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De-Frauding the System: Sham Plaintiffs and the Fraudulent Joinder Doctrine

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NOTE

DE-FRAUDING THE SYSTEM: SHAM PLAINTIFFS AND THE FRAUDULENT JOINDER DOCTRINE

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Playing off the strict requirements of federal diversity jurisdiction, plaintiffs can structure their suits to prevent removal to federal court. A common way to preclude removability is to join a nondiverse party. Although plaintiffs have a great deal of flexibility, they may include only those parties that have a stake in the lawsuit. Put another way, a court will not permit a plaintiff to join a party to a lawsuit when that party is being joined solely to prevent removal. The most useful tool federal courts employ to prevent this form of jurisdictional manipulation is Federal Rule of Civil Procedure 21. Rule 21 permits a federal court to drop a joined party if that party fails the permissive joinder rules of Federal Rule of Civil Procedure 20. Federal courts have an additional tool to scrutinize joined defendants: the fraudulent joinder doctrine. The doctrine permits a federal court to look beyond the face of the complaint to determine whether the plaintiff has a colorable claim against the nondiverse defendant. If not, the court ignores this diversity-destroying defendant and the suit remains in federal court. Ultimately, federal courts use this robust tool only to scrutinize the joinder of defendants, leaving some plaintiff-based manipulation unchecked. This Note argues that federal courts should correct this deficiency and extend the fraudulent joinder doctrine to police sham plaintiffs. Extending the doctrine in this manner would prevent jurisdictional gamesmanship, provide defendants with a fair opportunity to remove to a neutral forum, and supply clear standards for courts to deploy in scrutinizing the joinder of sham plaintiffs.

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INTRODUCTION

A plaintiff is the master of her complaint.[1] By initiating the lawsuit, the plaintiff shapes the scope of the litigation by selecting the forum, the venue, the timing of the litigation, and the parties involved.[2] Choosing between federal and state court is among the most important decisions a plaintiff makes.[3] Despite the deference that courts afford to a plaintiff's choice of forum,[4] a defendant retains the right to remove the suit to federal court if it could have been brought there initially.[5]

Conventional wisdom suggests that plaintiffs prefer to litigate in state court.[6] Empirical studies, however, have not shown a clear pro-plaintiff bias in state courts. But they have shown that plaintiffs suffer a significant drop

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1. 14B CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER & JOAN E. STEINMAN, FEDERAL PRACTICE AND PROCEDURE § 3721 (4th ed. 2009) [hereinafter 14B WRIGHT & MILLER].

2. JERRY M. CUSTIS, LITIGATION MANAGEMENT HANDBOOK § 8.3 (1996 & Supp. 2010).

3. *See* Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947) (noting that, in the context of forum non conveniens, "the plaintiff's choice of forum should rarely be disturbed"); 1 LITIGATING TORT CASES § 3:2 (Roxanne Barton Conlin & Gregory S. Cusimano eds., 2008).

4. 35A C.J.S. *Federal Civil Procedure* § 577 (2003).

5. 28 U.S.C. § 1441 (2006). A defendant may remove based on, among other things, federal question jurisdiction, *id.* § 1331, or diversity jurisdiction, *id.* § 1332.

6. *See* Paul Rosenthal, *Improper Joinder: Confronting Plaintiffs' Attempts to Destroy Federal Subject Matter Jurisdiction*, 59 AM. U. L. REV. 49, 50 (2009). A plaintiff may prefer to litigate in state court because of the benefits defendants receive in federal court. Some tactical and practical reasons for defendants' preference for federal court include the increased availability of summary judgment, *see* Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986), the possibility of separating the trial into liability and damages phases, *see* FED. R. CIV. P. 42(b), the increased role of the federal judge in the scheduling process, *see* FED. R. CIV. P. 16, and federal evidentiary laws that may be more favorable to defendants. Thomas A. Mauet, *The New World of Experts in Federal and State Courts*, 25 AM. J. TRIAL ADVOC. 223, 234–35 (2001).

in win rates after removal.[7] At the very least then, plaintiffs have an incentive to ensure that their state-court suits stay in state court.

Because of the strict requirements of federal diversity jurisdiction, a plaintiff has a number of legitimate tools to prevent removal.[8] A federal court may exercise diversity jurisdiction only when there is complete diversity between the parties and where there is an amount in controversy greater than $75,000.[9] A common way to prevent removal is to join a nondiverse party. On the defendant side, a plaintiff can either sue a nondiverse defendant[10] or file suit in a defendant's home state.[11] On the plaintiff side, a plaintiff may also join with another plaintiff to sue a common defendant.[12] When the other plaintiff shares a state of residency with the defendant, this nondiverse plaintiff destroys complete diversity and precludes the suit's removability. The flexibility to join with another plaintiff is subject to the same legitimate cause-of-action standard that applies to the joinder of defendants.

Sometimes, plaintiffs go beyond their permitted discretion and join nondiverse parties who lack a stake in the suit. These parties, which I call sham parties, do not contribute to the adjudication of the case; rather, they are joined solely to prevent removal. Sham parties impermissibly manipulate jurisdiction by depriving defendants of their statutory right of removal.

Courts use a number of tools to prevent this jurisdictional manipulation. By far, the strongest tool to scrutinize party joinder is Federal Rule of Civil Procedure 21. Under Rule 21, a federal court may sever dispensable, nondiverse parties to preserve diversity jurisdiction in select situations.[13] But Rule 21 is an incomplete tool. First, Rule 21 severability is discretionary: even in situations where improper joinder occurs, it is still up to the court to determine whether to sever the parties or permit the suit to continue. Secondly and more importantly, most courts look only to the plaintiff's complaint to determine whether severability is warranted.

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7. *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) (finding that, after controlling for other variables such as case selection, removal to federal court decreased plaintiffs' chances of winning by roughly one-fifth).

8. While plaintiffs have multiple tools to prevent removal under the theory of federal subject matter jurisdiction, this Note focuses solely on jurisdictional manipulation in diversity cases.

9. 28 U.S.C. § 1332(a).

10. This can be accomplished by joining with a plaintiff who is from the same state as the defendant or by suing a defendant who is from the same state as a plaintiff. This destroys complete diversity; thus, the action is not removable pursuant to 28 U.S.C. § 1441(a). The party who prevents complete diversity is called the diversity-destroying or nondiverse party.

11. *See* 28 U.S.C. § 1441(b) ("Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.").

12. FED. R. CIV. P. 20.

13. *See* FED. R. CIV. P. 21; Tab Express Int'l, Inc. v. Aviation Simulation Tech., Inc., 215 F.R.D. 621, 623 (D. Kan. 2003) ("Courts may order a Rule 21 severance when it will serve the ends of justice and further the prompt and efficient disposition of litigation.").

There is a complement to Rule 21 that does not suffer its infirmities: the fraudulent joinder doctrine. This doctrine permits a federal court to ignore the presence of a diversity-destroying defendant if the plaintiff has no legitimate cause of action against the defendant.[14] Unlike Rule 21, a court finding fraudulent joinder ignores the diversity-destroying party and is permitted to pierce the pleadings to determine whether that party has a stake in the suit.[15] In combination, Rule 21 and the fraudulent joinder doctrine cover most instances of jurisdictional manipulation by way of suing sham defendants. But because the doctrine of fraudulent joinder historically applies only to the joinder of defendants,[16] some unfair deprivation of removal rights goes unchecked when a plaintiff joins with sham plaintiffs.

The lack of a consistently applied fraudulent joinder doctrine for plaintiffs is troubling. Although Rule 21 could arguably police all instances of unfair jurisdiction manipulation by plaintiffs, the rule's discretionary nature[17] and lack of clear standards[18] make it an incomplete tool. Extending the fraudulent joinder doctrine would remedy this problem because it would provide defendants with a clear standard to prove the existence of a sham plaintiff,[19] and it would permit a federal court to go beyond the face of the complaint to determine whether the plaintiff has been fraudulently joined.[20] Moreover, if the conditions of fraudulent joinder have been satisfied, the court would then be obligated to ignore the diversity-destroying plaintiff.

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14. *See* James M. Underwood, *From Proxy to Principle: Fraudulent Joinder Reconsidered*, 69 ALB. L. REV. 1013, 1035 (2006) (describing fraudulent joinder as "a court-created exception to the complete diversity requirement"); *see also id.* at 1037 ("[A] defendant named to defeat removal and against whom the plaintiff has no 'possible' claim can be ignored in terms of analyzing the federal court's subject matter jurisdiction.").

15. *See infra* Section II.A.2.

16. E. Farish Percy, *Defining the Contours of the Emerging Fraudulent Misjoinder Doctrine*, 29 HARV. J.L. & PUB. POL'Y 569, 606 (2006) ("The traditional fraudulent joinder doctrine is typically applied in cases where the removing diverse defendant accuses the plaintiff of fraudulently joining a non-diverse defendant.").

17. *See* FED. R. CIV. P. 21 ("[T]he court *may* at any time, on just terms, add or drop a party. The court may also sever any claim against a party." (emphasis added)); *see also* Batton v. Ga. Gulf, 261 F. Supp. 2d 575, 584 n.17 (M.D. La. 2003) ("Recourse to Rule 21 severance is discretionary." (citing United States v. O'Neil, 709 F.2d 361, 368 (5th Cir. 1983))).

18. While most commentators agree that a federal court utilizing a Rule 21 analysis can pierce the pleadings to determine whether the plaintiff has fraudulently joined other plaintiffs, it is still subject to the discretion of the court. *See* 14C CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER & JOAN E. STEINMAN, FEDERAL PRACTICE AND PROCEDURE § 3734 (4th ed. 2009 & Supp. 2011) [hereinafter 14C WRIGHT & MILLER].

19. While there is some disagreement among circuits as to the standard used in determining whether the plaintiff has a legitimate claim against the defendant, most courts agree that it is some variant of the "no possibility of recovery under state law" standard. *See* Matthew J. Richardson, *Clarifying and Limiting Fraudulent Joinder*, 58 FLA. L. REV. 119, 146–47 (2006); *see also infra* Section III.B.

20. The majority of circuits agree that at least some evidence beyond the pleadings can be introduced. Richardson, *supra* note 19, at 136–44; *see also* Smallwood v. Ill. Cent. R.R., 385 F.3d 568, 573 (5th Cir. 2004) (noting that judges pierce the pleadings in some circumstances).

Extending the fraudulent joinder doctrine to cover sham plaintiffs would not impose new obligations on plaintiffs. Rather, it would turn a "may" into a "must": while improper joinder may lead to severance, fraudulent joinder must lead to severance. The doctrine would only eliminate a diversity-destroying plaintiff if the plaintiff pleaded false jurisdictional facts or if some outside factor estopped the plaintiff from joining the suit.[21] These outside factors are likely to go unnoticed under Rule 21 but could easily be detected in a fraudulent joinder analysis.

This Note argues that the traditional fraudulent joinder doctrine should be extended to permit federal courts to ignore diversity-destroying plaintiffs in select situations. Part I reviews diversity jurisdiction and removal generally, with special attention paid to the balancing of a plaintiff's interest in choosing the forum with the defendant's right of removal. Part II analyzes the way federal courts use Rule 21 and the fraudulent joinder doctrine in an attempt to prevent jurisdictional manipulation and concludes that the present tools do not provide robust enough protection. Part III contends that federal courts should apply the fraudulent joinder doctrine to plaintiffs in three circumstances: first, when the diversity-destroying plaintiff pleads false jurisdictional facts; second, when the defendant and diversity-destroying plaintiff are parties to a mandatory forum selection clause; and third, when the diversity-destroying plaintiff's cause of action is precluded because of an expired statute of limitations.

I. COMPETING RIGHTS TO FORUM SELECTION

Techniques to defeat removal work because federal diversity jurisdiction extends only to cases where the parties are completely diverse. Section I.A discusses the requirements of diversity jurisdiction and removal. Section I.B traces the conflict between permitting the plaintiff to choose the forum and the defendant's right of removal.

A. *Diversity Jurisdiction and Removal*

The Constitution authorizes federal courts to hear cases "between [c]itizens of different [s]tates."[22] Read literally, this grant of jurisdiction applies only to cases originally filed in federal court. However, Congress, with the Judiciary Act of 1789, gave defendants the right to remove a case to federal court.[23] The Supreme Court in *Martin v. Hunter's Lessee*[24] upheld the constitutionality of removal jurisdiction, finding that removal is implied by

21. *See infra* Section III.A.

22. U.S. CONST. art. III, § 2, cl. 1.

23. Judiciary Act of 1789, ch. 20, § 12, 1 Stat. 73, 79–80.

24. 14 U.S. (1 Wheat.) 304 (1816).

the Constitution's express grant of federal jurisdiction over particular subject matter.[25]

Today, a defendant may remove to federal court if the state court action falls under the original subject matter jurisdiction of the federal courts.[26] Removal is permitted under federal question[27] or diversity jurisdiction,[28] among other sources of federal subject matter jurisdiction. The federal diversity jurisdiction statute, 28 U.S.C. § 1332, grants federal courts original jurisdiction over "all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between . . . citizens of different States."[29] Because diversity jurisdiction deprives a state court of the chance to adjudicate a lawsuit implicating state law, federal courts strictly construe the diversity statute.[30] And because removal in diversity cases is based on an underlying grant of federal diversity jurisdiction, the removal statute is also strictly construed: "Not only does the language of the [removal statute] evidence the Congressional purpose to restrict the jurisdiction of the federal courts on removal, but the policy of the successive acts of Congress regulating the jurisdiction of federal courts is one calling for the strict construction of such legislation."[31]

Removal based on diversity jurisdiction is subject to a further limitation: the statute prohibits removal where an in-state defendant has been properly joined and served.[32]

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25. *Martin*, 14 U.S. (1 Wheat.) at 349 ("This power of removal is not to be found in express terms in any part of the constitution; if it be given, it is only given by implication, as a power necessary and proper to carry into effect some express power.").

26. 28 U.S.C. § 1441 (2006) ("[A]ny civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.").

27. *See generally* 14B WRIGHT & MILLER, *supra* note 1, § 3722. A defendant may remove a case if it satisfies the federal question jurisdiction requirements: "Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties." 28 U.S.C. § 1441(b).

28. *See supra* note 5 and accompanying text. *See generally* 14B WRIGHT & MILLER, *supra* note 1, § 3723 (4th ed. 2009 & Supp. 2011).

29. 28 U.S.C. § 1332.

30. *See* Healy v. Ratta, 292 U.S. 263, 270 (1934) ("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.").

31. Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 108 (1941).

32. 28 U.S.C. § 1441(b). This restriction derives from the primary justification for diversity jurisdiction: to protect out-of-state litigants from hostile state courts. *See* Bank of the U.S. v. Deveaux, 9 U.S. (5 Cranch) 61, 87 (1809).

B. *Balancing the Plaintiff's Choice with the Defendant's Right of Removal*

Permitting a defendant to remove a case is a compromise between a plaintiff's right to craft her lawsuit and the defendant's prerogative to select a more neutral forum.[33] A plaintiff is master of her complaint and thus is permitted to preclude removal in some circumstances.[34] To prevent diversity-based removal, a plaintiff has a number of options: plead less than the jurisdictional amount, intentionally leave out a party who could remove the action from the lawsuit, properly join a nondiverse party, or delay settlement or dismissal of the nondiverse party until the state court action has been pending for one year.[35] These tools give a plaintiff the initial opportunity to choose the forum.

Although the plaintiff's right to select the forum is a fundamental feature of the American legal system,[36] a defendant may exercise her right of removal in certain circumstances.[37] A defendant may remove a case that originally could have been brought in federal court.[38] The right of removal in federal question cases is relatively uncontroversial because of the presence of a federal cause of action, but removal in diversity cases is subject to more pronounced judicial criticism.[39] Despite this criticism, diversity jurisdiction appears to be here to stay as Congress recently expanded the

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33. Again, see *Deveaux*, 9 U.S. (5 Cranch) at 87, for the suggestion that fear of bias against out-of-state litigants is a justification for diversity jurisdiction. More recently, diversity jurisdiction itself has been subject to criticism, with some commentators even calling for its elimination as a source of federal subject matter jurisdiction. *See, e.g.*, ERWIN CHEMERINSKY, FEDERAL JURISDICTION 297 (5th ed. 2007).

34. 14B WRIGHT & MILLER, *supra* note 1, § 3721. Courts have long recognized that a plaintiff, as master of the complaint, can manipulate the forum in which her suit is brought and even, in certain circumstances, prevent removability. *See, e.g.*, Caterpillar Inc. v. Williams, 482 U.S. 386, 392 (1987) ("The [Well Pleaded Complaint] rule makes the plaintiff the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law.").

35. *See* 28 U.S.C. § 1446(b) ("[A] case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action."). For a discussion of permissible tactics to prevent removal based on diversity jurisdiction, see JAMES P. GEORGE, THE FEDERAL COURTHOUSE DOOR 118–19 (2002), and 14B WRIGHT & MILLER, *supra* note 1, § 3721.

36. *See, e.g.*, Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947) ("But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.").

37. 14B WRIGHT & MILLER, *supra* note 1, § 3721; *see also* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 349 (1816) ("This power of removal is not to be found in express terms in any part of the constitution; if it be given, it is only given by implication, as a power necessary and proper to carry into effect some express power.").

38. *See supra* Section I.A.

39. James M. Underwood, *The Late, Great Diversity Jurisdiction*, 57 CASE W. RES. L. REV. 179, 193–95 (2006) (discussing the increasing judicial hostility toward removal based on diversity jurisdiction).

availability of removal based on diversity jurisdiction when it enacted the Class Action Fairness Act of 2005.[40]

Not only will diversity jurisdiction continue to exist but so will the exacting standards that a defendant must satisfy to remove a case on diversity grounds. The restrictions on removal indicate a high degree of deference to the plaintiff's choice of forum.[41] Such deference, however, is granted only when the plaintiff properly exercises the right to craft her lawsuit.[42] Because of the potential for abuse, federal courts are permitted to look beyond the face of the complaint to determine whether a nondiverse party was improperly or fraudulently joined.

II. FEDERAL JURISDICTION AND IMPROPER JOINDER

Federal courts have a number of tools to police the joinder of parties and claims that exist only to prevent removal. A plaintiff can unfairly manipulate removal either by suing a nondiverse defendant or joining with a nondiverse plaintiff against a common defendant. Although federal courts use both the Federal Rules of Civil Procedure and the fraudulent joinder doctrine to police the joinder of sham defendants, courts have not consistently applied the fraudulent joinder doctrine to police the joinder of sham plaintiffs. Section II.A highlights the various tools federal courts use to police the improper joinder of defendants. Section II.B gives an overview of the tools in place to scrutinize the improper joinder of plaintiffs. Although the majority of the tools are the same, a significant gap exists because the fraudulent joinder doctrine does not traditionally apply to the joinder of plaintiffs. The few courts that have applied an analogous approach to the joinder of sham plaintiffs have done so without a governing theoretical framework.

A. *Improperly Joined Defendants*

Federal courts police the joinder of defendants with Rule 21 and the fraudulent joinder doctrine. Rule 21 is primarily a check on the mechanics of joinder, in that a federal court may dismiss a diversity-destroying party

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40. 28 U.S.C. § 1453 (2006); *see also* Underwood, *supra* note 39, at 202 (discussing the Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4).

41. Commentators and courts have found the following:

> There is . . . a qualitative difference between a device designed to invoke federal jurisdiction and one designed to avoid it. In the former instance, the already overburdened federal courts are being asked to adjudicate a case that, in the absence of the device, would fall outside their statutory, and perhaps their constitutional, competence. In the latter, if the device succeeds, a case depending on state law merely remains in the state court.

AM. LAW INST., STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 160 (1969).

42. *See id.* ("So long as federal diversity jurisdiction exists . . . the need for its assertion may well be greatest when the plaintiff tries hardest to defeat it.").

for failure to satisfy the Rule 20 standards for joinder.[43] Fraudulent joinder, on the other hand, involves a more substantive look at the claims the diversity-destroying party presents.[44] Although a fraudulently joined party purports to satisfy Rule 20, a court will nevertheless ignore her if her claim against the defendant is substantively defective.

1. Rule 21

The primary tool federal courts have to police all forms of improper joinder is Federal Rule of Civil Procedure 21.[45] The rule provides that "[o]n motion or on its own, the court may at any time, on just terms, add or drop a party. The court may also sever any claim against a party."[46] Severance is permitted in two distinct situations. First, a court may dismiss defendants improperly joined under the permissive joinder requirements of Rule 20.[47] Rule 20 permits defendants to be joined in an action if "any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences" and "any question of law or fact common to all defendants will arise in the action."[48] A defendant must satisfy both the same transaction and occurrence requirement and the common question of law or fact requirement to be joined in a lawsuit.[49]

Second, a federal court may sever even a properly joined defendant if doing so is in the interests of justice.[50] Courts often invoke this power to sever a diversity-destroying defendant whose presence in the lawsuit is not required; "[t]he jurisdictional defect may be cured if the parties joined are not indispensable, for the Court in the exercise of its sound discretion on motion of any party or of its own initiative may permit them to be dropped under Rule 21 . . . ."[51] Essentially, a federal court is permitted to determine independently if the defendant's right of removal is strong enough to overcome the plaintiff's interest in structuring the lawsuit.

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43. FED. R. CIV. P. 20–21.

44. *See infra* Section II.A.2.

45. FED. R. CIV. P. 21.

46. *Id.*

47. FED. R. CIV. P. 20(b). The defect leading to this type of severance is usually referred to as misjoinder. 25 FEDERAL PROCEDURE, LAWYERS EDITION § 59:205 (West 2011).

48. FED. R. CIV. P. 20(a)(2).

49. 7 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1683 (3d ed. 2001) [hereinafter 7 WRIGHT & MILLER].

50. Tab Express Int'l, Inc. v. Aviation Simulation Tech., Inc., 215 F.R.D. 621, 623 (D. Kan. 2003) ("Courts may order a Rule 21 severance when it will serve the ends of justice and further the prompt and efficient disposition of litigation.").

51. Padbury v. Dairymen's League Coop. Ass'n, 15 F.R.D. 484, 485 (M.D. Pa. 1954).

An important limitation to the severance discretion of Rule 21 is Rule 19, which compels joinder of all necessary parties.[52] A party is considered necessary if that party's rights would be impacted by the outcome of the litigation.[53] If a party is required to be joined under Rule 19, a court may not sever a defendant even if the party was misjoined or improperly joined. Rule 19 requires the joinder of defendants in two situations. First, a defendant must be joined if nonjoinder of the defendant "would prevent complete relief from being accorded."[54] Second, a defendant must be joined if the party's "absence from the action will have a prejudicial effect on that person's ability to protect [his] interest or will 'leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations.' "[55] Because codefendants often share some liability, the presence of both in a lawsuit is usually required.

2. The Fraudulent Joinder Doctrine

Before Rule 21, federal courts developed their own robust tool to police jurisdictional manipulation: the fraudulent joinder doctrine. The fraudulent joinder doctrine permits a federal court, when faced with a plaintiff's motion to remand, to ignore a diversity-destroying defendant if the court determines that the plaintiff has no reasonable basis for adding a claim against that defendant.[56] Under the doctrine, a court may pierce the pleadings to determine whether a plaintiff has a legitimate claim against the diversity-destroying defendant.[57] The doctrine is based on the proposition that a plaintiff who impleads a nondiverse defendant only to defeat removal is acting unfairly both toward the nondiverse defendant, who need not be in the lawsuit, and the diverse defendant, whose statutory right of removal is

52. 7 WRIGHT & MILLER, *supra* note 49, § 1685 ("[A] prerequisite to dropping a party under Rule 21 because the party's citizenship destroys the court's subject-matter jurisdiction over the case, is that the party's presence in the action is not required by Rule 19.").

53. *Padbury*, 15 F.R.D. at 485 ("Indispensable parties are those with such an interest in the controversy that a final decree cannot be entered in their absence without adversely affecting their rights or without leaving the action in a state which would be inconsistent with equity and good conscience.").

54. 7 WRIGHT & MILLER, *supra* note 49, § 1604.

55. *Id.* (quoting FED. R. CIV. P. 19(a)(1)(B)(ii)).

56. *See* Underwood, *supra* note 14, at 1033–35. The fraudulent joinder doctrine is distinct from the collusive joinder doctrine, which requires a federal court to decline jurisdiction if it finds that a party was joined collusively. 28 U.S.C. § 1359 (2006) ("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.").

57. Richardson, *supra* note 19, at 144. Piercing the pleadings includes looking at outside evidence, such as affidavits and deposition testimony. *See* Morris v. Princess Cruises, Inc., 236 F.3d 1061, 1068 (9th Cir. 2001) ("[F]raudulent joinder claims may be resolved by . . . consider[ation of] summary judgment-type evidence such as affidavits and deposition testimony." (quoting Cavallini v. State Farm Mut. Auto Ins. Co., 44 F.3d 256, 263 (5th Cir. 1995)) (internal quotation marks omitted)).

unjustly extinguished.[58] However, if the nondiverse defendant is not fraudulently joined, the federal court must remand the case because, absent complete diversity, the court does not have subject matter jurisdiction to hear the case.[59]

The Supreme Court first authorized courts to scrutinize the joinder of nondiverse defendants in 1886.[60] In *Plymouth Gold Mining Co. v. Amador & Sacramento Canal Co.*, the defendants argued that removal was proper because their nondiverse co-parties were attached only as " 'sham defendants' to prevent a removal."[61] The Court found that because the complaint alleged a facially legitimate cause of action against all defendants, the defendant bore the burden of establishing that the cause of action was fraudulent—a burden the defendant failed to carry.[62] Building off *Plymouth Gold Mining*, the Court employed the fraudulent joiner doctrine in *Wecker v. National Enameling & Stamping Co.*[63] The plaintiff, a resident of Missouri, sued his diverse employer and two nondiverse employees of the company in state court.[64] The defendant filed for removal, alleging that one employee was not a Missouri resident and the second was not related to the lawsuit.[65] Relying on affidavits, the Court found for the defendant:

> While the plaintiff, in good faith, may proceed in the state courts upon a cause of action which he alleges to be joint, it is equally true that the Federal courts should not sanction devices intended to prevent a removal to a Federal court where one has that right, and should be equally vigilant to protect the right to proceed in the Federal court as to permit the state courts, in proper cases, to retain their own jurisdiction.[66]

Wecker not only deployed fraudulent joinder analysis, but it also indicated that the Court would enforce limits on a plaintiff's right to determine the removability of a case.[67]

After establishing that a defendant could defeat a remand motion by claiming that a party was fraudulently joined, the Court clarified the doctrine's boundaries. In *Chesapeake & Ohio Railway Co. v. Cockrell*,[68] a Kentucky plaintiff sued a railroad company and two nondiverse employees of the railroad. Finding for the plaintiff on the motion for remand, the Court

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58. *See* Wilson v. Republic Iron & Steel Co., 257 U.S. 92, 97–98 (1921).

59. *See, e.g.*, Filla v. Norfolk S. Ry. Co., 336 F.3d 806, 811 (8th Cir. 2003).

60. *See* Plymouth Gold Mining Co. v. Amador & Sacramento Canal Co., 118 U.S. 264 (1886).

61. *Id.* at 270.

62. *Id.* at 270–71.

63. 204 U.S. 176 (1907).

64. *Wecker*, 204 U.S. at 178.

65. *Id.* at 180.

66. *Id.* at 185–86.

67. *See* Wilson v. Republic Iron & Steel Co., 257 U.S. 92, 97 (1921) ("[A defendant's] right of removal cannot be defeated by a fraudulent joinder of a resident defendant having no real connection with the controversy." (citing *Wecker*, 204 U.S. at 185–86)).

68. 232 U.S. 146 (1914).

held that the burden was on the defendant to show that the joinder of the two defendants "was merely a fraudulent device to prevent a removal."[69] The Court commented that it would find fraudulent joinder only if the plaintiff's claim against the nondiverse parties "was without any reasonable basis."[70] In a later case, the Supreme Court concluded that a plaintiff's motive for the joinder of parties was irrelevant to the question of fraudulent joinder.[71]

The current state of the fraudulent joinder doctrine gives a defendant two ways to defeat a plaintiff's motion for remand. First, the defendant can prove that the plaintiff pleaded false jurisdictional facts, indicating actual fraud.[72] Second, the defendant can prove that there is no possibility that the plaintiff will recover against the nondiverse defendant.[73]

Although there are some inconsistencies among courts in the deployment of the doctrine,[74] its existence is critical to the policing of unfair jurisdictional manipulation. The doctrine's primary benefits are its mandatory nature and the extent to which federal courts can pierce the pleadings to determine whether the joinder was fraudulent. Furthermore, the doctrine provides relatively straightforward standards to determine whether a nondiverse defendant was joined solely to defeat removal. Circuits differ on what level of piercing is permitted,[75] but most adopt a procedure similar to

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69. *Cockrell*, 232 U.S. at 153.

70. *Id.*

71. Mecom v. Fitzsimmons Drilling Co., 284 U.S. 183, 189 (1931) ("[T]he motive of a plaintiff in joining defendants is immaterial, provided there is in good faith a cause of action against those joined."). The distinction between good faith and motive turns on whether the plaintiff has a colorable claim against the defendant: so long as a plaintiff has a legitimate claim against a defendant, it is immaterial why the plaintiff is pursuing that claim.

72. *See* Boyer v. Snap-on Tools Corp., 913 F.2d 108, 111 (3d Cir. 1990).

73. *See, e.g.*, Jerome-Duncan, Inc. v. Auto-By-Tel, L.L.C., 176 F.3d 904, 907 (6th Cir. 1999) ("Under the doctrine of fraudulent joinder, the inquiry is whether [the plaintiff] had at least a colorable cause of action against [the defendant] in the Michigan state courts."). Some courts have argued that there is a third form of fraudulent joinder: where a plaintiff has procedurally misjoined nondiverse parties to prevent removal. *See* E. Farish Percy, *Making a Federal Case Out of It: Removing Civil Cases to Federal Court Based on Fraudulent Joinder*, 91 IOWA L. REV. 189, 215 (2005). However, this type of fraudulent joinder is more properly labeled fraudulent misjoinder and is outside the scope of this Note. *See generally* William E. Marple, *Removal to Federal Court Based on Misjoinder of Parties*, 41 TEX. TECH L. REV. 551 (2009).

74. *See infra* Section III.B.1.

75. Most circuits permit limited piercings of the pleadings. *See, e.g.*, Smallwood v. Ill. Cent. R.R., 385 F.3d 568, 574 (5th Cir. 2004) ("Attempting to proceed beyond this summary process carries a heavy risk of moving the court beyond jurisdiction and into a resolution of the merits . . . ."); Morris v. Princess Cruises, Inc., 236 F.3d 1061, 1068 (9th Cir. 2001) ("[F]raudulent joinder claims may be resolved by . . . consider[ation of] summary judgment-type evidence such as affidavits and deposition testimony." (quoting Cavallini v. State Farm Mut. Auto Ins. Co., 44 F.3d 256, 263 (5th Cir. 1995))); Mayes v. Rapoport, 198 F.3d 457, 465 (4th Cir. 1999) ("Further, in determining whether an attempted joinder is fraudulent, the court is not bound by the allegations of the pleadings, but may instead consider the entire record, and determine the basis of joinder by any means available." (internal citations omitted)); *Boyer*, 913 F.2d at 112; Smoot v. Chi., Rock Island & Pac. R.R., 378 F.2d 879, 882 (10th Cir.

that used when ruling on a motion for summary judgment.[76] This type of procedure permits the court to weigh evidence outside of the pleadings, including affidavits and deposition testimony.[77] Because it is mandatory and because it permits a court, on remand, to consider facts outside of the complaint, the fraudulent joinder doctrine is an enormously powerful tool for federal courts to use in vindicating a defendant's right of removal.

B. *Improperly Joined Plaintiffs*

Federal courts have the same Rule 21 severance authority to police the joinder of plaintiffs.[78] However, federal courts lack an analog to the fraudulent joinder doctrine.[79] As such, instances of unfair jurisdictional manipulation in the context of joined plaintiffs may go unnoticed.

1. Rule 21

Federal courts deploy the severance power of Rule 21 to scrutinize the joinder of plaintiffs. Like defendants, plaintiffs may be permissively joined under Rule 20 provided that such plaintiffs "assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the same, transaction, occurrence, or series of transactions or occurrences."[80] Plaintiffs' claims must also share a common question of law or fact.[81] If the joined plaintiffs fail to satisfy either requirement, the court may sever the misjoined party under Rule 21.

Rule 21 also permits a federal court to sever properly joined plaintiffs if doing so is in the "interests of justice."[82] This provides a federal court the discretion to dismiss a diversity-destroying plaintiff from the lawsuit in order to preserve its subject matter jurisdiction. This authority, like the authority to dismiss properly joined defendants, is discretionary.[83]

The court's severance authority is limited by Rule 19. If a joined plaintiff is "necessary" under Rule 19, a court may not sever that party—even if doing so would be in the interests of justice.[84] This restriction makes sense given the Federal Rules' concern with efficiency: if a lawsuit is to proceed,

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1967) ("[T]he issue must be capable of summary determination and be proven with complete certainty." (quoting Dodd v. Fawcett Publ'ns, Inc., 329 F.2d 82, 85 (10th Cir. 1964)).

76. *See* AM. LAW INST., FEDERAL JUDICIAL CODE REVISION PROJECT 518 (2004); *see also* Percy, *supra* note 73, at 226.

77. *See Morris*, 236 F.3d at 1068.

78. *See* 7 WRIGHT & MILLER, *supra* note 49, § 1682.

79. *See infra* Section II.B.2.

80. FED. R. CIV. P. 20(a)(1)(A).

81. FED. R. CIV. P. 20(a)(1)(B).

82. *See* Tab Express Int'l, Inc. v. Aviation Simulation Tech., Inc., 215 F.R.D. 621, 623 (D. Kan. 2003).

83. *See* FED. R. CIV. P. 21 ("[T]he court *may* at any time, on just terms, add or drop a party. The court may also sever any claim against a party." (emphasis added)).

84. *See* FED. R. CIV. P. 19(a)(1).

all relevant parties whose rights may be impacted by the lawsuit should be present. However, there are few instances where a plaintiff would be considered "necessary" under Rule 19 because each plaintiff with a legitimate claim has an individual right to sue a defendant. The fact that a substantially similar case was brought against a common defendant does not (in most situations) alter the plaintiff's claim against the defendant.[85] But in certain cases where a plaintiff is a necessary party, federal courts may not use the severance prerogative of Rule 21 to retain jurisdiction over a removed case.[86]

2. Other Methods

There is a disparity between the tools federal courts have to police sham defendants and sham plaintiffs. Specifically, in the context of sham plaintiffs, there has not been a consistently applied analog to the fraudulent joinder doctrine.[87] Without a similar doctrine, a removing defendant loses two important protections: mandatory dismissal of fraudulently joined plaintiffs and the opportunity to present evidence outside of the pleadings.[88]

Some courts have recognized that a plaintiff-centered fraudulent joinder rule should apply.[89] Those district courts that deploy fraudulent-joinder-like analysis to plaintiffs properly recognize—as this Note does—that there is no reason why the fraudulent joinder framework cannot be applied to sham plaintiffs.[90] But these courts are applying the doctrine without any clear guidance from their respective circuits. Thus, defendants still risk having a different district court in the same circuit conclude that the fraudulent joinder doctrine does not extend to plaintiffs.

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85. This right is grounded in the Due Process Clause. A cause of action is essentially property of the individual claimant; thus, each plaintiff has a right to defend her property in court. For example, the Supreme Court has stated,

> The due process clause requires that every man shall have the protection of his day in court, and the benefit of the general law, a law which hears before it condemns, which proceeds not arbitrarily or capriciously but upon inquiry, and renders judgment only after trial, so that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society.

Truax v. Corrigan, 257 U.S. 312, 332 (1921) (citing Hurtado v. California, 110 U.S. 516, 535 (1884)); *see also* 7 WRIGHT & MILLER, *supra* note 49, § 1683 ("Rule 20 is merely a procedural device and does not alter the substantive rights of the parties.").

86. *See supra* notes 52–53, 84, and accompanying text.

87. *See* Heather R. Barber, *V. Removal and Remand*, 37 LOY. L.A. L. REV. 1555, 1565 (2004) (discussing the possibility that fraudulent joinder may apply to plaintiffs).

88. *See supra* notes 56–57 and accompanying text.

89. *See, e.g.*, Foslip Pharm., Inc. v. Metabolife Int'l, Inc., 92 F. Supp. 2d 891, 903 (N.D. Iowa 2000); Lerma v. Univision Commc'ns, Inc., 52 F. Supp. 2d 1011, 1014 (E.D. Wis. 1999); Nelson v. St. Paul Fire & Marine Ins. Co., 897 F. Supp. 328, 330 (S.D. Tex. 1995).

90. Not all courts are willing to extend fraudulent joinder to sham plaintiffs. *See* Johnston Indus. v. Milliken & Co., 45 F. Supp. 2d 1308, 1312–14 (M.D. Ala. 1999) ("[T]he application of the doctrine of fraudulent joinder of a defendant does not extend to include the alleged fraudulent joinder of a plaintiff.").

Even in the districts that do not affirmatively invoke the fraudulent joinder doctrine, courts sometimes permit parties to present materials outside of the pleadings on remand motions.[91] This usually occurs when the defendant challenges a plaintiff's characterization of a claim as purely state-law based.[92] Because of the possibility of manipulation, courts do not have to accept the characterization of the cause of action found in the complaint and may, under certain circumstances, use outside materials to determine the proper characterization.[93] Courts have also looked beyond the pleadings to scrutinize a suit's actual amount in controversy,[94] to determine if the plaintiff is circumventing a prior adjudication of her claim,[95] and to decide if a defendant has sought removal twice in the same action.[96] While these examples show that federal courts have pierced the pleadings in narrow circumstances, there is no set framework for piercing the pleadings with regard to the joining of sham plaintiffs to a lawsuit.

District courts are not unfamiliar with the type of analysis that a plaintiff-centered fraudulent joinder doctrine would bring. However, because there has not been a consistent application of the doctrine, defendants are unable to rely on its well-established procedures and standards when confronted with a sham plaintiff. To properly protect a defendant's right of removal in the face of a diversity-destroying plaintiff, courts should deploy the standards and procedures of the fraudulent joinder doctrine.

III. FASHIONING A PLAINTIFF-CENTERED FRAUDULENT JOINDER DOCTRINE

This Part argues that extending the fraudulent joinder doctrine provides the simplest and most effective way to guard against unfair jurisdictional gaming by plaintiffs who join with a sham plaintiff. Section III.A presents the likely situations in which the doctrine would be deployed. Section III.B discusses and refutes possible arguments against the extension of the doctrine.

A. *Situations Involving Sham Plaintiffs*

Extending the fraudulent joinder doctrine would permit a court to ignore a diversity-destroying plaintiff in two situations. First, a court could ignore a

91. Romano v. Kazacos, 609 F.3d 512, 520 (2d Cir. 2010) ("[I]f subject matter jurisdiction is contested, courts are permitted to look to materials outside the pleadings.").

92. Oglesby v. RCA Corp., 752 F.2d 272, 277–78 (7th Cir. 1985) ("It is proper for the court to examine the record to determine if the real nature of the claim is federal, notwithstanding plaintiff's characterization to the contrary." (internal quotations omitted)).

93. *E.g.*, Brooks v. Solomon Co., 542 F. Supp. 1229, 1231 (N.D. Ala. 1982) (analyzing deposition testimony to determine that the plaintiff's characterization of her claim as grounded in state law was false, thus permitting removal).

94. *E.g.*, Ellis v. Logan Co., 543 F. Supp. 586, 588 (W.D. Ky. 1982).

95. *E.g.*, Villarreal v. Brown Express, Inc., 529 F.2d 1219, 1221 (5th Cir. 1976).

96. *E.g.*, S.W.S. Erectors, Inc. v. Infax, Inc., 72 F.3d 489, 492 (5th Cir. 1996).

diversity-destroying plaintiff if the plaintiff pleads false jurisdictional facts.[97] Second, a court could ignore a plaintiff if the defendant proves that there is no possibility that the plaintiff can recover against the nondiverse defendant.[98] The first situation arises in cases of actual fraud.[99] The second occurs because the diversity-destroying plaintiff is estopped from pursuing joint litigation. In other words, something outside the complaint itself must constrain the plaintiff such that there is no possibility of recovering against the defendant in the joint suit. This is likely to occur where the diversity-destroying plaintiff is subject to a mandatory forum selection clause[100] or where the joined plaintiff's cause of action is barred by the applicable statute of limitations.[101]

1. Pleading False Jurisdictional Facts

Although most instances of fraudulent joinder do not require any showing of fraud, the fraudulent joinder doctrine covers instances where a plaintiff pleads false jurisdictional facts to destroy complete diversity.[102] Extending the doctrine to cover a plaintiff's actual fraud in pleading jurisdictional facts is doctrinally sound, even if it will seldom be employed.

In the typical case, the diversity-destroying plaintiff alleges in her complaint that her residence is the same as the state of incorporation of the defendant. Under the fraudulent joinder doctrine, a removing defendant is permitted to introduce evidence beyond the pleadings to prove whether the plaintiff has committed actual fraud in her pleading of jurisdictional facts.[103] Like the traditional fraudulent joinder doctrine, a defendant would still bear the burden of proving actual fraud.[104] Because all factual allegations are evaluated "in the light most favorable to the plaintiff,"[105] the defendant must do more than raise a reasonable doubt as to the true residency of the plaintiff.[106]

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97. *See* Boyer v. Snap-on Tools Corp., 913 F.2d 108, 111 (3d Cir. 1990).

98. *See, e.g.*, Jerome-Duncan, Inc. v. Auto-By-Tel, L.L.C., 176 F.3d 904, 907 (6th Cir. 1999) ("Under the doctrine of fraudulent joinder, the inquiry is whether [the plaintiff] had at least a colorable cause of action against [the defendant] in the Michigan state courts.").

99. *See infra* Section III.A.1.

100. *See infra* Section III.A.2.

101. *See infra* Section III.A.3.

102. *See Boyer*, 913 F.2d at 111.

103. *See* B., Inc. v. Miller Brewing Co., 663 F.2d 545, 551 n.14 (5th Cir. Unit A Dec. 1981).

104. *Id.* at 548.

105. *Id.* at 549.

106. *See* Oliva v. Chrysler Corp., 978 F. Supp. 685, 689 (S.D. Tex. 1997) (finding that the defendant failed to carry its burden in establishing "outright fraud" by clear and convincing evidence when it failed to produce any evidence); *cf. Boyer*, 913 F.2d at 111 ("[T]here is no suggestion by defendants that plaintiffs have falsely alleged their Pennsylvania citizenship or that of Baldwin and Kaiser [the defendants]."). If a defendant does not challenge the stated domiciles of the other parties, the pleadings of the jurisdictional facts are considered nonfraudulent even if they turn out to be false. *See* Green v. Amerada Hess Corp., 707 F.2d 201,

2. Mandatory Forum Selection Clauses

A plaintiff-centered fraudulent joinder doctrine would also protect freely negotiated forum selection clauses. Parties entering into complex cross-forum contracts may include forum selection clauses to designate an exclusive forum for potential litigation. These contracts not only restrict a party's choice of forum, but they also limit the parties' ability to enter into a related lawsuit in an alternative forum.

Forum selection clauses can be either permissive or mandatory.[107] Permissive clauses authorize both jurisdiction and venue in a particular forum, but they do not prohibit litigation in another forum.[108] A permissive clause does not alter a defendant's right to remove a case to federal court, even if the original litigation commenced in the designated state forum.[109] A mandatory clause is much more restrictive: a case can only be brought in the specified forum.[110] A plaintiff subject to a mandatory forum selection clause is estopped from joining a lawsuit outside of the forum.[111] Fraudulent joinder would be implicated in the face of mandatory forum selection clauses only.[112] Because mandatory forum selection clauses require all disputes to be litigated in one forum, they also preserve the defendant's right of removal by preventing either party from using their diversity-destroying potential. Imagine a contract between a franchisor and franchisee, which includes a forum selection clause that restricts all suits to the state of the franchisee.[113]

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205 (5th Cir. 1983) (finding that because the defendant admitted that the other parties were Mississippi residents, the plaintiff's pleading of jurisdictional facts was "obviously not fraudulent").

107. 14D CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3803.1 (3d ed. 2007 & Supp. 2011) [hereinafter 14D WRIGHT & MILLER].

108. *See* IntraComm, Inc. v. Bajaj, 492 F.3d 285, 290 (4th Cir. 2007) (finding a forum selection clause permissive because it "permits jurisdiction in one court but does not prohibit jurisdiction in another").

109. *See, e.g.*, Global Satellite Commc'n Co. v. Starmill U.K. Ltd., 378 F.3d 1269, 1273 (11th Cir. 2004).

110. *See* 14D WRIGHT & MILLER, *supra* note 107, § 3803.1.

111. *See id.*

112. Mandatory forum selection clauses come in two types. The first specifies both a forum and a venue, such that all possible litigation must be brought in a specific state and particular court. For example, "[a]ll litigation shall be brought in the state court of the location of the franchisee." *See* 17A AM. JUR. 2D *Contracts* § 259 (2004) ("If mandatory venue language is employed . . . the clause will be enforced." (citing John Boutari & Son, Wines & Spirits, S.A. v. Attiki Imps. & Distribs. Inc., 22 F.3d 51, 53 (2d Cir. 1994))). A mandatory forum selection clause that requires all litigation to be pursued in state court precludes the defendant from removing to federal court and thus would not implicate the extension of the fraudulent joinder doctrine. The second type of forum selection clause specifies a particular forum but does not restrict venue to either a state or federal court. Because it does not specify a venue, an action brought in state court is removable by the defendant and thus implicates the fraudulent joinder doctrine.

113. This hypothetical case is based in part on *Taco Bell Corp. v. Dairy Farmers of America, Inc.*, 727 F. Supp. 2d 604 (W.D. Ky. 2010).

At first blush, this type of agreement appears to give little benefit to the franchisor because it subjects the company to suit in any state in which it has a franchise. However, by restricting each franchisee to its home-state court, the franchisor preserves its right of removal in every state outside of its principal place of business and state of incorporation.[114] A mandatory forum selection clause, written between a franchisor and franchisee from the same state, prevents the franchisees in the franchisor's home state from shopping their diversity-destroying capability to another franchisee. Put another way, the franchisor is limiting its exposure to state court proceedings only to its home state because its home-state franchisees cannot join lawsuits outside the home state.

An illustrative case, *Taco Bell Corp. v. Dairy Farmers of America, Inc.*, was decided in 2010.[115] The plaintiffs were two groups of Taco Bell franchisees who collectively sued Dairy Farmers of America for breach of contract in Kentucky state court.[116] The first group of plaintiffs was comprised entirely of Kentucky franchisees.[117] If this group had filed suit independently, Dairy Farmers could have removed the case because it was a resident of Kansas and Missouri. However, the Kentucky franchisees filed suit jointly with the second group—which included franchisees in Kansas and Missouri.[118] These plaintiffs shared a state of residence with the defendant and thus their presence in the lawsuit precluded removability. Seeking removal, the defendant argued that the nondiverse franchisees in the second group were fraudulently joined because "under the forum selection clause [between the franchisor and the defendant], their actions [could] only be maintained in a jurisdiction other than Kentucky."[119] Essentially, the defendant was arguing that the out-of-state franchisees could only avoid federal court by maintaining the suit in their home-state court (either Kansas or Missouri).

The court deployed a form of plaintiff-centered fraudulent joinder doctrine[120] but held that the nondiverse plaintiffs need not be severed, because the plaintiffs had a colorable claim that the forum selection clause was for their unilateral benefit and was thus waivable.[121] Because it was waivable,

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114. Under 28 U.S.C. § 1441(b) (2006), an in-state defendant is not permitted to remove a case to federal court.

115. *Taco Bell*, 727 F. Supp. 2d 604.

116. The contract was between Taco Bell and Dairy Farmers, but the franchisees were permitted to sue as third-party beneficiaries to the contract. *See id.* at 606.

117. *Id.*

118. *Id.*

119. *Id.* The forum selection clause stated that "[t]he exclusive venue for any proceeding between Supplier [Dairy Farmers] and any Designated Affiliate [Plaintiffs] shall be the locality of the Designated Affiliate's principal place of business." *Id.* (alterations in original).

120. The court correctly recited the standards for the fraudulent joinder doctrine. *See id.* at 606 (noting that the burden is placed on the removing party and that all ambiguities in state law must be resolved in favor of the nonremoving party).

121. *Id.* at 609.

the court found that the nondiverse plaintiffs were properly joined and the action was remanded to state court.[122]

This ruling was erroneous. *Taco Bell* shows why a consistent and more robust plaintiff-centered fraudulent joinder doctrine must be applied. The court's decision that the forum selection clause was unilateral ignored the two advantages to mandatory forum selection clauses discussed above. Because the clause restricted each franchisee to sue in its own state, the supplier would have the right to remove in every state but its state of incorporation and the state of its principal place of business (here Kansas and Missouri).[123] Although the court deployed a form of fraudulent joinder analysis, it failed to properly identify the effect that a forum selection clause has on a defendant's right of removal. The nondiverse group in *Taco Bell* included sham plaintiffs because they were contractually estopped from joining the Kentucky state lawsuit. If the court had conducted a proper fraudulent joinder analysis, this group would have been dismissed from the lawsuit, and the suit as between Dairy Farmers and the group of Kentucky franchisees would have proceeded in Kentucky state court.

All mandatory forum selection clauses that specify a forum outside of the defendant's home state implicitly preserve the defendant's right of removal. As such, a nondiverse plaintiff who violates the forum selection clause to join a lawsuit in a prohibited forum is both violating the contract and engaging in jurisdictional manipulation. While the former violation is handled by any number of remedies, such as a motion to dismiss in state court,[124] there is no remedy that addresses the concern of jurisdictional manipulation and the deprivation of the defendant's right of removal. Relying on a motion to dismiss in state court both fails to properly protect the defendant's right of removal by delaying the exercise of that right and could potentially extinguish that right altogether if the state court fails to rule for one year.[125] To preserve this right, federal courts should deploy the fraudulent joinder doctrine in cases where the joinder of a nondiverse plaintiff violates a valid forum selection clause.

3. Statute of Limitations

A court may also ignore a diversity-destroying plaintiff where the plaintiff's claim is barred by the applicable statute of limitations and recovery

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122. *Id.* at 609–10.

123. This restriction derives from 28 U.S.C. § 1441(b) (2006), which prohibits removal for an in-state defendant.

124. For actions brought in state courts, a defendant can typically file a motion to dismiss when the claim is brought in the improper forum. *See, e.g.*, John G. Powers, *Planning for Forum Selection in Commercial Transactions*, N.Y. ST. B. ASS'N J., Feb. 2006, at 22, 22. If the action were brought in federal court, a defendant would have more options, including filing a motion to dismiss, asking for a transfer to the contracted-for forum, or seeking transfer on the grounds of forum non conveniens. *See* 1 BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS § 3:33 (Robert L. Haig ed., 3d ed. 2011).

125. *See* 28 U.S.C. § 1446(b) (stating the one-year time limit for removal).

against the defendant is thus impossible. This is likely to occur when plaintiffs sue under their own state law in a joint suit against a common defendant. If the statute of limitations is already expired in one state, the plaintiff with an expired claim should not be permitted to destroy diversity. In reviewing the motion for remand, district courts are not wholly confined to looking at the face of the complaint,[126] so it is possible that the running of the statute of limitations would be uncovered.

Although determining if a statute of limitations has run is often an easy inquiry, its incorporation into the traditional fraudulent joinder doctrine is contested.[127] Those courts that limit the reviewability of statute of limitations challenges usually ground their unwillingness to pierce the pleadings in a reluctance to upset complicated state court proceedings.[128] In contrast, some courts have permitted a defendant to raise a statute of limitations defense to preserve removal.[129] Ultimately, permitting a nondiverse party with an expired claim to upset removal is unfair to the defendant. Because fraudulent joinder is meant to vindicate a defendant's right of removal, the doctrine as applied to all sham parties should extend to cover statute of limitations claims.

B. *Evaluating the Doctrine's Extension*

Although extending the doctrine of fraudulent joinder is a simple proposition, there are a number of legitimate concerns that arise with any alteration to civil litigation's liberal joinder rules. Nevertheless, these concerns are outweighed by the strong interests that counsel in favor of adopting a consistent plaintiff-centered fraudulent joinder doctrine.

1. Objections

The most effective critique of any extension of the fraudulent joinder doctrine is the lack of consistency between circuits in the deployment of the current doctrine. To prove the existence of fraudulent joinder, a defendant must show that the plaintiff sued the nondiverse defendant solely to prevent removal.[130] This requires showing that the plaintiff does not have a legitimate cause of action against the defendant. Although the test seems simple,

126. *See* 14C WRIGHT & MILLER, *supra* note 18, § 3734 ("Fortunately, in practice, the federal courts usually do not limit their inquiry to the face of the plaintiff's complaint, but rather consider the facts disclosed in the record of the case as a whole, in determining the propriety of removal.").

127. *Compare In re* Briscoe, 448 F.3d 201, 219 (3d Cir. 2006) (permitting fraudulent joinder analysis of a statute of limitations claim), *with* Riverdale Baptist Church v. Certainteed Corp., 349 F. Supp. 2d 943, 949–50 (D. Md. 2004) (finding that the piercing of the pleadings permitted by fraudulent joinder analysis did not permit an inquiry into the statute of limitations).

128. *Riverdale*, 349 F. Supp. 2d at 950.

129. *See, e.g.*, Ritchey v. Upjohn Drug Co., 139 F.3d 1313, 1319–20 (9th Cir. 1998).

130. For a complete discussion of the standards, see Percy, *supra* note 73, at 216–20, and Underwood, *supra* note 14, at 1045–86.

there is no agreed-upon standard to determine if a cause of action is legitimate. Courts and commentators have identified the "reasonable basis for the claim" test,[131] the "no possibility of recovery" test,[132] the "no reasonable possibility of recovery" test,[133] and the "failure to state a claim" test.[134] The divergence among circuits is cause for concern when considering an extension of the doctrine of fraudulent joinder.[135]

But problems of application in the area of sham plaintiffs are largely overstated. First, most courts follow a uniform procedure to determine if fraudulent joinder exists in the sham defendant context. The Eleventh Circuit has recited the most common procedure:

> To determine whether the case should be remanded, the district court must evaluate the factual allegations in the light most favorable to the plaintiff and must resolve any uncertainties about state substantive law in favor of the plaintiff. The federal court makes these determinations based on the plaintiff's pleadings at the time of removal; but the court may consider affidavits and deposition transcripts submitted by the parties.[136]

It is only after courts deploy this procedure that questions of the appropriate standard arise. Second, in the context of plaintiff-centered fraudulent joinder, the differing standards do not pose as much of a problem because of the narrow circumstances under which fraudulent joinder review of sham plaintiffs should be permitted. And because the limited circumstances in which the fraudulent joinder doctrine should be applied to the joinder of sham plaintiffs involve largely objective criteria, the concern about inconsistent standards is insignificant.

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131. Filla v. Norfolk S. Ry. Co., 336 F.3d 806, 810 (8th Cir. 2003) (looking to the pleadings to determine if there is no "reasonable basis in fact and law supporting a claim" (quoting Wiles v. Capitol Indem. Corp., 280 F.3d 868, 871 (8th Cir. 2002)) (internal quotation marks omitted)), *cited in* Percy, *supra* note 73, at 216.

132. Crowe v. Coleman, 113 F.3d 1536, 1538 (11th Cir. 1997) ("[T]he removing party has the burden of proving that either: (1) there is no possibility the plaintiff can establish a cause of action against the resident defendant; or (2) the plaintiff has fraudulently pled jurisdictional facts to bring the resident defendant into state court." (citing Cabalceta v. Standard Fruit Co., 883 F.2d 1553, 1561 (11th Cir. 1989))), *cited in* Percy, *supra* note 73, at 216.

133. The Court of Appeals for the Fifth Circuit applies the fraudulent joinder rule most liberally. *See* Gray *ex rel.* Rudd v. Beverly Enters.-Miss., Inc., 390 F.3d 400, 405 (5th Cir. 2004) ("[T]he plaintiff may not rely solely on the allegations in his complaint; the court may 'pierce the pleadings' and consider summary judgment-type evidence to determine whether the plaintiff truly has a reasonable possibility of recovery in state court.").

134. Stephen E. Abraham & William M. Hensley, *Remand: One Constitution, One Standard*, 27 PEPP. L. REV. 263, 270 (2000) (arguing that fraudulent joinder should be evaluated like a 12(b)(6) motion).

135. *See* Percy, *supra* note 73, at 215 (noting that the century-long evolution of the doctrine has left a myriad of standards); Richardson, *supra* note 19, at 122 ("[T]his complexity is reflected and exacerbated in federal circuits . . . ."); Underwood, *supra* note 14, at 1022–23 (noting the widespread confusion among district courts on what standard to apply).

136. *Crowe*, 113 F.3d at 1538 (citations omitted) (citing B., Inc. v. Miller Brewing Co., 663 F.2d 545, 549 (5th Cir. Unit A Dec. 1981)).

Similarly, there is some disagreement among circuits as to how far courts are permitted to pierce the pleadings.[137] But unlike the circuit split regarding standards for what is considered fraudulent joinder, there is relatively widespread acceptance of the summary judgment standard for the extent to which courts may pierce the pleadings; generally, courts may consider the entire record available at the time of remand.[138] The summary judgment standard permits an appropriate amount of piercing and would reveal the information required to support a finding of fraudulent joinder in the narrow situations presented above. Furthermore, the traditional fraudulent joinder analysis incorporates a strong presumption in favor of remand, which would alleviate potential unfairness to properly joined plaintiffs.[139]

A further practical objection might be that severing plaintiffs who satisfy Rule 20 violates the voluntary/involuntary rule.[140] Because the proposed expansion covers only plaintiffs, the voluntary/involuntary rule is not implicated. Although a finding of fraudulent joinder would, in essence, involuntarily dismiss the diversity-destroying plaintiff from the lawsuit, both plaintiffs' rights would remain intact.[141] The diverse plaintiff would retain the right to initiate suit in state court, but the defendant would get to exercise the right of removal. The only benefit the diversity-destroying plaintiff bestowed on the diverse plaintiff was nonremovability. But if the court finds that the diversity-destroying plaintiff was fraudulently joined, it essentially would be determining that the plaintiffs had no right to sue jointly in the first place. The diverse plaintiff would get exactly what a plaintiff is entitled to: the option to initially file in state court with the possibility that the defendant will remove. Likewise, the nondiverse plaintiff would still retain the right to sue, albeit in a different forum.

Even if the doctrine can be implemented, a question arises as to whether federal courts should be taking on more cases by policing the joinder of sham plaintiffs. Certainly, the extension of the doctrine may result in a nominal increase in the number of diversity cases in federal court. But a

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137. *See* Percy, *supra* note 73, at 224–26 ("While most courts do pierce the pleadings, some courts engage in extremely limited piercing, while others engage in broad piercing similar to that used by the courts when ruling on summary judgment motions.").

138. AM. LAW INST., *supra* note 76, at 518; *see also Crowe*, 113 F.3d at 1538.

139. *See* Coyne v. Am. Tobacco Co., 183 F.3d 488, 493 (6th Cir. 1999) (noting that all inferences go to the nonremoving party).

140. The voluntary/involuntary rule has two prongs. First, if the plaintiff voluntarily dismisses a nondiverse party, the defendant may remove the case to federal court, provided that the proper removal procedures are followed. *See* Powers v. Chesapeake & Ohio Ry. Co., 169 U.S. 92, 101–02 (1898). Second, if the nondiverse party is dismissed from the lawsuit involuntarily, the defendant does not gain the right to remove. *See* Whitcomb v. Smithson, 175 U.S. 635 (1900) (finding that a ruling on the merits in favor of the diversity-destroying defendant did not permit removal for the remaining defendant). In limiting removal to situations where the nondiverse party is voluntary dismissed, the voluntary/involuntary rule entrenches the plaintiff's choice of form.

141. *See* 7 Wright & Miller, *supra* note 49, § 1652 ("Rule 20 is merely a procedural device and does not alter the substantive rights of the parties .... [E]ach plaintiff's right of action remains distinct, as if it had been brought separately.").

plaintiff-centered fraudulent joinder doctrine would not increase the number of suits that could be brought in federal court; rather, it would assure defendants that removable cases would remain removable despite attempted jurisdictional manipulation by plaintiffs.

2. Benefits

The benefits of extending a well-established doctrine to cover new forms of jurisdictional manipulation are consistency and competence. Extending the doctrine would give defendants the flexibility to introduce materials outside of the pleadings to challenge a plaintiff's presence in a lawsuit.[142] Moreover, courts treat the dismissal of a fraudulently joined party as mandatory,[143] so that the extension would ensure that all federal courts ignore the joinder of sham plaintiffs. This would be an improvement over the discretionary nature of the Rule 21 severance power.[144] Other methods of policing unfair jurisdictional manipulation are similarly reliant on a judge's discretion and thus do not provide robust enough protection for a defendant's right of removal.[145]

Extending the doctrine to police plaintiff-centered fraudulent joinder not only will help alleviate the potential shortfalls of relying on a court's discretion, but it will also make the inquiry more efficient for federal courts which can rely on the well-established limitations of the doctrine itself. Relatedly, federal courts have been deploying the doctrine to sham defendants for over a hundred years and have developed a competency in determining whether a party has been joined solely to prevent removal. The transition to analyzing plaintiffs should impose no significant burdens on the judiciary.

From a policy perspective, extending the doctrine would properly reestablish the balance between a plaintiff's right to structure her lawsuit and the defendant's right of removal. Although the plaintiff has the right to establish the initial structure of her lawsuit, there is no right to unfairly deprive a defendant of her right of removal, as recognized by both Rule 21 and the traditional fraudulent joinder doctrine. Permitting courts to engage in fraudulent joinder analysis for a narrow set of plaintiffs would not disrupt

142. *See, e.g.*, Morris v. Princess Cruises, Inc., 236 F.3d 1061, 1068 (9th Cir. 2001).

143. *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 to a Federal court where one has that right, and should be equally vigilant to protect the right to proceed in the Federal court as to permit the state courts, in proper cases, to retain their own jurisdiction."); *see also id.* at 185–86.

144. *See* Tab Express Int'l, Inc. v. Aviation Simulation Tech., Inc., 215 F.R.D. 621, 623 (D. Kan. 2003).

145. *See* Tedford v. Warner-Lambert Co., 327 F.3d 423, 426–27 (5th Cir. 2003) (finding that the one-year time limit on removal is subject to equitable exception at the court's discretion).

the liberal joinder rules currently in place; rather, it would prevent jurisdictional gaming that is already contrary to federal practice.[146]

CONCLUSION

For over one hundred years, federal courts have scrutinized the joinder of nondiverse defendants with the fraudulent joinder doctrine. The doctrine continues to play a role in preventing plaintiffs from manipulating jurisdiction by suing sham defendants. Because plaintiffs can unfairly preclude removability by joining with sham plaintiffs, the doctrine should be extended to permit federal courts to use the same type of analysis against joint plaintiffs. Extending the doctrine would strike the appropriate balance between preserving the plaintiff's right to structure the lawsuit and protecting the defendant's choice to remove a completely diverse case to a neutral, federal forum.

146. *See* Scott R. Haiber, *Removing the Bias Against Removal*, 53 CATH. U. L. REV. 609, 645 (2004) (noting the various forms of procedural gamesmanship undertaken by plaintiffs).