**Driving Misjoinder: The Improper Party Problem in Removal Jurisdiction**

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**ABSTRACT**

This Article explores, and ultimately embraces, a new exception to the complete diversity rule in removal cases: the doctrine of procedural misjoinder. We argue that the doctrine offers federal courts a vital tool with which to police joinder gamesmanship. Absent this power, plaintiffs may preclude defendant access to federal courts by the relatively simple expedient of joining in state court largely unrelated claims against or on behalf of non-diverse parties. The resulting lawsuit thus fails the complete diversity test, rendering such cases removal-proof. Like fraudulent joinder, the long-standing practice of ignoring non-diverse parties against whom no valid claim may be asserted, the doctrine of procedural misjoinder would permit federal courts to disregard any diversity-destroying parties who have been improperly added to the state lawsuit. Because access to federal courts is at stake, we believe federal courts should adopt this new doctrine, applying federal joinder standards to test the legitimacy of plaintiffs' party alignments before denying removal jurisdiction.

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## INTRODUCTION

Some very oddly-structured lawsuits have been appearing in state courts lately. Plaintiffs who have never met – indeed, who often live half-way across the country from one another – are teaming up to sue in state court. And in many of these cases, the joint suits include defendants against whom most of the plaintiffs assert no claim.

A recent case involving Fen-Phen presents a particularly striking example. Six lawsuits were filed in Georgia state court against New Jersey-based Wyeth Laboratories

(the manufacturer of Pondimin and Redux), a Georgia company that made phentermine (one of the ingredients of Fen-Phen), and some of Wyeth's Georgia-based employees.[1] Each of these suits included between 15 and 25 joined plaintiffs aligned in an eerily similar pattern. In each case, the group included a single Georgia plaintiff, a single New Jersey plaintiff, and a contingent of between 13 and 23 other plaintiffs from states scattered across the country.[2] The plaintiffs from distant states like Idaho and Wyoming had never met their co-plaintiffs from Georgia and New Jersey. Nor had they any grievance against Wyeth's Georgia-based employees.

So what were they all doing together in Fulton County, Georgia state court? How can we explain this phenomenon of strangers joining together across state lines, suing defendants connected only to a handful of them? From a distance, such cases appear to be random acts of misjoinder – that is, the grouping of claims by or against unrelated parties. But we suspect that in each of these cases, the same thing was driving the plaintiffs to commit misjoinder: the desire to prevent removal jurisdiction. It is no secret that plaintiffs often deliberately structure their state court lawsuits to prevent removal by defendants to federal court. Plaintiffs have long known that they could prevent removal in a putative diversity suit by adding a co-plaintiff from the same state as the defendant, or by adding a co-defendant from the same state as the plaintiff.[3] The trick, of course, was finding a "spoiler;" in many cases, the transaction or occurrence being litigated simply did not involve a non-diverse plaintiff or defendant to add.

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[1] In re Diet Drugs Prods. Liab. Litig., 294 F. Supp. 2d 667, 671 (E.D. Pa. 2003).

[2] The additional plaintiffs came from Arizona, California, Idaho, Illinois, Minnesota, Montana, North Dakota, Utah, Wisconsin, and Wyoming. *See id.*

[3] Strawbridge v. Curtiss, 3 Cranch 267 (1806).

Today, however, some plaintiffs appear to be pushing the limits of (or ignoring altogether) the "transactional" structure of modern litigation in order to add a diversity-destroying party. They can do this by joining either a non-diverse plaintiff, a non-diverse defendant, or both.[4] Each of those scenarios present the same problem: while there is a core group of completely diverse parties litigating a particular transaction or occurrence, plaintiffs' joinder of an unrelated party renders diversity incomplete and precludes removal.

Defendants have begun fighting back. Arguing that plaintiffs are abusing the rule of permissive joinder in their efforts to thwart diversity removal, defendants contend that improperly joined parties simply should not count in the complete diversity calculus. Thus, under the so-called doctrine of "procedural misjoinder,"[5] federal courts are empowered to disregard any misjoined parties when assessing the citizenship of the parties for purposes of exercising removal jurisdiction.[6] Advocates of procedural misjoinder point to the long-established doctrine of fraudulent joinder for support. Under the fraudulent joinder doctrine, federal courts already do something very similar: when a claim against a non-diverse "spoiler" defendant is wholly without legal merit, the court

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[4] *See infra* notes __-__ and accompanying text.

[5] While some courts have referred to this as "fraudulent misjoinder," we prefer the term "procedural misjoinder" because we do not believe that application of the doctrine should rely on an inquiry into a plaintiff's motive (fraudulent or otherwise). *See infra* Part IV(C).

[6] CHARLES ALAN WRIGHT, ARTHUR R. MILLER, MARY KAY KANE, 14B FEDERAL PRACTICE & PROCEDURE, §3723 (3rd ed. 1998) (identifying procedural misjoinder as a "new concept that appears to be part of the doctrine of fraudulent joinder has begun to emerge in the case law").

disregards that party for purposes of determining whether there is complete diversity of citizenship.[7]

The doctrine of procedural misjoinder has achieved somewhat mixed success. On one hand, federal courts increasingly have demonstrated willingness to take on this challenge, untangling the claims, carving out the improperly joined parties under Federal Rule of Civil Procedure 21, and then assessing diversity for each of the newly-separated litigation units. But in other respects, the doctrine of procedural misjoinder has been disappointing. Some courts, following an approach suggested by the Federal Practice and Procedure treatise, have refused to adopt the doctrine, instead holding that defendants must return to state court and seek severance there. Still other courts have adopted the doctrine but held that any misjoinder must be assessed under state joinder standards because the case was initially filed in state court. In many such cases, courts have found joinder proper under the more liberal and forgiving joinder rules employed by the state in question. Finally, some courts have adopted the doctrine but limited it to situations of "egregious" misjoinder.

This Article seeks to bring some clarity to this muddled state of affairs, offering a proposed methodology for applying the new doctrine. Parts I and II examine the origins of the misjoinder problem, briefly recounting the historical background of the removal doctrine and the complete diversity rule, as well as permissive joinder law and misjoinder

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[7] *See infra* notes ___-___ and accompanying text; *see also* FEDERAL PRACTICE & PROCEDURE, *supra* note __, §3641 (discussing fraudulent joinder of nondiverse defendant "who could not conceivably be liable" as a procedural device used to defeat complete diversity); Wecker v. National Enameling & Stamping Co., 204 U.S. 176, 186 (1907) ("Federal courts should not sanction devices intended to prevent the 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.").

generally. Part III explores the emerging case law on procedural misjoinder. Finally, Part IV critiques the existing approaches to this developing area of law and embraces an (admittedly) imperfect solution that we believe is nevertheless significantly preferable to other more problematic solutions.

We disagree with the courts who reject the doctrine of procedural misjoinder altogether.[8] While this solution is certainly the easiest to implement, it would entrust vital determinations regarding access to federal courts to state legislatures and state courts. We also disagree with the courts that, after adopting the doctrine, have then looked to state joinder rules. This approach suffers from the same weakness as the first solution – defendants' rights to access federal courts becomes dependent upon state joinder rules, no matter how disadvantageous or inefficient. Finally, we reject the use of an "egregiousness" requirement. Indeed, it is the worst of all worlds in that it simultaneously complicates the analysis while significantly diluting the power of federal judges to protect their removal jurisdiction.

Ultimately, we conclude that federal courts should adopt the doctrine of procedural misjoinder and apply federal joinder standards to determine whether parties have been improperly joined. Because we regard misjoinder to be as real a threat to diversity removal as fraudulent joinder, we view the doctrine of procedural misjoinder as a vital judicial tool to police joinder gamesmanship. We believe that it is the obligation of federal courts to exercise such authority rather than washing their hands of the problem by relegating the task to state courts. A doctrine based on Federal Rule 20 would provide

[8] *See infra* notes __-__ and accompanying text.

a uniform, nationwide method for ensuring that the addition of transactionally-unrelated parties does not thwart diversity removal.

## PART I: REMOVAL JURISDICTION AND THE COMPLETE DIVERSITY REQUIREMENT

Procedural misjoinder is a removal maneuver. And removal is a complex blend of federal subject matter jurisdiction and statutorily-defined mechanics. Thus, any analysis of procedural misjoinder must begin with a discussion of removal jurisdiction and mechanics. This Part supplies that foundation. It begins by looking at the removal statutes and considering their intersection with original jurisdiction to derive the complete diversity requirement for diversity removal. It then shows how Congress and the courts have deviated from this rule over time.

### A. *Removal Basics*

Under the general removal statute, a state court action may be removed only if it was one "of which the district courts of the United States have original jurisdiction."[9] Translated, this means that the defendant may remove a case to federal court only if the plaintiff could have filed the suit in federal court in the first place.[10] It is the removing defendant's burden to show that the federal court would have had subject matter jurisdiction had the plaintiff filed in federal court instead of state court.

One of the core bases for federal subject matter jurisdiction is diversity of citizenship. The statutory requirements for diversity jurisdiction are well-known. First, there must be complete diversity of citizenship, meaning that no plaintiff can be a citizen of the same state as any defendant. Second, there must be a sufficient amount in

[9] 28 U.S.C. §1441(a).

[10] City of Chicago v. Int'l College of Surgeons, 522 U.S. 156, 529 (1997).

controversy. Recently, the Supreme Court held that federal courts may exercise supplemental jurisdiction over joined plaintiffs who, on their own, do not meet the amount in controversy requirement.[11] But the Court made clear that supplemental jurisdiction does not extend to joined plaintiffs who would spoil diversity. In the words of the Court, the presence of a single non-diverse plaintiff "contaminates" the suit as a whole, destroying the diversity jurisdiction to which the supplemental plaintiff seeks to attach himself. Thus, whether jurisdiction is analyzed under the diversity statute alone or in conjunction with the supplemental jurisdiction statute, a federal court can hear the case only if the citizenship of all plaintiffs is diverse from that of all defendants.

This is where the doctrine of procedural misjoinder comes in. It involves a state court suit in which the parties are not completely diverse. As such, it could not be filed originally in federal court based on diversity, so therefore can not be removed based on diversity. The defendant argues, however, that the case should be removable based on complete diversity insofar as all of the properly joined parties are diverse. More specifically, the defendant argues that the party or parties spoiling complete diversity should be disregarded because the claims that involve them do not arise out of or relate to the same transaction or occurrence that is the subject of the suit between the diverse parties. Absent these "misjoined" parties, the complete diversity requirement would be satisfied and the case could be removed.

It seems relatively clear that Congress could explicitly allow for removal under these circumstances. First, the requirement of complete diversity comes from Congress,

[11]Exxon Mobil Corp. v. Allapattah Svcs., Inc., 125 S.Ct. 2611 (2005).

not Article III.[12] Congress may authorize "minimal diversity" suits in federal court, and did so just this year with class actions.[13] Second, there is nothing that forbids Congress from vesting more of the Article III diversity power by way of removal than it allows for original filing. If it wanted to, for example, Congress could allow defendants to remove regardless of the amount in controversy, even while retaining an amount in controversy requirement for plaintiffs. Summing these principles, there would appear to be no reason why Congress – though still preserving the statutory complete diversity requirement as to original filings by plaintiffs – could not authorize defendants to remove up to the Article III limits of minimal diversity.

Yet it is equally clear that Congress has not explicitly enacted a procedural misjoinder mechanism. Section 1441(a) contains only one explicit exception – defendants sued under fictitious names do not count. In other words, a case is removable under diversity despite the presence of a same-state defendant if the plaintiff sues the defendant as a "Doe" defendant or other fictitious name. Nothing else in §1441(a) permits a court to disregard the citizenship of a state court party when assessing whether the suit would satisfy original federal subject matter jurisdiction.

One court has suggested that §1441(b) speaks to the complete diversity requirement in that it allows removal only if "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." [14] According to this court, the reference to parties "properly joined" signals

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[12]State Farm Fire and Casualty Co. v. Tashire, 386 U.S. 523 (1967).

[13]Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4.

[14]*See* Jones v. Nastech Pharmaceutical, 319 F.Supp.2d 720 (S.D. Miss. 2004).

Congress's intention that federal courts disregard improperly joined parties for removal purposes.[15] We do not share this interpretation. To start, §1441(b) only refers to defendants. But, as we discuss below, it is the presence of misjoined plaintiffs that is the most vexing problem. Moreover, we read §1441(b) as an additional *limitation* on diversity removal, not an expansion. Section 1441(b) provides that defendants cannot remove diversity suits from the courts of their home state. In multiple defendant suits, the bar is triggered if any of the defendants is from that state. The language in §1441(b) regarding "parties in interest properly joined" defines which defendants will trigger the home-state removal bar, but it says nothing about which parties count towards the "original jurisdiction" requirement in §1441(a).[16]

In sum, aside from the instruction to disregard "Doe" defendants, the removal statutes say nothing to authorize diversity removal for anything less than complete diversity. If procedural misjoinder is to find a home in the existing jurisdictional framework, it must look between or beyond the text.

**B.** ***Exceptions for Incomplete Diversity -- Then and Now***

[15] *Id.* at 725 (asserting that "joinder in that action could only be proper in accordance with the state rule of procedure on joinder, not the federal rule of joinder.").

[16] While the requirement of complete diversity and the bar on home-state defendant removal both operate to prevent removal, they are quite distinct. Assume, for example, a suit filed by a Texas plaintiff against a New York defendant in California state court. If the plaintiff had joined a Texas co-defendant, removal would have been barred by §1441(a) for lack of complete diversity, but would not have triggered §1441(b). In contrast, if the plaintiff had joined a California co-defendant, the suit would still have satisfied complete diversity and been removable under §1441(a), but would have triggered the §1441(b) bar because of the presence of a home state defendant.

One is always tempted to think that the problems of today are new. In procedure, that is often not the case, and so it is with procedural misjoinder. Indeed, there is a rich history to diversity-based removal and jurisdictional spoilers. For over 80 years – from 1866 to 1948 –a diverse defendant could remove despite the presence of a spoiler if he could show that his portion of the suit was "separable" from the rest of it. While "separable controversy" removal has been abandoned, it gave rise to the doctrine of fraudulent joinder. That doctrine survives, of course, and stands as the clearest current response to plaintiffs' efforts to defeat removal through joinder games. Finally, this section addresses the role ofjurisdic tional cures in removed cases, which represents yet another way in which federal courts depart from a strict insistence that only complete diversity cases can fall within the jurisdiction granted by the removal statute.

*1. Separable Controversy and Separate Claim Removal*

The First Congress provided for removal in its very first jurisdictional statute, the Judiciary Act of 1789.[17] The original removal bill allowed out-of-state defendants to remove cases brought by home-state plaintiffs when the amount in controversy exceeded $500.[18] While the statute itself addressed only suits by single plaintiffs against single defendants, the courts imported the complete diversity requirement of Strawbridge v.

[17] Ch. 20, 1 Stat. 73, § 12.

[18] Ch. 20, 1 Stat. 73, § 12.

Curtiss[19] with the result being that diversity-based removal was allowed only when all of the plaintiffs were in-state and all of the defendants were out-of-state.[20]

The original system for diversity-based removal remained in place until after the Civil War. In 1866, however, Congress fundamentally altered diversity-based removal with the Separable Controversy Act of 1866,[21] which directly addressed the problem of jurisdictional spoilers.[22] The Act allowed a single diverse defendant to remove his part of a case to federal court – despite the presence of joined non-diverse co-defendants – if the case against him was separable from the case against the other defendants.[23] But the Separable Controversy Act of 1866 proved troublesome in that it split the case between state court and federal court. As the Supreme Court remarked, "[m]uch confusion and embarrassment, as well as increase in the cost of litigation, had been found to result from the provision in the [Act of 1866] permitting the separation of controversies arising in a suit, removing some to the Federal court, and leaving others in the State court for

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[19] 3 Cranch 267 (1806).

[20] *See* Barney v. Latham, 103 U.S. 205, 209 (1880). The opinion in *Barney* gives a splendid overview of the history of removal from the First Congress through 1880.

[21] 14 Stat. 306.

[22] The following year, Congress added the Prejudice or Local Influence Act of 1867, which allowed either an out-of-state plaintiff or defendant to remove upon a showing of local bias. 14 Stat. 558. This removal mechanism, however, continued to be subject to the complete diversity rule. Thus, a non-diverse party joined with a spoiler could not invoke "local prejudice" removal, but instead would have to qualify for "separable controversy" removal. *See* Case of the Sewing Machine Companies, 18 Wall. 553 (1873).

[23] *See* Barney v. Latham, 103 U.S. 205, 210 (1880).

determination."[24] To cure the problem, Congress altered diversity-based removal yet again, this time providing that the presence of a "separable controversy" allowed the non-diverse defendant to remove the entire suit.[25] Congress evidently continued to believe that diverse defendants to a separable controversy should not lose their access to federal court simply because a non-diverse co-defendant had been joined.[26] But "[r]ather than split up such a suit between courts of different jurisdictions, Congress determined that the removal of the separable controversy to which the judicial power of the United States was, by the Constitution, expressly extended, should operate to transfer the whole suit to the Federal court."[27]

The "separable controversy" model remained in place until 1948, when Congress created the Judicial Code of 1948. Among its changes, Congress abolished "separable controversy" removal and replaced it with a provision allowing removal of the entire suit if it included a removable "separate and independent claim or cause of action."[28] This marked yet another substantial shift in diversity-based removal. According to one commentator, the courts were still struggling to draw principled lines between separable

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[24] *Id.* at 213.

[25] Act of March 3, 1875, 18 Stat. 470, § 2.

[26] *Barney*, 103 U.S. at 210 (interpreting Congress as intending that the presence of a non-diverse co-defendant should not require the diverse defendant "to remain in the State court, and surrender his constitutional right to invoke the jurisdiction of the Federal court.").

[27] Barney v. Latham, 103 U.S. 205, 213 (1880).

[28] 28 U.S.C. § 1441(c) (1958).

and non-separable claims.[29] Under the new model, removal was no longer driven by whether the plaintiff sought joint or several liability, but instead would look to whether the plaintiff had joined multiple claims. If the suit contained a separate claim that itself was removable, then the whole suit could be removed, leaving it to the district court's discretion whether to remand the tagalong part of the suit.

Diversity-based removal came full circle in 1990, when Congress amended 1441(c) to limit separate claim removal to federal question cases.[30] With that, diversity-based removal had returned to where it started in 1789: a diverse defendant joined with a diversity spoiler had no statutory vehicle to seek removal on the basis that he had a "diversity suit" unfairly (and perhaps intentionally) trapped inside a larger non-removable action.

2. *Fraudulent Joinder*

Perhaps the most important exception to the complete diversity requirement for diversity-based removal is the doctrine of fraudulent joinder. Under the fraudulent joinder doctrine, federal courts may disregard a non-diverse party in determining complete diversity of citizenship where it can be established that plaintiff does not have a

[29] *See* William Cohen, *Problems in the Removal of a "Separate and Independent Claim or Cause of Action"*, 46 MINN. L. REV. 1, 5 (1962).

[30] *See* Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089.

valid cause of action against that party.[31] The court then decides whether to keep the case or remand for lack of diversity based on the remaining parties.[32]

The fraudulent joinder doctrine does not appear in the current removal statutes, but it does have statutory origins. Recall from above that Congress at one time authorized removal of incomplete diversity suits if they contained within them a "separable controversy" that met the complete diversity requirement. Shortly thereafter, the Supreme Court ruled thatwhen tortfeasors or obligors were sued jointly there could be no separable controversy for removal purposes.[33] This was true even if the plaintiff could have sued the defendants severally, and defendants could not make the controversy separable by mounting separate defenses.[34] In short, a plaintiff who pursued his case as one for joint liability effectively prevented the diverse defendant from invoking separable controversy removal.[35]

Predictably, defense lawyers started complaining that plaintiffs were conjuring up unfounded and improper joint liability claims against nondiverse defendants for the

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[31] *See* Wormley v. Wormley, 21 U.S. 421, 451 (1823); 1A J. MOORE & B. RINGLE, MOORE'S FEDERAL PRACTICE, ¶¶ 0.161[1.-1], at 257-59, 0.161[2], 0.168[3.-2-2], at 549 (2d ed. 1989 & Supp. 1989- 1990).

[32] *See* MOORE'S FEDERAL PRACTICE, *supra* note __.

[33] *See* Pirie v. Tvedt, 115 U.S. 41, 43 (1885) (no separable controversy when plaintiff sues joint tortfeasors); Louisville & Nashville R.R. Co., 114 U.S. 52, 55 (1885) (no separable controversy when plaintiff sues joint obligors).

[34] *See* Powers v. Chesapeake & Ohio Rwy. Co., 169 U.S. 92, 97 (1898).

[35] One treatise authored by a federal judge includes a section frankly titled, "How Plaintiff May Prevent Removal by Joining as a Defendant a Resident of the State." *See* JOHN C. ROSE, ROSE'S FEDERAL JURISDICTION AND PROCEDURE, § 385, p. 334 (2nd ed. 1922).

express purpose of precluding separable controversy removal. These "sham defendants" should be disregarded, the defendants argued.[36] The argument was not wholly novel. By then, it was already settled that federal courts should disregard "formal" or "nominal" parties when determining whether complete diversity existed.[37] These "sham" defendants were not really "nominal parties," however, because the plaintiffs did assert a claim of personal liability against them. It did not take long for both the litigants and courts to embrace a new term – "fraudulent joinder" – to describe the alleged unfounded assertion of joint liability.[38]

Finally, in 1907, the Supreme Court explicitly adopted and applied the fraudulent joinder doctrine in *Wecker v. National Enameling & Stamping Company*,[39] finding that the defendant had conclusively shown in its removal petition and the supporting materials that the nondiverse defendant simply had not done anything that could give rise to joint

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[36] *See* Plymouth Cons. Gold Mining Co. v. Amador & S. Canal Co., 118 U.S. 264, 270 (1886).

[37] *See* Wormley v. Wormley, 21 U.S. 421, 451 (1823) ("This Court will not suffer its jurisdiction to be ousted by the mere joinder or non-joinder of formal parties."); *see also* Walden v. Skinner, 101 U.S. 577, 589 (1879) ("[T]he rule is settled that the mere fact that one or more [nominal] parties reside in the same State with one of the actual parties to the controversy will not defeat the jurisdiction of the court."); Wood v. Davis, 59 U.S. 467, 469 (1855) ("It has been repeatedly decided by this court, that formal parties, or nominal parties, or parties without interest, united with the real parties to the litigation, cannot oust the federal courts of jurisdiction.").

[38] During a span of fifteen years, the Supreme Court referred to the "fraudulent joinder" of a joint tortfeasor no fewer than five times, though each time deciding the case on a different basis. *See* Ala. Great So. Rwy. Co. v. Thompson, 200 U.S. 206, 216-17 (1906); Kansas City Suburban Belt Rwy. Co. v. Herman, 187 U.S. 63, 70 (1902); Whitcomb v. Smithson, 175 U.S. 635, 638 (1900); Powers v. Chesapeake & O. Rwy. Co., 169 U.S. 92, 102 (1989); Louisville & N. R. Co. v. Wangelin, 132 U.S. 599, 603 (1890).

[39] 204 U.S. 176 (1907).

liability.[40] As the Court explained: "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."[41] Concluding that "the real purpose in joining Wettengel was to prevent the exercise of the right of removal by the nonresident defendant," the Supreme Court affirmed the lower court's decision disregarding his presence and refusing remand.[42]

Over the next decade or so, the Supreme Court addressed fraudulent joinder many times, clarifying its meaning and making concrete two fundamental principles. First, the Court made clear that there was no fraudulent joinder if the applicable state law recognized a possibility of holding the spoiler jointly liable.[43] Second, the Court held that

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[40] The plaintiff was injured when he fell into a pot of boiling grease at work. He sued his employer for allowing unsafe working conditions. He then joined a claim against a man named Wettengel, who the plaintiff claimed negligently designed the part of the factory where he was injured. In its removal petition, however, the company documented that Wettengel was a rank-and-file draftsman who made no decisions but simply followed orders. It was on this basis that the Supreme Court concluded that Wettengel should be disregarded because he did nothing to which any joint duty could attach. *Wecker*, 204 U.S. at 185.

[41] *Wecker*, 204 U.S. at 185-86.

[42] *Id.*. at 186.

[43] *See* McAllister v. Chesapeake & Ohio Rwy. Co., 243 U.S. 302, 310-11 (1917); Chicago, Rock Island & Pac. Rwy. Co. v. Whiteaker, 239 U.S. 421, 424 (1915); Chicago, Rock Island & Pac. Rwy. Co. v. Schwyhart, 227 U.S. 184, 193 (1913); Chicago, Burlington & Quincy Rwy. Co. v. Willard, 220 U.S. 424, 425 (1911). In an earlier case giving a glimpse into practice under *Swift v. Tyson*, the Supreme Court had squarely held that state law – not federal common law – determined whether joint liability was

the plaintiff's motive in pursuing joint liability was immaterial.[44] So long as the plaintiff was pursuing a plausible theory of joint liability, his reasons for doing so simply did not matter. As a result, the Court rejected fraudulent joinder arguments in several cases involving spoilers who were legally viable targets but whose real value, being "men of small means," lay in their sharing the same citizenship as the plaintiff.

It bears mentioning that the focus on possible joint liability – rather than just possible liability at all – was quite deliberate. When reading these older fraudulent joinder cases, one must recall that common law joinder was far more restrictive (at least in actions at law) than the comparatively free-wheeling transaction-based joinder we have now under the Federal Rules of Civil Procedure. Under common law pleading, a plaintiff could join defendants only if he alleged joint liability (or at least joint and several liability).[45] "Misjoinder" generally meant that the plaintiff had joined defendants who

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possible. *See* Ala. Great So. Rwy. Co. v. Thompson, 200 U.S. 206, 219 (1906). This was an important ruling, because federal common law rejected joint liability in many situations where state law recognized it. Nonetheless, the Court was clear that, in determining whether a case filed in state law presented a separable controversy, it was state law that controlled. *Id*.

[44] *See* Ill. Cent. R.R. Co. v. Sheehog, 215 U.S. 308, 316 (1909) ("In the case of a tort which gives rise to a joint and several liability, the plaintiff has an absolute right to elect, and to sue the tort feasors jointly if he sees fit, no matter what his motive."). The Chicago, Rock Island & Pacific Railway continued to press the issue, but the Court held firm. *See* Chicago, Rock Island & Pacific Rwy. Co. v. Whiteaker, 239 U.S. 421, 424 (1915); Chicago, Rock Island & Pac. Rwy. Co. v. Dowell, 229 U.S. 102, 114 (1913); Chicago, Rock Island & Pac. Rwy. Co. v. Schwyhart, 227 U.S. 184, 193 (1913).

[45] *See* CHARLES E. CLARK, HANDBOOK ON THE LAW OF CODE PLEADING 257 (1928); JAMES GOULD, A TREATISE ON THE PRINCIPLES OF PLEADING 388-391 (6th ed. 1909); BENJAMIN J. SHIPMAN, HANDBOOK OF COMMON-LAW PLEADING 135-38 (2nd ed. 1895).

were only separately liable.[46] So when the cases delve deeply into whether the non-diverse defendant could be jointly liable under the applicable state law, they mean just that. If a spoiler – though the target of a valid claim – could only be separately liable, his joinder really was improper, and it therefore could be assumed to be a device to deprive the defendant of his right to exercise separable controversy removal.[47]

Oddly enough, the Supreme Court has not applied the fraudulent joinder doctrine in the modern joinder era. The last Supreme Court case finding fraudulent joinder was

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[46] OLIVER L. BARBOUR, BARBOUR ON THE LAW OF PARTIES 305 (1864); *see also* CLARK, *supra* note __, at 262 (discussing consequences of misjoining severally-liable parties); SHIPMAN, *supra* note ___, at 139-41 (same).

[47] It is from this vantage point that one must read cases like *Chesapeake & Ohio Rwy. Co. v. Cockrell*, 232 U.S. 146 (1914). The railroad was being sued by the estate of a man struck and killed by one of their trains. The railroad and the administrator were diverse, but the suit also joined claims against the engineer and the fireman on the train, both non-diverse to the administrator. The complaint charged all defendants with negligence in failing to keep a proper lookout, failing to warn pedestrians of the approaching train, and failing to stop the train. *Id*. at 150. In response to the claim that the engineer and fireman were fraudulent joined, the Court replied: "Here the plaintiff's petition, as is expressly conceded, not only stated a good cause of action against the resident defendants, but, tested by the laws of Kentucky, as it should be, stated a case of joint liability on the part of all the defendants. As thus stated the case was not removable, the joinder of the resident defendants being apparently the exercise of a lawful right." *Id*. at 153. That was the holding, but the court then took on the defendant's complaint that the factual allegations of negligent lookout and failure to warn were demonstrably false, explaining that such an argument "went to the merits of the action as an entirety, and not to the joinder; that is to say, it indicated that the plaintiff's case was ill founded as to all defendants. Plainly, this was not such a showing as to engender or compel the conclusion that the two employees were wrongfully brought into a controversy which did not concern them." *Id*. at 153. Recently, some courts have cited that language as establishing that a defendant cannot invoke fraudulent joinder when the defense that precludes liability for the nondiverse party would also preclude liability for the diverse party. *See, e.g.,* Smallwood v. Ill. Cent. R.R. Co., 385 F.3d 568, 575 (5th Cir. 2004). The so-called "common defense" codicil to fraudulent joinder likely reads *Cockrell* outside of its common law pleading context. In all likelihood, the Court meant only to note that the defense of "it didn't happen that way and I can prove it" simply does not speak to whether the theory pleaded by the plaintiff could lead to joint liability as required for proper common law joinder.

*Wilson v. Republic Iron & Steel Company*, decided in 1921.[48] Even then, the Court itself did not make a finding of fraudulent joinder, but instead sustained removal based on the plaintiff's failure to contest the defendant's specific allegations of fraudulent joinder in the removal petition.[49] Upon that, the Court concluded that "[a]s the joinder was a sham and fraudulent – that is, without any reasonable basis in fact and without any purpose to prosecute the cause in good faith against the coemploye,"[50] it did not matter whether state law recognized joint liability or not. Subsequent Supreme Court cases have acknowledged the doctrine of fraudulent joinder and restated its terms but only in dicta.[51]

Still, there is no doubting the doctrine's continued vitality.[52] Of course, with the end of separable controversy removal in 1948, the focus is no longer on joint liability but on the more basic issue of whether the plaintiff states a possible claim against the alleged spoiler. But with that adjustment, fraudulent joinder survives, if not thrives. Every

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[48] 257 U.S. 92 (1921).

[49] *Id*. at 98.

[50] *Id*. at 98.

[51] The 1939 case of *Pullman Company v. Jenkins*, 305 U.S. 534 (1939) is often cited for the doctrine of fraudulent joinder. In that case, however, the Court specifically notes that "there was no charge that the joinder was fraudulent." *Id.* at 541. The real issue in that case was whether the defendant could remove under the separable controversy doctrine. In other words, the case assumed that valid claims against all the defendants existed, the question was whether the claim against the non-diverse defendant was separable from the balance of the action. The Court's most recent reference to fraudulent joinder hardly even qualifies as dicta. *See* Rurhrgas AG v. Marathon Oil Co., 526 U.S. 574, 581 n.5 (1999) (noting that the Fifth Circuit had rejected the defendant's fraudulent joinder argument).

[52] As one leading treatise states, "it is well-settled that the district court will not allow removal jurisdiction to be defeated by the plaintiff's destruction of complete diversity of citizenship by the collusive or improper joinder of parties." FEDERAL PRACTICE & PROCEDURE, *supra* note __, § 3723, at 625.

circuit has reaffirmed the doctrine at some point in the last few years. The burden remains high: the defendant must show that there is no reasonable possibility of a claim under applicable state law. But, when the required showing is made, the federal court will disregard the fraudulently joined defendant and assess diversity based on the remaining parties.

3. *Post-Removal Cures*

In order to remove a case based on diversity jurisdiction, there must be complete diversity at the time of removal. This can occur either because the plaintiff's initial state court suit met the complete diversity requirement, [53] or because the plaintiff later created complete diversity by voluntarily dismissing the non-diverse parties.[54] In the latter case, the spoiler must be voluntarily dismissed within one year of when the suit was filed in state court.[55] But in either situation, complete diversity must exist at the time the defendant removes the case.

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[53] FEDERAL PRACTICE & PROCEDURE, *supra* note __, § 3723, at 571-72. This, apparently, is to prevent a defendant from moving after the suit is filed to create diversity in order to remove. *Id*. at 574.

[54] 28 U.S.C. § 1446(b). Two observations about "new removal" are in order. First, while the statute does not explicitly limit "new removal" to voluntary changes, the Supreme Court has long held that involuntary changes – such as the court granting summary judgment for the non-diverse defendant – do not qualify. *See* cite. Second, as a practical matter, the only way a plaintiff can create completely diversity by voluntarily changing the party line-up is by deleting the non-diverse parties. A plaintiff cannot create complete diversity by adding parties; if the existing parties have overlapping citizenships, the addition of more parties cannot alter that.

[55] 28 U.S.C. § 1446(b). This provision was added in 1990 under the view that, after one year, it just wasn't worth the disruption and inefficiency to allow diversity removal. One side effect of capping diversity removal at one year – and perhaps one that should have been better anticipated – is that a plaintiff can block removal by joining a spoiler for one year and then dismiss the spoiler on day 366 without triggering a new removal period. *See* Steven S. Gensler, *Diversity Class Actions, Common Relief, and the*

During the last few decades, however, the Supreme Court has recognized (or, perhaps, rehabilitated) a limited theory of jurisdictional cure. Under this theory, incomplete diversity can be "cured" by the deletion of the spoiler later in the lawsuit.[56] While originally developed in cases filed initially in federal court, it also applies in removed cases when a court learns later in the suit that complete diversity did not exist at the time of removal.[57] Thus, "a district court's error in failing to remand a case improperly removed [for lack of complete diversity] is not fatal to the ensuing adjudication if federal jurisdictional requirements are met at the time judgment is entered."[58]

The next section of this Article addresses joinder and severance under Rule 20 and Rule 21 respectively, and we reserve our extended discussion of jurisdictional cures until then. But one further point should be made now regarding jurisdictional cures and removal jurisdiction. In extending the jurisdictional cure doctrine to removal, the *Caterpillar* Court made clear that it saw the problem as presenting two separate questions. First, it viewed the core jurisdictional cure question as going to the court's

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*Rule of Individual Valuation*, 82 OREGON L. REV. 295, 259-363 (2003) (discussing how plaintiffs game removal by underpleading their state court claims during the one-year removal period). The United States Judicial Conference has recently approved and forwarded to Congress a recommendation that the one-year cap on diversity removal give way for good cause.

[56] *See* Grupo Dataflux v. Atlas Global Group, L.P., 541 U.S. 567, 572-73 (2004); Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 836 (1989).

[57] *See* Caterpillar v. Lewis, 519 U.S. 61, 76-77 (1996).

[58] *Id* at 65.

original diversity jurisdiction under §1332.[59] Second, it noted that, even when §1332 is satisfied by an eventual cure, there still remained the question of what to do about the violation of §1441(a)'s requirement that the court's subject matter jurisdiction be met at the time of removal.[60] On this point, the Court was clear: the technical statutory violation of §1441 does not require remand if the jurisdictional defect is later cured.[61] "To wipe out the adjudication postjudgment, and return to state court a case now satisfying all federal jurisdictional requirements, would impose an exorbitant cost on our dual court system, a cost incompatible with the fair and unprotracted administration of justice." So understood, *Caterpillar* stands as yet another example of the Supreme Court looking beyond the plain text of the removal statutes to uphold removal of a case that, initially, does not have complete diversity of citizenship.

[59] *Id*. at 73.

[60] *Id.*

[61] *Id.* at 75-77; *see also* Grupo Dataflux v. Atlas Global Group, L.P., 541 U.S. 567, 574 (2004) (stating that the holding of *Caterpillar* was that the statutory defect under §1441(a) did not require remand when the lack of complete diversity was cured later).

## PART II: JOINDER AND SEVERANCE UNDER THE FEDERAL RULES

While procedural misjoinder is, at its core, a removal maneuver, it is a maneuver that pivots on party joinder. This Part, accordingly, looks at party joinder under the Federal Rules of Civil Procedure. It first considers permissive party joinder and misjoinder under Rules 20 and Rule 21 respectively. It concludes with a deeper look at how courts use severance under Rule 21 to cure diversity defects by omitting jurisdictional spoilers after – and, sometimes, long after – the federal court assumes jurisdiction.

### A. *Permissive Joinder and Misjoinder*

Historically, in actions at common law, defects in party joinder could be fatal to plaintiffs' claims.[62] Equity practice was much more forgiving, ordinarily allowing misjoinder of parties to be corrected by a plaintiff through an amendment to the complaint.[63] The merger of law and equity resulted in a uniform set of procedural rules that sided with equity practice, resulting in current Federal Rule of Civil Procedure 21.

Rule 21 states that "misjoinder of parties is not ground for dismissal of an action."[64] Rather, the rule provides district (and appellate)[65] courts the discretion to drop or add parties "at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately."[66] Rule 21 is thus the party

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[62] *See* FEDERAL PRACTICE & PROCEDURE, *supra* note __, §1681, p.472-73.

[63] *Id.*

[64] FED. R. CIV. P. 21.

[65] *See* Newman Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826 (1989).

[66] FED. R. CIV. P. 21.

equivalent of Rule 42(b), which grants federal courts broad discretion to separate claims and issues for litigation "in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy."[67] With respect to severance and addition of parties, "Rule 21 furthers the policy of the federal rules to continue and determine an action on its merits whenever that can be done without prejudice to the parties."[68]

Misjoinder of claims, of course, begs the question of when claims are considered improper or "misjoined" for Rule 21 purposes. Misjoinder may be determined by improper application of any of the joinder rules, but the rule most relevant to the procedural misjoinder line of cases is Rule 20(a), which governs permissive joinder of parties.

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[67] FED. R. CIV. P. 42(B).

[68] FEDERAL PRACTICE & PROCEDURE, *supra* note __, at 474.

Federal Rule 20 is the basic rule defining party-initiated joinder. It provides, in pertinent part:

> All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action. All persons . . . may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action.[69]

Thus, Federal Rule 20 provides for both the joinder of multiple plaintiffs and the joinder of multiple defendants. The standard for plaintiff joinder and defendant joinder is the same: (1) the joined claims must arise out of the same transaction, occurrence, or series of transactions or occurrences; and (2) there must be a question of law or fact common to all of the joined claims. In both cases, party joinder is permissive rather than mandatory. [70]

A plaintiff must meet the two-part test to join parties under Rule 20, but it remains the plaintiff's option whether to do so. Under the modern rules framework, joinder of parties is "strongly encouraged" in order to achieve the broadest possible scope of action consistent with fairness to the parties."[71]

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[69] FED. R. CIV. P. 20(a).

[70] *See e.g.*, FEDERAL PRACTICE & PROCEDURE, *supra* note __, §1652, at 397 (Rule 21 "permits the joinder of persons whose presence is procedurally convenient but is not regarded as essential to the court's complete disposition of any particular claim.").

[71] United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 724 (1966);*see also* FEDERAL PRACTICE & PROCEDURE, *supra* note __, §1652, at 395 ("The purpose of the rule is to promote trial convenience and expedite the final determination of disputes, thereby preventing multiple lawsuits."); Mary Kay Kane, *Original Sin and the Transaction in Federal Civil Procedure*, 76 Tex. L. Rev. 1723, 1728-29 (1998) ("Modern

There is no definitive standard for what constitutes a transaction under Rule 20.[72] Most courts seem to define the transaction as a set of logically-related events.[73] But rather than establish any hard and fast rules, courts have preferred to analyze transactional relatedness on a case-by case basis informed by policy considerations like efficiency, convenience, and fairness.[74] The result is a highly-flexible standard that eludes fixed boundaries, with courts reaching quite conflicting results as to its meaning.[75] This has been particularly true, for example, with respect to product liability cases as courts confront attempts to utilize Rule 20 to join the claims of numerous plaintiffs

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joinder policy is to encourage resolving controversies in one lawsuit rather than many, and that policy underlies the determination of what may constitute a transaction for purposes of [Federal Rule 20]").

[72] MOORE'S FEDERAL PRACTICE, *supra* note __, § 20.05[1] (2004). The reference to "occurrences" in Rule 20 appears to be historical, and courts have viewed "transaction" and "occurrence" to be synonymous. *Id.; see also* FEDERAL PRACTICE & PROCEDURE, *supra* note __, §1653, at 412.

[73] *See* Alexander v. Fulton County, 207 F.3d 1303, 1323 (11th Cir. 2000); Disparte v. Corporate Executive Bd., 223 F.R.D. 7, 10 (D.D.C. 2004); *see generally* MOORE'S FEDERAL PRACTICE, *supra* note __, § 20.05[2]; FEDERAL PRACTICE & PROCEDURE, *supra* note __, § 1653, at 409.

[74] Thirty years ago, the Eighth Circuit described transactional relatedness in terms still often quoted today: "'Transaction' is a word of flexible meaning. It may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship." Mosley v. Gen. Motors Corp., 497 F.2d 1330, 1333 (8th Cir. 1974); *see also* Insolia v. Phillip Morris, Inc., 186 F.R.D. 547, 549 (W.D. Wis. 1999).

[75] *See, e.g.,* Elizabeth J. Cabraser, *The Class Action Counterreformation*, 57 STAN. L. REV. 1475, 1487 (2004) (lamenting that "although the policies underlying Rule 20 favor joinder whenever possible to serve goals of expediency, efficiency, and convenience, the courts themselves have taken mixed and, in some cases, contradictory approaches to Rule 20").

injured in similar circumstances by a defendant's product or drug.[76] The struggle to consistently apply the same transaction requirement is also evident in employment discrimination cases.[77]

### B. *Rule 21 and Incomplete Diversity: Recent Supreme Court Jurisprudence*

It is frequently said that the Federal Rules generally leave party structure to the litigants. It is also said that, for purposes of federal subject matter jurisdiction, the federal court takes the case as it finds it. Together, these suggest a strictly passive model in which federal judges assess jurisdiction based on the party line-up as set by the litigants

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[76] In one line of cases, courts have rejected such attempts, requiring "at a minimum that the central facts of each plaintiff's claim arise on a somewhat individualized basis out of the same set of circumstances." *In re* Orthopedic Bone Screw Prods. Liab. Litig., 1995 WL 428683 (E.D. Pa. 1995). These courts have denied Rule 20 joinder where the alleged same transaction consisted of plaintiffs suffering injuries from a medical device in different states at different times, *id.*, or being exposed to asbestos or tobacco products at different times in different circumstances. *See, e.g.,* Malcom v. Nat. Gypsum Co., 995 F.2d 346 (2d Cir. 1993) (asbestos); Insolia v. Philip Morris, Inc., 186 F.R.D. 547, 549 (W.D. Wis. 1999) (tobacco); *see also* Saval v. BL Ltd., 710 F.2d 1027, 1031 (4th Cir. 1983) (rejecting joinder where plaintiffs warranty claims based on different cars purchased at different times).

Faced with similarly disparate individual circumstances, however, other courts have permitted plaintiffs to sue defendant manufacturers on product liability claims, finding that the same transaction standard could be met simply by a defendant's failure to warn or to produce a defective product. *See, e.g., In re* Norplant Contraceptive Prods. Liab. Litig., 168 F.R.D. 579 (E.D. Tex. 1996); *see also* Cabraser, *supra* note __, at 1487-90 (describing split among courts considering product liability claims).

[77] *Compare* Bailey v. Northern Trust Co., 2000 WL 1567862, at *2 (N.D. Ill. 2000) (denying Rule 20 joinder of employment discrimination claims due to "factual differences" among claimants) *and* Smith v. North Am. Rockwell Corp. Tulsa Div., 50 F.R.D. 515, 522 (N.D. Okla. 1970) (same) *with* Streeter v. Joint Indus. Bd. Of the Elec. Indus., 767 F. Supp. 520, 529 (S.D.N.Y. 1991) (holding that plaintiffs' hostile work environment claims amounted to a single transaction); *and* Best v. Orner & Wasserman, 1993 WL 284145 (N.D. Ill. 1993) (finding same transaction test met even when plaintiffs' claims arose out of separate time periods).

and do not interfere with those choices in order to affect the jurisdictional consequences. Overall, this is no doubt an accurate picture. But the line between the party control over the line-up and passive judicial assessment of jurisdiction is not as bright as we are led to believe.

In *Newman-Green, Inc. v. Alfonzo-Larrain*, the Supreme Court reaffirmed the proper use of Rule 21 to drop from the action a party whose presence destroyed complete diversity.[78] In *Newman-Green*, an Illinois corporation brought a breach of contract claim against a Venezuelan corporation, four Venezuelan citizens, and an American citizen domiciled in Venezuela. On appeal to the Seventh Circuit of a partial summary judgment, the appellate court found that the American defendant destroyed diversity, as he was neither a foreign citizen nor a citizen of any state as required by 28 U.S.C. §1332(a)(2)-(3).[79] Rather than dismiss the case for lack of subject matter jurisdiction, however, the Seventh Circuit panel relied, *inter alia*, on Rule 21 as authority to grant plaintiff's motion to dismiss the nondiverse American defendant from the suit, thereby ensuring complete diversity.[80] The en banc Seventh Circuit reversed the panel's decision, holding that only district courts have the authority to drop a dispensable nondiverse party, and that Rule 21 does not extend that power to appellate courts.

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[78] 490 U.S. 826 (1989).

[79] Newman-Green, Inc. v. Alfonzo-Larrain, 832 F.2d 417 (7th Cir. 1987).

[80] *Id*. at 420.

The Supreme Court sided with the original Seventh Circuit panel and several other circuit courts of appeal,[81] finding that appellate courts do indeed "have the power to dismiss jurisdictional spoilers" thereby preserving diversity jurisdiction.[82] While federal subject matter jurisdiction "ordinarily depends on the facts as they exist when the complaint is filed," the Court noted that "[l]ike most general principles, . . . this one is susceptible to exceptions."[83] In this case, the Court found that Rule 21 grants courts "authority to allow a dispensable nondiverse party to be dropped at any time, even after judgment has been rendered."[84] The Court did, however, caution that appellate courts should use this authority "sparingly," with an eye toward preventing undue prejudice to existing parties in the suit.[85]

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[81] *See, e.g.,* May Department Store Co. v. Federal Ins. Co., 305 F.3d 597 (7th Cir. 2002); Soberay Mach. & Equip. CO. v. MRF Ltd., Inc., 181 F.3d 759 (6th Cir. 1999); Galt G/S v. JSS Scandinavia, 142 F.3d 1150 (9th Cir. 1998); Lenon v. St. Paul Mercury Ins. Co., 136 F.3d 1365 (10th Cir. 1998); Safeco Ins. Co. v. City of White House, Tenn., 36 F.3d 540 (6th Cir. 1994); Turtur v. Rothschild Registry Int'l, Inc., 26 F.3d 304 (2d Cir. 1994); Bhatla v. U.S. Capital Corp., 990 F.2d 780 (3rd Cir. 1993).

[82] 490 U.S. at 830.

[83] *Id*.

[84] *Id*. at 832. *See also* FEDERAL PRACTICE & PROCEDURE, *supra* note __, §1685 ("Courts frequently employ Rule 21 to preserve diversity jurisdiction over a case by dropping a nondiverse party if the party's presence in the action is not required under Rule 19. . . . .The courts have also used Rule 21 to drop a party who was joined in an action for the purpose of preventing removal to a federal court."); *see also id.* §1684 ("When misjoinder involves the joining of a party who would be proper but whose presence destroys diversity," a court may "avoid dismissing the action by eliminating the party whose presence causes the jurisdictional defect, if this can be done without running into difficulty under the compulsory-joinder provisions of Rule 19.").

[85] *Id*. at 837-38.

In *Newman-Green*, the presence of a nondiverse party came to light only after the case had been litigated through partial summary judgment and was on appeal. In a more recent case, *Caterpillar, Inc. v. Lewis*, the Court addressed the situation where a district court erroneously rejected plaintiff's timely objection to an improperly removed case.[86] In *Caterpillar*, a Kentucky plaintiff brought a product liability action against a diverse bulldozer manufacturer and a nondiverse defendant that serviced the bulldozer. An insurance company intervened as a plaintiff in the suit, bringing subrogation claims against both the manufacturer and the service company. Although the plaintiff settled his claim against the nondiverse service company, the insurance company's claim against it remained in the case when the manufacturer removed the case to federal court. The plaintiff objected to removal on the grounds of incomplete diversity – the insurance company's claim against the nondiverse service company destroyed complete diversity. The district court rejected this argument, denying plaintiff's motion to remand. Later, the insurance company also settled its claim against the service company, leaving only diverse parties in the case for the trial and entry of judgment.

Writing for a unanimous Supreme Court, Justice Ginsburg acknowledged the district court's erroneous exercise of subject matter jurisdiction at the time of the removal, but held that the post-removal settlement of the claim against the service company prior to trial cured that jurisdictional error.[87] Justice Ginsburg emphasized that

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[86] 519 U.S. 61 (1996).

[87] *Id*. at 477. This holding follows in part from earlier cases in which removing defendants challenged removal jurisdiction after adverse judgments, when at the time of trial the parties were completely diverse. *See* Grubbs v. General Elec. Credit Corp., 405 U.S. 699 (1972); American Fire & Casualty Co. v. Finn, 341 U.S. 6 (1951).

"Once a diversity case has been tried in federal court, with rules of decision supplied by state law under the regime of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), considerations of finality, efficiency, and economy become overwhelming."[88]

Rule 21, then, is a powerful tool for courts to exercise in determining appropriate (and binding) federal litigation units. As a practical matter, this procedural power is rarely exercised by a federal court in cases involving original jurisdiction because the party seeking federal court jurisdiction -- the plaintiff -- will likely structure the litigation in a manner to ensure federal court jurisdiction. Moreover, most diversity defects are discovered early in the suit rather than later. At the beginning of the suit, the court will have sunk less time and effort in the suit, and therefore will be less inclined to cure the defect rather than simply dismiss the suit and leave it to the plaintiff whether to re-file a restructured suit in federal court or to pursue the same suit in a state forum.

The greater untapped potential within Rule 21, then, most likely lies in removed actions. Specifically, the need to examine and curtail improper party joinder arises more and more often in the context of removal cases, engendering a perceived need for more aggressive use of the Rule 21 authority. It remains to be seen what role the significant discretionary authority federal courts have under Rule 21 to sever and structure federal cases might play in the emerging doctrine of procedural misjoinder.

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[88] *Id*. at 75 (*citing* Newman-Green, 490 U.S. 826 (1989). *But cf*. Grupo Dataflux v. Atlas Global Group, L.P., 124 S.Ct. 1920 (2004) (holding that postfiling change in plaintiff's citizenship could not cure defect in diversity jurisdiction, which is to be determined at the time of filing).

## PART III: THE NEW GAME IN TOWN: PROCEDURAL MISJOINDER

In a recent flurry of cases, several district courts have embraced procedural misjoinder as an extension of the long-standing doctrine of fraudulent joinder. As in fraudulent joinder cases, [89] a finding on removal that the plaintiff has improperly misjoined parties, either plaintiffs or defendants, in order to frustrate complete diversity, empowers a district court on removal to ignore the presence of any nondiverse parties in determining diversity of citizenship. If the court determines that removal of the properly joined diverse parties is appropriate, the claims of misjoined parties will be remanded to the state court.

Several questions surround this emerging doctrine: Should it be recognized at all, either as a legitimate extension of the fraudulent joinder doctrine or as an independent ground for removal jurisdiction? Is misjoinder defined by state joinder standards (because the case was initially filed in state court) or by federal joinder standards (because a federal judge will be making the decision)? Should courts require some degree of bad faith beyond mere misjoinder? This Part explores the doctrine and the thorny issues it has raised.

### A. *Origins of Doctrine*

Procedural misjoinder seems to have originated with the Eleventh Circuit's opinion in *Tapscott v. MS Dealer Service Corporation*.[90] In *Tapscott*, plaintiffs joined a putative class action alleging, inter alia, violations of Alabama common law and statutory

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[89] *See supra* notes ___-___ and accompanying text.

[90] 77 F.3d 1353 (11th Cir. 1996), *abrogated on other grounds*, Cohen v. Office Depot, Inc., 204 F.3d 1069 (11th Cir. 2000); *see also* FEDERAL PRACTICE & PROCEDURE, *supra* note __, §3723 (attributing procedural misjoinder doctrine to Tapscott decision).

fraud in connection with the sale of service contracts related to the sale of automobiles (the automobile class) with a class action arising from the sale of service contracts in connection with retail products (the merchant class).[91] The named class representative for the automobile class, Gregory Tapscott, was an Alabama citizen. He joined sixteen additional named plaintiffs and over twenty defendants, one of whom was an Alabama resident. With respect to the merchant class, a separate group of plaintiffs, including two Alabama plaintiffs, asserted claims against several nondiverse defendants and Lowe's Home Centers, Inc., a diverse North Carolina citizen. Lowe's removed the case to federal court, seeking diversity jurisdiction under 28 U.S.C. §1332, and filed a motion to sever the claims against it from the claims against the other defendants. The district court granted the motion to sever pursuant to Federal Rule of Civil Procedure 20, finding "an improper and fraudulent joinder, bordering on a sham."[92] Plaintiffs had failed to assert any joint liability or conspiracy between Lowe's and the nondiverse defendants, and determined that the alleged transactions in the automobile class had no commonality with the transactions alleged in the merchant class except for the fact that both classes alleged violations of the same Alabama Code provisions. The court then asserted jurisdiction over the plaintiff claims against Lowe's, and remanded the claims against the remaining defendants to state court.[93]

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[91] 77 F.3d at 1355.

[92] Tapscott v. MS Dealer Serv. Corp., No. CV 94-PT-2027-S, at 2 (N.D. Ala. Nov. 1, 1994) (memorandum opinion).

[93] *Id*. at 1355-56.

Affirming the district court, the Eleventh Circuit rejected plaintiffs' argument that misjoinder may never rise to the level of fraudulent joinder.[94] In other words, so long as plaintiffs state a valid claim against a defendant, joinder of that claim with a transactionally unrelated (and therefore, pursuant to Rule 20, misjoined) claim cannot be regarded as fraudulent joinder. The Eleventh Circuit held that "Misjoinder may be just as fraudulent as the joinder of a resident defendant against whom a plaintiff has no possibility of a cause of action."[95] The court cautioned, however, that not all misjoinders by plaintiffs will rise to such an "egregious" level it may be regarded as fraudulent joinder.[96] Unfortunately, the court did not provide additional guidance regarding how to distinguish between ordinary misjoinder and "egregious" misjoinder that would permit a court to disregard the citizenship of nondiverse misjoined defendants in considering removal from state courts of otherwise completely diverse parties.[97]

The Fifth Circuit, in *In re Benjamin Moore & Company*, signaled its amenability to the fraudulent misjoinder theory.[98] In *Benjamin Mo*ore, the court rejected defendants' request for a writ of mandamus ordering the district court to consider the possibility of

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[94] *Id*. at 1360.

[95] *Id*. (*quoting* 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 connection with the controversy.'").

[96] 77 F.3d at 1360.

[97] *See, e.g.,* In re Bridgestone/Firestone, Inc., 260 F. Supp. 2d 722, 728 (S.D. Ind. 2003) (noting that although *Tapscott* required "something more" than mere misjoinder, "[p]recisely what the 'something more' is was not clearly established in *Tapscott* and has not been established since.").

[98] 309 F.3d 296 (5th Cir. 2002).

fraudulent misjoinder, but did so in an opinion that favorably cited Tapscott's language regarding fraudulent misjoinder and suggested the application of the theory to the joinder of multiple plaintiffs "who have nothing in common with each other."[99] The Fifth Circuit panel expressed "confiden[ce] that the able district court did not intend to overlook a feature critical to jurisdictional analysis," consideration of whether "misjoinder of plaintiffs should . . . be allowed to defeat diversity jurisdiction."[100]

In a second denial of mandamus relief in the *Benjamin Moore* litigation, the Fifth Circuit found that it did not have jurisdiction to review the district court's subsequent rejection of defendants' fraudulent misjoinder objection.[101] The court once again, however, indicated apparent support for the theory: "Thus, without detracting from the force of the *Tapscott* principle that fraudulent misjoinder of plaintiffs is no more permissible than fraudulent misjoinder of defendants to circumvent diversity jurisdiction, we do not reach its application in this case."[102]

### B. *Development and Opposition to Procedural Misjoinder*

In the last several years, as one district court noted, the procedural misjoinder doctrine "has not met with resounding approval."[103] Yet district courts in a number of

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[99] *Id*. at 298 (*citing Tapscott*, 77 F.3d at 1360).

[100] *Id*.

[101] In re Benjamin Moore & Co., 318 F.3d 626 (5th Cir. 2002).

[102] *Id*. at 630-31.

[103] Jamison v. Purdue Pharma Co., 251 F. Supp. 2d 1315, 1319 (S.D. Miss. 2003); *see also infra* notes __-__ and accompanying text.

jurisdictions have followed *Tapscott's* lead,[104] and some have expanded it even further to eliminate the requirement of "egregious" misjoinder.[105] The doctrine has proved most attractive to courts grappling with complex product liability suits, where plaintiffs routinely join nondiverse physicians or retailers as defendants to defeat diversity jurisdiction, or join the claims of plaintiffs from multiple states with nothing in common except a common (or similarly situated) defendant.[106]

Expanding on Tapscott, district courts have applied its procedural misjoinder doctrine to the improper joinder of plaintiffs. For example, in *Greene v. Wyeth*, the district court determined that while the claims all of the Nevada plaintiffs against the non-Nevada (and therefore diverse) manufacturers of the diet drug combination Fen-Phen shared a sufficient transactional nexus, only two of the plaintiffs asserted claims against an in-state physician and a sales representative.[107] The remedy for this misjoinder was to utilize Rule 21 to sever and remand the suits brought by the two plaintiffs who asserted

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[104] *See, e.g.*, Greene v. Wyeth, 344 F. Supp. 2d 674 (D. Nev. 2004); Jones v. Nastech Pharmaceutical, 319 F. Supp. 2d 720 (S.D. Miss. 2004); Grennell v. Western So. Life Ins. Co., 298 F. Supp. 2d 390 (S.D. W.Va. 2004); Burns v. Western So.n Life Ins. Co., 298 F. Supp. 2d 401 (S.D. W.Va. 2004); *In re* Diet Drugs Prod. Liab. Litig., 294 F. Supp. 2d 667 (E.D. Pa. 2003); Coleman v. Conseco, Inc., 238 F. Supp. 2d 804 (S.D. Miss. 2002); *In re* Rezulin Prod. Liab. Litig., 168 F. Supp. 2d 136 (S.D.N.Y. 2001).

[105] *See Burns*, 298 F. Supp. 2d 401; *Greene*, 344 F. Supp. 2d 674, 684 ("The rule regarding severance where there is a 'fraudulent misjoinder' is new and not universally applied"); *infra* notes __-__ and accompanying text.

[106] *See generally* John B. Oakley, *Joinder and Jurisdiction in the Federal District Courts: The State of the Union of Rules and Statutes*, 69 TENN. L. REV. 35 (2001) (noting that the "liberal joinder rules, combined with the high cost of litigation and strict rules of claim preclusion, have made the typical modern federal civil action a multi-claim, multi-party action which often involves exquisitely complex clusters of claims and massively sprawling sets of parties.").

[107] 344 F. Supp. 2d 674, 683 (D. Nev. 2004).

claims against the non-diverse defendants, retaining diversity jurisdiction over the other plaintiffs' claims.[108]

Similarly, in *Jones v. Nastech Pharmaceutical*, the court found in the case of multiple plaintiffs that the joinder of one Mississippi plaintiff with claims against both the diverse defendant pharmaceutical companies and a nondiverse Mississippi physician defendant amounted to procedural misjoinder.[109] The court ordered the remand of the single plaintiff's claims and retention of the remaining claims by plaintiffs not treated by the physician and completely diverse from the pharmaceutical defendants.[110]

The court in *In re Rezulin Products Liability Litigation*, noted that pharmaceutical cases raise "more complicated issues of causation and exposure" than "pure product defect" cases where "an identical product defect allegedly caused identical results."[111] Rather, the court explained, the Rezulin litigation plaintiffs

> allege a defect (or defects) the precise contours of which are unknown and which may have caused different results – not merely different injuries – in patients depending on such variables as exposure to the drug, the patient's physical state at the time of taking the drug, and a host of other known and unknown factors that must be considered at trial with respect to each individual plaintiff. . . . Joinder 'of several plaintiffs who have no connection to each other in no way promotes trial convenience or expedites the adjudication of asserted claims.'[112]

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[108] *Id*.

[109] 319 F. Supp. 2d 720, 727 (S.D. Miss. 2004).

[110] *Id*.

[111] 168 F. Supp. 2d 136 (S.D.N.Y. 2001).

[112] *Id*. at 146. (*quoting In re Diet Drugs*, 1999 WL 554584, at *3 (E.D. Pa. 1999)); *see also* Simmons v. Wyeth Lab., Inc., 1996 WL 617492, at *4 (E.D. Pa. 1996).

In similar circumstances, however, some courts have declined to apply the doctrine of procedural misjoinder. In a case involving the prescription drug Oxycontin, for example, five Mississippi plaintiffs filed suit against diverse manufacturers and marketers of the drug, as well as nondiverse pharmacies and a Mississippi physician.[113] Defendants removed the case to federal court, arguing fraudulent misjoinder. The court declined to apply the theory, finding that while only two of the plaintiffs asserted medical malpractice claims against the physician, not every plaintiff need bring a claim against every defendant. The claims were logically related under Mississippi joinder law,[114] the court held, and the plaintiffs' complaint alleged a conspiracy between the defendants (unlike the two classes in *Tapscott* who had no defendants in common and did not assert any claims of conspiracy).[115]

Courts have also applied the doctrine of procedural misjoinder in cases where plaintiffs in one state join a plaintiff from the defendant's home state for the purpose of defeating removal. The problem with such joinder, according to one court, is that the nondiverse out-of-state plaintiffs' claims "'occurred in complete factual, temporal and geographic isolation' from the claims of the [in-state plaintiffs]. Plaintiffs presented no evidence to the Court that their transactions were related in any way."[116]

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[113] *Id*.

[114] *See infra* notes __-__ and accompanying text.

[115] *Id*. at 1322-23; *see also* Sweeney v. Sherwin Williams Co., 304 F. Supp. 2d 868, 873-74 (S.D. Miss. 2004) (rejecting removal based on procedural misjoinder in products liability action against manufacturers of lead-based paint, where nondiverse retailers sold paint to at least one plaintiff).

[116] 238 F. Supp. 2d 804, 818 (S.D. Miss. 2002) (*quoting* Rudder v. Kmart, 1997 WL 907916 (D. Ala. 1997).; *see also In re* Diet Drugs, 294 F. Supp. 2d 667 (E.D. Pa.

Despite this apparent trend toward acceptance of the procedural misjoinder doctrine, the authors of Federal Practice and Procedure, the leading civil procedure treatise, have been far less enthusiastic. Voicing concerns about the development of procedural misjoinder, and the creative use of Rule 21 to exclude nondiverse parties from the diversity jurisdiction decision in removal cases, the treatise authors suggest that the better solution to such misjoinder may be to require

> the removing party challenge the misjoinder in state court before seeking removal. Because removal is not possible until the misjoined party that destroys diversity jurisdiction is dropped from the action, the thirty-day time limit for removal (but not the overall one-year limit for diversity cases) would not begin to run until that had occurred and thus a requirement that misjoinder be addressed in the state court would not impair the ability of an individual to remove an action following the elimination of the improperly joined party."[117]

Concurring with this approach, one court emphasized that "the last thing the federal courts need is more procedural complexity," including uncertainty regarding when misjoinder rises to the level of "egregiousness" justifying the disregard of nondiverse parties for removal purposes.[118]

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2003) (finding fraudulent misjoinder of New Jersey diet drug consumers with claims of Georgia plaintiffs as the defendant pharmaceutical company was a citizen of New Jersey).

[117] FEDERAL PRACTICE & PROCEDURE, *supra* note __, §3723; *see also id.* §3641 ("Another technique used by some district courts is to remand the case and require the diverse defendant to resolve the claimed misjoinder in state court. If the state court later severs the case so diversity exists, the defendant could again seek removal.").

[118] Osborn v. Metropolitan Life Ins. Co., 341 F. Supp. 2d 1123, 1128 (E.D. Cal. 2004); *see also* Hewitt v. AAA Ins. Co., 1999 WL 243642, *2 (E.D. La. 1999); *infra* notes __-__ and accompanying text.

Indeed, courts have applied inconsistent standards to the question of egregiousness.[119] Guided by *Tapscott's* language, the majority of courts demand more than simply the presence of nondiverse misjoiner parties, but rather a showing that the misjoinder reflects an egregious or bad faith intent on the part of the plaintiffs to thwart removal.[120] More recently, however, some courts have begun to reject such an egregiousness requirement, holding that misjoinder alone justifies the severance of nondiverse parties in removal cases involving otherwise diverse citizens.[121]

## PART IV: PROCEDURAL MISJOINDER: A FEDERAL DOCTRINE TO PROTECT FEDERAL INTERESTS

As developed above, the federal courts have taken different paths. One approach is to reject the doctrine altogether as an unwarranted or imprudent exercise of discretion on the part of federal district courts. Under this approach, the case is remanded and the defendant must argue misjoinder and seek severance in state court. Most of the courts to have addressed the issue, however, have adopted the doctrine of procedural misjoinder and, accordingly, will consider whether parties have been misjoined in a way that is blocking removal. Within this group, most of the courts have concluded that state joinder rules control, though a few still look to Federal Rule 20. Finally, whether the court chooses to apply state or federal joinder standards, the court must decide whether it will sustain removal upon any showing of misjoinder or whether the court will remand absent a showing of egregious misjoinder.

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[119] *See, e.g.*, Greene, 344 F. Supp. 2d 674, 684.

[120] *See id.*

[121] *See id.*; Rezulin Prod. Liab. Litig., 168 F. Supp. 2d 136, 147-48; Burns v. Western So. Life Ins. Co., 298 F. Supp. 2d 401, 403; Grennell v. Western So.Life Ins. Co., 298 F. Supp. 2d 390, 396 (S.D. W.Va. 2004).

The following sections consider these various approaches and set forth our views on their merits. We reach three conclusions. First, we conclude that federal courts should continue to recognize and develop the doctrine of procedural misjoinder. Second, we conclude that federal courts should apply Federal Rule 20 (rather than state joinder rules) to assess the joinder or misjoinder of the state court parties. Third, we conclude that the "egregiousness" requirement adopted by some courts is unwarranted and should be abandonded. Adding these together, we arrive at our main position – that federal courts should disregard parties joined in violation of Federal Rule 20 when determining whether complete diversity exists for purposes of removal.

### A. *Protecting Access to Federal Courts*

As a threshold matter, we must consider whether the federal courts should recognize the doctrine of procedural misjoinder at all. The Federal Practice and Procedure treatise, for example, questions whether it is necessary, pointing out that the defendant could seek severance in state court. Given that option, perhaps federal courts should not do anything to further complicate an already messy jurisdictional area like removal. Moreover, even if procedural misjoinder reflects good jurisdictional policy, one might question whether it is authorized. As discussed in Part II, nothing in the current removal statute explicitly states that incomplete diversity removal is allowed if the spoiler is misjoined. Thus, one might simply choose to defer to the plain text and say that complete diversity is required – period. These are legitimate objections and must be answered. As explained below, however, we think the better course is that federal courts continue to adopt and develop the doctrine of procedural misjoinder subject, of course, to any contrary action by Congress.

First, we are persuaded that misjoinder in fact presents a real problem in diversity removal. The reported cases are not random or isolated. Rather, they appear in courts from across the country and span nearly a decade. We suspect they reflect a more widespread strategy in which some lawyers design their litigation packages around keeping the case in state court rather than efficiency or convenience. Our confidence in this not-particularly-earth-shattering assertion is bolstered by history. The doctrine of procedural misjoinder may only have been "discovered" in the last 10 years, but lawyers have been gaming party structure to block removal since at least the post-Civil War era. Indeed, one is hard-pressed to identify a more enduring problem in removal.

Ironically, recent developments in class action jurisdiction may well exacerbate the problem. Under the recently enacted Class Action Fairness Act, Congress broadly expanded diversity jurisdiction over interstate class actions and mass actions.[122] Among other things, defendants will be able to remove such actions based on minimal diversity and without regard to the presence of a local defendant. While some opportunities still exist to structure non-removable state court class actions and mass actions, they are few and narrowly-drawn. One possible result is that plaintiffs will continue to file the same types of lawsuits, knowing that they are likely to be removed. But one also might suspect that plaintiffs will file ever more joined-but-not-mass actions in order to escape the Class Action Fairness Act. And of that group, many are sure to deliberately join spoiler parties with an eye towards defeating ordinary diversity removal.

Second, and most importantly, we think the procedural misjoinder doctrine is an important – and arguably necessary – addition to the law of diversity removal.

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[122] Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4

Specifically, we part company with the view that the possibility of seeking severance in state court is an adequate substitute. We do so because, under that approach, state joinder practices would define access to federal court. In our view, tying removal to state joinder rules puts the diversity removal docket in jeopardy and fails to protect defendants' access to federal court.

Imagine a state joinder rule that allowed unlimited defendant joinder – i.e., a rule that allowed plaintiffs to join completely unrelated defendants. Under that system, further imagine a plaintiff from that state with a product liability claim against a non-resident drug company. On its own, complete diversity would exist. But instead, the state plaintiff avails himself of his state's unlimited joinder law and adds a claim against his local plumber for faulty repair of his leaking toilet. In that case, there would be no "misjoinder" as defined by state law and the defendant, being unable to obtain a severance in state court, would be locked in state court.

We think that outcome is inconsistent with prevailing removal practice. It has never been supposed that federal courts must defer to state practices in determining whether removal is proper. Under modern removal practice, for example, only defendants may remove, and plaintiffs may not.[123] On two occasions, the Supreme Court has rejected removal on the basis that the parties attempting to remove were plaintiffs, even though state practice denominated them as defendants. As the Supreme Court succinctly explained, "[f]or the purpose of removal, the federal law determines who is plaintiff and who is defendant. It is a question of the construction of the federal statute

[123] 28 U.S.C. §1441(a). *See also* FEDERAL PRACTICE & PROCEDURE, *supra* note __.

on removal, and not the state statute. The latter's procedural provisions cannot control the privilege or removal granted by the federal statute."[124]

In these cases, the Supreme Court shows that it understands the real task at hand – identifying Congress's intent. And the Court recognizes that there is no reason to think that Congress ever intended to delegate to states the question of "who" can remove. Indeed, blindly following state practice on who is a defendant would frustrate Congress's intent by making removal practice vary based on which state was involved: "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. Hence the Act of Congress must be construed as setting up its own criteria, irrespective of local law, for determining in what instances suits are to be removed from the state to the federal courts."[125]

Within this larger context, it is easy to see why it is an insufficient response to the misjoinder problem for federal courts to simply remand defendants to state court with instructions to seek severance there. If a defendant's sole recourse is to seek severance in state court, then access to the federal courthouse becomes dependent on the peculiar party structure practices of the state courts. This is inconsistent with the principle, consistently articulated by the Supreme Court, that removal is governed by federal standards uniform

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[124]Chicago, R.I. & P.R. Co. v. Stude, 346 U.S. 574, 580 (1954); *see also* Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 104 (1941) ("at the outset it is to be noted that decision turns on the meaning of the removal statute and not upon the characterization of the suit or the parties to it by state statutes or decisions.").

[125]*Shamrock Oil*, 313 U.S. at 104; *see also* Grubbs v. Gen. Elec. Credit Corp., 405 U.S. 699, 705 (1972) ("While, of course, Texas is free to establish such rules of practice for her own courts as she chooses, the removal statutes and decisions of this Court are intended to have uniform nationwide application.").

across the country. It is no answer to say that, in most cases, state joinder standards and Federal Rule 20 would yield the same result. For one thing, this general overlap provides little comfort when states do adopt comparatively broad joinder rules, as did Mississippi until very recently. But more importantly, we do not think the question turns on whether state and federal joinder standards differ a little or a lot. We suspect, for example, that state law and federal law would reach identical conclusions in most cases about which party is the plaintiff and which is the defendant. But that has never been supposed as a reason for deferring to state party designations.

We also have serious doubts about whether, under the current removal statutes, it would be practicable to require defendants to seek severance in state court. As the removal statutes now stand, a petition to remove a suit based on diversity of citizenship must be filed within one year of the time the suit is filed in state court.[126] Events that make a state court action removable after the one-year deadline are immaterial.[127] This means that the defendant contesting misjoinder in state court must seek and obtain a severance in state court within the first year the suit is filed in order to meet the one-year window for diversity removal. We fear that this will cause trouble for many defendants. It is far from certain that the state court judge would even entertain the motion within one year. A clear act of misjoinder could fall victim to a slow docket, an indecisive judge, or get lost behind a host of other motions (some perhaps strategically timed to divert the state court's energy and attention for one year). Moreover, as with any removal topic, it is difficult to predict what other complications might arise given the disparate practices

[126] 28 U.S.C. §1446(b).

[127] *See* FEDERAL PRACTICE & PROCEDURE, *supra* note __.

and procedures that one confronts in the state courts across the country. Without attempting to canvass the field, we suspect that some state's practices would present other challenges to the defendant's ability to obtain a clean break from the misjoined parties.

Finally, we do not read the current removal statutes as foreclosing the doctrine of procedural misjoinder. We concede, of course, that the removal statutes do not explicitly authorize it. And we acknowledge – though perhaps question[128] – the general proscription that the removal statutes are to be construed narrowly. But it is too late in the day to take a purely strict constructionist approach and insist that only cases that satisfy complete diversity at the time of removal can be removed, and nothing else.

In two different circumstances, the Supreme Court has interpreted the removal statutes to allow removal of a case that, at the time, does not meet the complete diversity requirement. Under the doctrine of fraudulent joinder, the court allows removal of an incomplete diversity case when the court is satisfied that it can dispense with the spoiler. While we say that the court "disregards" the spoiler, the reality is that the court takes jurisdiction over the spoiler and enters a binding order – i.e., one that carries preclusive effect – dismissing the claim on the merits. The Supreme Court's recognition of the jurisdictional cure doctrine in removed cases is another example. Indeed, in that situation, the Supreme Court explicitly acknowledged that it needed to find exceptions for both the diversity statute *and* the removal statute, respectively. Both of these exceptions to the complete diversity requirement exist because they are deemed to promote federal norms about when the federal courthouse door should be open. If

[128] *See, e.g.,* Scott R. Haiber, *Removing the Bias Against Removal*, 53 CATH. U. L. REV. 609 (2004).

procedural misjoinder also promotes those norms, then there is no reason why it should be singled out under a strict construction theory of removal.

In reaching this conclusion, we are mindful that there is history here. Congress allowed "separable controversy" removal for a period and then abandoned it.[129] In this respect, the absence of any current mechanism in the removal framework carries more significance.[130] But we do not think that Congress's earlier abandonment of separable controversy removal forecloses the courts from recognizing the procedural misjoinder doctrine today.

First, the old "separable controversy" mechanism and modern procedural misjoinder really are different mechanisms.[131] Separable controversy removal did not turn on transactional relatedness. Rather, it turned solely on whether the plaintiff pleaded joint or several liability. If the plaintiff pleaded claims against co-defendants and asserted several liability, the controversy was separable even though the claims arose from the same transaction. Thus, many related parties would have been subject to separable controversy removal.

Moreover, what Congress jettisoned was a rule that allowed the entire suit to be removed to federal court if it contained a separable component.[132] The procedural

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[129] *See supra* notes _____ and accompanying text.

[130] *See, e.g.*, Shamrock Oil comment re former statutes allowing plaintiff removal.

[131] Congress also abandoned separate claim removal in diversity suits. That was truly a foreign concept and says little about the vitality of procedural misjoinder.

[132] The original separable controversy provision contemplated that only the diverse part of the separable controversy would be removed. *See supra* notes ___ and accompanying text. As a result, *related suits* were sometimes split between state and federal court, an inefficiency that led Congress to amend the statute to bring the entirety

misjoinder doctrine does not contemplate shifting the entire suit to federal court for disposition of the merits. Rather, it contemplates a brief shift of the suit to federal court only for so long as it takes for the federal judge to identify the misjoinder and sever. It specifically contemplates that, after severance, any claims that then fail the complete diversity test will be remanded.

Finally, it is important to note that fraudulent joinder – a doctrine first developed to implement separable controversy removal – survived the abrogation of separable controversy removal. Indeed, if anything, the doctrine of fraudulent joinder has grown since the adoption of transactional pleading under the Federal Rules of Civil Procedure. In short, while there is history here, we do not think it can be fairly read to preclude the limited procedural misjoinder that we advocate. Rather, we are quite comfortable that the existing diversity removal framework – whether viewed through the lens of history or modern practice – can accommodate procedural misjoinder.

**B. *Federal Joinder Standards***

Having established that federal courts should recognize procedural misjoinder, we now turn to a question that has occupied a great deal of attention among the lower courts -- whether the joinder at issue should be judged by state or federal joinder standards. When the Eleventh Circuit started all of this in *Tapscott* in 1996, it applied Federal Rule

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of the "separable controversy" to federal court. The procedural misjoinder doctrine, however, does not risk splitting related suits between state and federal court. If the claims are related, they will satisfy the low threshold for joinder under Federal Rule 20 and no misjoinder will exist for the court to sever. Only when *unrelated* claims have been joined will the doctrine of procedural misjoinder carve the suit into a state component and a federal component.

20 without discussion.[133] The Fifth Circuit's opinion in *Moore* which tacitly endorsed the procedural misjoinder doctrine said even less.[134] Perhaps those courts thought it did not matter. In many cases, the state and federal standards will be sufficiently alike – if not identical – that the result will be the same under either.[135] But in other cases the state and federal joinder standards will differ considerably.[136] Thus, the district courts have had many occasions to address this important question.

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[133]Tapscott v. MS Dealer Svc. Corp., 77 F.3d 1353, 1360 (11th Cir. 1996).

[134]*In re* Benjamin Moore & Co., 309 F.3d 296, 298 (5th Cir. 2002).

[135]*See, e.g.*, Asher v. 3M Co., 2005 WL 1593941, at *7 (E.D. Ky. June 30, 2005) ("Here, the Court need not decide whether federal or state joinder rules apply . . . because the Kentucky and federal rules regarding joinder are, in all practical respects, identical."); Reed v. Am. Med. Security Group, Inc., 324 F. Supp. 2d 798, 804 (S.D. Miss. 2004) (stating that, under Mississippi's new joinder rule, "the difference between applying federal and state standards for joinder could fairly be said, at least for purposes of this case, to be more theoretical than practical"); Grennell v. Western So. Life Ins. Co., 298 F. Supp. 2d 390, 397 (S.D. W. Va. 2004) ("[T]his court need not decide whether to apply federal or state law regarding permissive joinder, as the two are identical in West Virginia."); *In re* Diet Drugs Prods. Liab. Litig., 294 F. Supp. 2d 667, 673 (E.D. Pa. 2003 (federal and Georgia state joiner standards were "virtually identical"); Conk v. Richards & O'Neill, LLP, 77 F. Supp. 2d 956, 971 (S.D. Ind. 1999) ("the difference between applying federal and state standards for joinder may be more theoretical than practical in this case").

[136]*See, e.g.*, Osborn v. Metro. Life Ins. Co., 341 F. Supp. 2d 1123, 1128 (E.D. Cal. 2004) (noting that joinder would be improper under Federal Rule 20 but proper under California's more liberal joinder practice). Until 2004, the difference was particularly acute in Mississippi. Before then, it was generally held that Mississippi state practice allowed "virtually unlimited" party joinder, largely to offset the fact that Mississippi does not have a class action mechanism. *See* Jamison v. Purdue Pharma Co., 251 F. Supp. 2d 1315, 1320 (S.D. Miss. 2003). In 2004, an amendment to Mississippi's version of Rule 20 and a pathbreaking decision by the Mississippi Supreme Court converged to bring Mississippi joinder practice more in line with federal joinder practice, at least in personal injury cases. *See* Janssen Pharmaceutica, Inc. v. Armond, 866 So. 2d 1092, 1097 (Miss. 2004). It would be premature, however, to say that Mississippi and federal joinder practice are now identical. Moreover, it is not yet clear whether these reforms also reach joinder in low-damage consumer fraud cases. *Walton v. Tower Loan of Miss.*, 338 F. Supp. 2d 691, 695-96 & n.5 (N.D. Miss. 2004).

One early district court opinion invoked the *Erie* doctrine on its way to holding that Federal Rule 20 would control a procedural question such as this in federal court.[137] In *Coleman v. Conseco, Inc.*, the court concluded that, because "the joinder provisions of [Federal] Rule 20 are procedural in nature," Federal Rule 20 must be followed as a valid exercise of the Rules Enabling Act process.[138] This is no doubt true as a general proposition, but it answers the wrong question. The question is not whether federal joinder standards apply in federal court diversity suits, but, rather, whether the case may be removed to federal court consistent with 28 U.S.C. § 1441(a). Nothing in *Hanna v. Plumer*, the Rules Enabling Act, or any other component of the *Erie* doctrine requires that Congress look exclusively to Federal Rule 20 in deciding which claims or parties count towards the complete diversity requirement.

Not surprisingly, *Coleman* and its *Erie* rationale appear to have been abandoned. A few other district courts have applied Federal Rule 20, but not for Erie reasons. Rather, they have done so either because they were following *Tapscott* or without discussion.[139] Rather, the district courts have universally rejected *Coleman*'s reasoning and instead have assessed joinder under state law.[140] Indeed, the victory has been so

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[137]Coleman v. Conseco, Inc., 238 F. Supp. 2d 804, 815-16 (S.D. Miss. 2002).

[138]238 F. Supp. 2d at 816.

[139] *See In re* Silican Prods. Liab. Litig., 2005 WL 1593936, at *74 n. 141 (S.D. Tex. June 30, 2005) (following *Tapscott*); In re Rezulin Prods. Liab. Litig., 168 F. Supp. 2d 136, 144 (S.D.N.Y. 2001) (no discussion).

[140]*See* Conk v. Richards & O'Neill, LLP., 77 F. Supp. 2d 956, 971 (S.D. Ind. 1999); *see also* Jackson v. Truly, 307 F. Supp. 2d 818, 824 (N.D. Miss. 2004); In re Diet Drugs Prods. Liab. Litig., 294 F. Supp. 2d 667, 673 (E.D. Pa. 2003); *In re*

complete that even the author of *Coleman* – the case that had invoked Erie to select Federal Rule 20 – switched sides.[141]

The courts that follow state joinder rules do so for two principal reasons. First, they often analogize to fraudulent joinder. Because courts look to state law to determine whether a party was fraudulently joined, they reason that they should also look to state law to determine if a party has been misjoined.[142] One court put it this way: "Federal law does not govern whether a plaintiff has stated a viable claim against a non-diverse defendant for purposes of fraudulent joinder. Similarly, we do not see how federal joinder rules should apply when the issue is fraudulent misjoinder of non-diverse plaintiffs in a state court action so as to defeat our diversity jurisdiction."[143]

Second, the courts thatfollow state joinder law argue that misjoinder must refer to state joinder rules because "the question is whether the parties were misjoined in state court."[144] As one court explained, "[a]fter all, when [the plaintiff] filed his complaint in [state] court, he was not required to comply with the Federal Rules of Civil Procedure in terms of joinder of parties or claims or any other aspect of the case."[145] Following this

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Bridgestone/Firestone, Inc., 260 F. Supp. 2d 722, 729 (S.D. Ind. 2003); Jamison v. Purdue Pharma Co., 251 F. Supp. 2d 1315, 1321 n.6 (S.D. Miss. 2003).

[141]Sweeney v. Sherwin Williams Co., 304 F. Supp. 2d 868, 875 (S.D. Miss. 2004) (abrogating *Coleman*).

[142]Jackson v. Truly, 307 F. Supp. 2d 818, 824 (N.D. Miss. 2004); Jamison v. Purdue Pharma Co., 251 F. Supp. 2d 1315, 1321 n.6 (S.D. Miss. 2003).

[143]*In re* Diet Drugs Prods. Liab. Litig., 294 F. Supp. 2d 667, 673-74 (E.D. Pa. 2003); *see also* Conk v. Richards & O'Neill, LLP, 77 F. Supp. 2d 956, 971 (S.D. Ind. 1999).

[144]Osborn v. Metro. Life Ins. Co., 341 F. Supp. 2d 1123, 1128 (E.D. Cal. 2004).

[145]Conk v. Richards & O'Neill, LLP, 77 F. Supp. 2d 956, 971 (S.D. Ind. 1999).

line of reasoning, one court added that "[i]t makes little sense to say that the [non-diverse party's] joinder became fraudulent *only after removal and only under the federal rule*."[146]

Though these arguments have a superficial appeal, closer scrutiny shows them to be flawed. First, the analogy to fraudulent joinder is misleading. Distilled to its essence, the fraudulent joinder doctrine states that courts should disregard bogus claims against non-diverse defendants when assessing whether diversity is complete. Thus, substantive merit becomes a jurisdictional filter, and the courts look to state law to define merit. But what is the alternative? In a diversity suit, the substantive merits are set by state law. When the federal courts use substantive merit as a gatekeeper for diversity jurisdiction, they have no choice but to use state law to define merit.

While procedural misjoinder acts as another jurisdictional gatekeeper, it does not use substantive merit to control the gate. Under the procedural misjoinder doctrine, courts disregard *unrelated* claims against non-diverse parties when assessing whether diversity is complete. Whether the claims are weak or strong is irrelevant. All that matters is whether the claims are sufficiently related (or unrelated).

The argument that only state joinder rules can define whether a case is "misjoined" while pending in state court simply misunderstands the role of procedural misjoinder. The doctrine of procedural misjoinder does not exist to police state joinder rules. It exists to safeguard fair access to the federal courts. What is important is not

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[146]Jamison v. Purdue Pharma Co., 251 F. Supp. 2d 1315, 1321 n.6 (S.D. Miss. 2003) (emphasis in original); *see also* Asher v. 3M Co., 2005 WL 1593941, at *7 n.3 (E.D. Ky. 2005) ("If the plaintiffs' claims were properly joined under state rules, then there was no basis for removing the action to federal court in the first place because there was no diversity jurisdiction.").

whether state joinder rules are being properly followed, but whether the joinder of parties in state court is unfairly restricting access to the federal courts. It must be remembered that "procedural misjoinder" is just the term the courts chose to describe situations where they will overlook the presence of a diversity spoiler whose connection to an otherwise removable lawsuit is too tenuous. The courts could just as easily have embraced the phrase "diversity spoiling." It would still do no more than convey the court's conclusion that removal is proper despite the party structure chosen by the plaintiff in state court.

Which brings us back to the core point. Procedural misjoinder may pivot on the relatedness of claims by or against joined parties, but it is ultimately a jurisdictional doctrine. It reflects a policy choice that sometimes defendants should be able to remove even though there are spoiler parties included in the state court suit. The standards for when we allow removal under these circumstances reflect federal policyabout when the federal courts should be available to defendants originally sued in state court. We could look anywhere to find relatedness standards to give mechanical content to this removal mechanism. To the extent either federal joinder standards or state joinder standards supply that content, it is because they best serve federal policy.

As a policy matter, we think federal joinder is the right match. In truth, we think it is the only match. State joinder rules cannot do the job. To realize this, one need only recall that even properly applied state joinder standards can thwart federal diversity policy if they allow unrelated or loosely-related claims to be joined in one action.[147] If you believe – as we do – that there is a value to giving out-of-state defendants access to federal court when sued by a home state plaintiff, and if you believe – as we do – that the

[147] *See supra* notes ____ and accompanying text.

presence of a wholly unrelated non-diverse party should not foreclose that access to federal court, then you cannot blindly defer to whatever joinder rules the states might decide to follow, however permissive.

In contrast, there are many advantages to using Federal Rule 20 to define relatedness. Federal courts make Rule 20 joinder decisions routinely in cases invoking original jurisdiction, and are thus far more familiar with its requirements and scope than they would be with state joinder rules. Using Federal Rule 20 to define relatedness would yield a nationally uniform standard for disregarding "unrelated" state court parties, whereas using state joinder law would make federal jurisdiction different in districts located in states with strict joinder rules than those located in states with liberal joinder rules. Using Federal Rule 20 to define relatedness would also result in greater equality among parties with regard to access to a federal forum. If a particular party alignment would have been improper if filed in federal court, but proper if access to federal court is sought by a defendant through removal, defendants may be unfairly disadvantaged in asserting federal court protection.

Moreover, although the Supreme Court has not explicitly weighed in on this subject, there is some evidence that the Court does not think that federal removal should incorporate state joinder practices. In *Grubbs v. General Electric Credit Corporation*, the United States was made party to a lawsuit when the original defendant filed a counter-claim and joined the United States as a co-defendant.[148] The United States

[148] 405 U.S. 699, 700-01 (1972). In truth, the counter-claim plaintiff was not asserting any claim for relief against the United States, but instead added the United States as a party because the United States had a pre-existing judgment against the counter-claim plaintiff and wanted the state court to sort out priorities among the potential creditors. *Id.* at 701.

removed the entire case, including the claims asserted between the original plaintiff and defendant, and including claims brought by the counter-claim plaintiff involving other potential creditors, some of whom were not diverse. Ultimately, the Supreme Court upheld removal jurisdiction despite the presence of the satellite non-diverse parties, stating that "[i]t would serve no purpose to require that in order to sustain jurisdiction in such a case, the prevailing party in the original two-sided litigation must go further and show that there was likewise jurisdiction as to virtually unrelated claims that the state court had permitted to be joined in the same lawsuit."[149] The Supreme Court's reasoning for this holding is telling: "While, of course, Texas is free to establish such rules of practice for her own courts as she chooses, the removal statutes and decisions of this Court are intended to have uniform nationwide application. 'Hence the Act of Congress must be construed as setting up its own criteria, irrespective of local law, for determining in what instances suits are to be removed from the state to the federal courts.'"[150]

As a cautionary note, we appreciate that procedural misjoinder foists a jurisdictional gatekeeping role onto a federal joinder rule never designed to serve such a function. As discussed in Part II, *supra,* Rule 20 was deliberately crafted to sweep broadly, allowing all related parties and claims to be brought together in a single case.[151] But Rule 20 does not play the role of bouncer because it does not have to; other federal

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[149] *Id.*, at 705-06.

[150] *Id.* at 705 (*quoting* Shamrock Oil Corp. v. Sheets, 313 U.S. 100, 104 (1941)).

[151] As the Supreme Court has explained, "Under the Rules, the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged." United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 724 (1966).

rules stand ready to usher out parties who outlast their welcome. Indeed, federal courts enjoy wide discretion to carve up the litigation into more efficient and fair packages, trying separate issues and claims under Rule 42(b) and dropping or adding parties under Rule 21. It is these rules that truly determine the scope of a federal lawsuit, granting district courts the authority to conduct fair and efficient adjudication of claims.[152] So when a case brought in federal court stretches the bounds of Rule 20's same transaction test, the court may address any prejudice or loss of efficiency by severing parties or claims as needed rather than denying joinder in the first place.[153]

Given the limited role of Rule 20, therefore, federal courts must appreciate that the procedural misjoinder doctrine we advocate will not be a panacea. The broad sweep of Rule 20 will continue to give plaintiffs wide latitude in determining party structure. And in many of these cases, it will no doubt appear that the plaintiffs have taken advantage of Rule 20's lenient approach to joinder to construct a non-removable case. But we trust thatfederal court s will resist any temptation to alter the meaning of Rule 20 out of a desire to clamp down on such perceived plaintiff joinder abuses. The focus of

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[152] In light of the fact that any decision to allow joinder of tangentially related claims of multiple parties may be dealt with at a later stage of the litigation through Rules 42(b) or 21, courts may be tempted to take a no harm, no foul approach to sketchy joinder claims.

[153] *See, e.g.,* Bridgeport Music, Inc. v. 11C Music, 202 F.R.D. 229 (M.D. Tenn. 2001) (noting that even if it had not found the joinder of parties improper, "the Court would exercise the discretion afforded it to order a severance"); Rappoport v. Steven Spielberg, Inc.,16 F. Supp.481 (D. N.J. 1998) (*quoting* Wyndam Assoc. v. Bintliff, 398 F.2d 614, 618 (2d Cir. 1968 ) (holding that Rule 21 "authorizes the severance of any claim, even without a finding of improper joinder, where there are sufficient other reasons for ordering a severance").

Rule 20 must continue to be driven by its direct role in regulating joinder, not by the indirect role it will play in regulating removal jurisdiction.

Reliance on a joinder rule ill-equipped to perform a jurisdictional gatekeeping function, therefore, is admittedly far from a perfect solution to the procedural misjoinder problem. We believe it is nevertheless preferable to the even more problematic alternatives of applying state joinder rules or abandoning any attempt to police joinder gamesmanship altogether.

### C. *Rejection of the Egregiousness Test*

Finally, assuming the vitality of the procedural misjoinder doctrine, we must address the question of whether to restrict its application to cases involving "egregious" or bad faith misjoinder. In our view, such an egregiousness test makes little sense in the context of procedural misjoinder. The origin of this test can be found in *Tapscott*, which considered procedural misjoinder to be a species of fraudulent joinder.[154] Because the court believed that the doctrine of fraudulent joinder required some finding of egregiousness or fraud on the part of the plaintiff, it imported that concept into its application of procedural misjoinder. This approach is flawed in several respects.

First, procedural misjoinder is best understood not as a type of fraudulent joinder, but rather as an independent exception to the requirement of complete diversity at the time of removal. In other words, both doctrines authorize courts to disregard the presence of certain nondiverse parties. With respect to fraudulent joinder, that means excluding from the complete diversity calculus any nondiverse party against whom a

[154] *See, e.g.,* Tapscott v. MS Dealer Serv. Corp., 77 F.3d 1353 (11th Cir. 1996) (finding the misjoinder of parties to be "so egregious as to constitute fraudulent joinder").

frivolous claim has been asserted. In cases involving procedural misjoinder, however, courts ignore the presence of improperly joined nondiverse parties. The viability of the claim by or against a nondiverse party is utterly irrelevant in the context of procedural misjoinder, which focuses solely on the relatedness of the claims plaintiffs seek to join.

Second the "fraudulent" nature of fraudulent joinder itself increasingly has been called into question. As one court explained, fraudulent joinder is simply a "term of art 'which does not impugn the integrity of plaintiffs or their counsel and does not refer to an intent to deceive.'"[155] Similarly, if a plaintiff misjoins a nondiverse party, there need be no inference of fraud or bad intent. Rather, the remedy for such an error should be simply to disregard the misjoined party in determining complete diversity. Indeed, even if the plaintiff did deliberately attempt to prevent removal to federal court by adding the claims of nondiverse parties, there is nothing inherently fraudulent about such a motive. Plaintiffs are free to bring suit in the forum of their choice, structuring their actions and joining claims and parties as they wish, so long as the resulting lawsuit comports with the applicable joinder rules and asserts nonfrivolous claims.

This analysis reveals the inaptness of terms like "fraudulent misjoinder" or the requirement of an egregiousness element. The purpose of procedural misjoinder is not to search the hearts of plaintiffs to uncover their motives for adding non-diverse parties.[156]

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[155] *Greene*, 344 F. Supp. 2d at 685.

[156] Indeed, application of an egregiousness test would impose an unnecessarily burdensome and subjective inquiry into the plaintiffs' state of mind, a problematic exercise at best. How should a court draw the line between egregious and non-egregious misjoinder of nondiverse parties? Can that line be drawn solely from the face of the pleadings, or will courts need to delve more deeply into plaintiffs' psyches? *See, e.g.,* FEDERAL PRACTICE & PROCEDURE, *supra* note __, § 3723 (criticizing procedural misjoinder doctrine in part because of the increased complexity implicit in *Tapscott's*

Rather, procedural misjoinder doctrine reflects an important limitation on the outer reaches of plaintiff autonomy in cases where the joinder of nondiverse parties denies defendants the ability to seek the federal forum to which they are entitled. If those limits are not observed, removal is thwarted whether the joinder was improper by a little or by a lot. The focus, therefore, must be on the protection of defendants' right of access to federal courts and the proper joinder structure of a lawsuit, not on the motives or bad faith of plaintiffs, and the doctrine should not limited to the worst offenders.

## CONCLUSION

The tension between party joinder and removal of diversity cases has vexed both Congress and the courts for well over a century. We think the doctrine of procedural misjoinder provides federal judges much-needed authority to disregard improperly joined non-diverse parties whose presence would otherwise block access to federal court. States, of course, are free to make their own choices about what constitutes an appropriate litigation package in state court. But access to federal court should not turn on those state policy choices. Rather, defendants faced with diversity-destroying but transactionally-unrelated parties should have access to a federal remedy guided by federal standards defining the proper scope of a multi-party lawsuit. Such a remedy, of course, cannot relieve all of the tension between our loose joinder standards and our comparatively strict jurisdictional requirements. But by eliminating the strategic benefit to adding in unrelated or barely-related parties, it would cut down the incentive structure that is currently driving misjoinder.

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contention that "not all procedural misjoinder rises to the level of fraudulent joinder"); Burns, 298 F. Supp. 2d at 403.