characterized as a sham, at the unfair expense not only of [this defendant] but of many individuals and small enterprises that are being unfairly dragged into court simply to prevent the adjudication of lawsuits against the real target, in a federal forum.”). For an example of how improper joinder can affect one individual, see discussion of Hilda Bankston's story *supra* note 59. See also *supra* note 43 and accompanying text (discussing “magic jurisdictions”).

143. See *supra* Part I.D.3 (explaining plaintiffs' use of Non-Removal Agreements to prevent removal to federal court).

144. See, e.g., *Booth v. Mary Carter Paint Co.*, 202 So. 2d 8 (Fla. Dist. Ct. App. 1967) (discussing, for the first time, “Mary Carter Agreements”). Mary Carter Agreements are “basically a contract by which one co-defendant secretly agrees with the plaintiff that, if such defendant will proceed to defend himself in court, his own maximum liability will be diminished proportionately by increasing the liability of the other co-defendants.” *Ward v. Ochoa*, 284 So. 2d 385, 287 (Fla. 1973). Mary Carter Agreements have four basic elements: “(1) secrecy, (2) the signing defendant remains in the lawsuit, (3) the signing defendant guarantees plaintiff a certain monetary recovery, and (4) the signing defendant's liability is decreased in direct proportion to the increase in the non-signing defendants' liability.” Steven Plitt, *The Evolving Boundaries of Damron/Morris Agreements: A Search for the Missing Link, A Judicial Determination of the Length of a Reasonable Person's Arm, and Other Progressive Issues*, 35 ARIZ. ST. L.J. 1331, 1339–40 n.50 (2003). Based on the similarities between Mary Carter Agreements and Non-Removal Agreements, some of the arguments used to invalidate or criticize the former apply equally to the latter.

145. See *Joe v. Minn. Life. Ins. Co.*, 257 F. Supp. 2d 845, 845 (S.D. Miss. 2003) (detailing the circumstantial evidence of an apparent agreement in a cynical tone prior to denying remand); *In re Diet Drugs*, 220 F. Supp. 2d at 425 (referring to Non-Removal Agreements as “sham[s]” and as improper efforts to destroy jurisdiction). The conflicts that led many courts and scholars to condemn Mary Carter Agreements and similar agreements also apply to Non-Removal Agreements. Cf. *Taylor v. DiRico*, 606 P.2d 3, 10 (Ariz. 1980) (explaining that such agreements “create situations rife with temptation to act dishonestly and collusively”); *Dosdourian v. Carsten*, 624 So. 2d 241, 243 (Fla. 1993) (holding Mary Carter Agreements *per se* invalid because “such agreements tend to mislead judges and juries and border on collusion”); Steven F. Griffith, Jr., *If You Scratch My Back, I'll Scratch Yours: Mary Carter Agreements in Louisiana*, 45 LOY. L. REV. 725, 741 (1999) (“[T]he existence of the Mary Carter Agreements alone must cast doubt on the fairness of the trial[.]”); Plitt, *supra* note 144, at 1339 n.50 (“‘Mary Carter’ Agreements hinder the search for truth and, to the observation of some courts, border on collusion.”).

146. A number of courts have taken this approach to Mary Carter Agreements. See, e.g., *Dosdourian*, 624 So. 2d at 243 (invalidating Mary Carter Agreements); *Lum v. Stinnett*, 488 P.2d 347, 351 (Nev. 1971) (finding that agreements to foster litigation that include a party with no interest in that litigation are contrary to public policy); *Elbaor v. Smith*, 845 S.W.2d 240, 250 (Tex. 1992) (declaring Mary Carter Agreements void and condemning them because they “skew the trial process, mislead the jury, promote unethical collusion among nominal adversaries, and create the likelihood that a less culpable defendant will be hit with the full judgment”); see also June F. Entman, *Mary Carter Agreements: An Assessment of Attempted*

difficult to uncover, and parties have an obvious incentive to hide such agreements from the court.<sup>147</sup> Therefore, defendants must be given an opportunity to perform minimal discovery to uncover the presence of a Non-Removal Agreement.<sup>148</sup> As “smoking gun” evidence may be rare, when determining whether an agreement has been made,<sup>149</sup> the court should consider: (1) the burden of a verdict upon the parties,<sup>150</sup> (2) the reasonableness of pursuing the defendant, and (3) the level of defense the party is undertaking.<sup>151</sup>

Another strategy for curbing the use of Non-Removal Agreements is to focus on sanctions.<sup>152</sup> Sanctions could be fashioned under the Rules of Professional Responsibility<sup>153</sup> and Rule 11.<sup>154</sup> By adopting a

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*Solutions*, 38 U. FLA. L. REV. 521, 579 (1986) (“The best solution is outright prohibition of Mary Carter agreements.”).

147. See, e.g., *Joe*, 257 F. Supp. 2d at 849 (explaining that the court had previously ordered further discovery to determine why the defendant had been joined, but noting that “[f]urther discovery ha[d], not unexpectedly, revealed no ‘smoking gun’”); see also discussion *supra* note 144 (noting that one of the elements of a Mary Carter agreement is “secrecy”).

148. See Levin & Hays, *supra* note 58, at 1 (“In this situation, defense counsel can explore whether the plaintiff has promised the non-diverse defendant that the plaintiff will dismiss that defendant after a year—the limit for removal of cases . . . .”); see, e.g., *Joe*, 257 F. Supp. 2d at 847 (authorizing discovery to specifically address whether parties had engaged in an agreement to destroy federal jurisdiction).

149. See, e.g., *Joe*, 257 F. Supp. 2d at 849 (“From the failure to raise a valid defense, to provision of a helpful affidavit, and the use of an Answer to assail fellow defendants in this action, all the evidence points to the conclusion that defendant [blocking removal] is more aligned with the plaintiff than with the [other] defendants.”); see also *In re Diet Drugs*, 220 F. Supp. 2d at 422 (charging that judges “must not leave their ‘common sense’ outside the courtroom when weighing evidence”).

150. See *supra* Part II.C (discussing the Benefit-Burden Test).

151. See *Joe*, 257 F. Supp. 2d at 849 (recognizing that the plaintiff was seeking “deep pockets”); *In re Diet Drugs*, 220 F. Supp. 2d at 422 (“Failure to consent to removal has occurred even in those jurisdictions in rural Mississippi and the Rio Grande Valley region of Texas which are well known for their high verdicts for plaintiffs against corporate defendants.”).

152. See John E. Benedict, *It’s a Mistake to Tolerate the Mary Carter Agreement*, 87 COLUM. L. REV. 368, 386 (1987) (calling for “severe penalties” for all who attempt to keep a Mary Carter Agreement hidden from the court).

153. See, e.g., MODEL RULES OF PROF’L CONDUCT R. 8.4(c)–(d) (2004) (“It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation . . . [or] engage in conduct that is prejudicial to the administration of justice.”). Rule 3.1 restricts a lawyer from bringing a “frivolous” proceeding. *Id.* R. 3.1. Comment 1 to Rule 3.1 charges that “[t]he advocate has a duty to use legal procedure for the fullest benefit of the client’s cause, but also has a duty not to abuse legal procedure.” *Id.* cmt. 1. Of more serious consequence may be Rule 3.3, which requires, *inter alia*, that “a lawyer shall not knowingly . . . make a false statement of fact or law to a tribunal.” *Id.* R. 3.3(a)(1). The Rules warn that lawyers should avoid even the appearance of impropriety. See *Forum Shopping Reconsidered*, *supra* note 36, at 1690 (citing MODEL RULES OF PROF’L CONDUCT R. 1.10 cmt.); see also Algero, *supra* note 36, at 106 (arguing that the Model Rules of Professional Conduct can be used to curb the abuses of forum shopping); Benedict, *supra* note 152, at 386 n.93 (proposing penalties under the old Model Code of Professional Responsibility DR 1-102(A)(4)–(5) (1979), which are precursors to modern Rule 8.4.).

policy that imposes sanctions on those who participate in, or even offer Non-Removal Agreements, the courts may be able to curb their use.<sup>155</sup>

Once a defendant has been deemed improper because of a Non-Removal Agreement, the courts must decide how to proceed with that party.<sup>156</sup> Similar to other forms of improper joinder, the lack of unanimity should be ignored for purposes of determining diversity jurisdiction; however, dismissing the claims against the improper party might be more difficult.<sup>157</sup> The best option may be for courts to interpret a plaintiff's Non-Removal Agreement as a waiver, thereby involuntarily forfeiting the claim, resulting in a

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154. See FED. R. CIV. P. 11 (reproduced in note 87). Once an agreement is made to exchange non-removal for non-pursuit of claims, it could be argued that no real cause of action exists between those parties. By failing to alert the court and seeking removal of that defendant from the case, both the plaintiff's and the defendant's attorneys may be acting in violation of Rule 11 sections 2 or 3. See, e.g., *Trampe v. Wis. Tel. Co.*, 252 N.W. 675, 676, 678 (Wis. 1934) (finding that the withholding of information regarding an agreement between the parties "imposed a fictitious suit upon the court" and that such a suit was "a waste of the court's time and the public money").

155. This approach has been proposed by the House of Representatives in its efforts to decrease the filing of frivolous claims. LARA, H.R. 4571, 108th Cong. § 6 (2004). The LARA bill reads in part:

**THREE-STRIKES RULE FOR SUSPENDING ATTORNEYS WHO COMMIT MULTIPLE RULE 11 VIOLATIONS.**

(a) Mandatory Suspension.—Whenever a Federal district court determines that an attorney has violated Rule 11 of the Federal Rules of Civil Procedure, the court shall determine the number of times that the attorney has violated that rule in that Federal district court during that attorney's career. If the court determines that the number is 3 or more, the Federal district court—

(1) shall suspend that attorney from the practice of law in that Federal district court for 1 year; and

(2) may suspend that attorney from the practice of law in that Federal district court for any additional period that the court considers appropriate.

(b) Appeal; Stay.—An attorney has the right to appeal a suspension under subsection (a). While such an appeal is pending, the suspension shall be stayed.

(c) Reinstatement.—To be reinstated to the practice of law in a Federal district court after completion of a suspension under subsection (a), the attorney must first petition the court for reinstatement under such procedures and conditions as the court may prescribe.

H.R. 4571, § 6.

156. See *supra* note 149 and accompanying text (discussing the court's options in dealing with an improperly-joined party).

157. See, e.g., *Bohanan v. Atchison Topeka & Santa Fe Ry. Co.*, 289 F. Supp. 490, 492 (D. Okla. 1968) (finding that a court must be able to "summarily eliminate [a] fraudulently joined [d]efendant."). For an example based on Non-Removal Agreements, see *In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prods. Liab. Litig.*, 220 F. Supp. 2d 414, 425 (E.D. Pa. 2002) ("In sum, we disregard the nonconsent to removal of the phentermine defendants because we find they are fraudulently joined.").

dismissal on grounds akin to “failure to prosecute.”<sup>158</sup> However, if Non-Removal Agreements are deemed unenforceable,<sup>159</sup> a plaintiff could allege that he did not intend to keep the agreement and would have pursued a judgment against the defendant.<sup>160</sup> Such deceit should not be passively condoned by the courts, however, because allowing these agreements to progress unchecked threatens the credibility of the judicial process.

#### CONCLUSION

The courts should adopt a universal standard for improper joinder that better protects diversity jurisdiction. This three-part standard should require remand where: (1) there is no reasonable possibility that the plaintiff can establish a cause of action against a defendant; (2) the plaintiff’s pleading of jurisdiction contains outright fraud; or (3) there is clear and convincing evidence that the plaintiff has no intention to pursue the diversity-destroying defendant. Such a move would lead to more predictability in the legal system and better protection of defendants’ right to have legitimately removable claims heard in federal court.

Unlike other approaches, this test clearly addresses the problem of Non-Removal Agreements. If allowed to develop unchecked, these collusive agreements could drastically undermine the fair exercise of federal subject matter jurisdiction. Federal courts are ones of limited jurisdiction, but plaintiffs should not be permitted to further limit access by improper means.

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158. See FED. R. CIV. P. 41(b) (explaining that a court should grant an involuntary dismissal “[i]f the plaintiff fails to prosecute or to comply with these rules or a court order”).

159. See Underwood, *supra* note 16, at 625 n.221 (“Whether [litigation] agreements of this nature are enforceable is not altogether clear.”). Some states have deemed certain litigation agreements unenforceable because they violate public policy. See, e.g., *Dosdourian v. Carsten*, 624 So. 2d 241, 243 (Fla. 1993) (explaining that such agreements are misleading to judges and juries and are collusive in nature).

160. Presumably, the defendant could take his chances in a breach of contract action by basing his claim on the Non-Removal Agreement. This concern underscores the importance of including guidelines and sanctions pursuant to the Rules of Professional Conduct. Such a situation is “rife with temptation to act dishonestly and collusively.” *Taylor v. DiRico*, 606 P.2d 3, 10 (Ariz. 1980). This incentive is exactly what led many courts to condemn, or outright ban, *Mary Carter Agreements*. See cases cited *supra* note 145.