DEFINING THE CONTOURS OF THE EMERGING FRAUDULENT MISJOINDER DOCTRINE

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I. INTRODUCTION

Over the past decade, procedural misjoinder has emerged as a new and distinct type of fraudulent joinder[1] and has given rise to removal jurisdiction in numerous complex civil cases, including many mass tort and multi-district litigation cases.[2] As plaintiffs, who generally prefer to litigate in state court, and

1. *See* John S. Clark Co. v. Travelers Indem. Co. of Ill., 359 F. Supp. 2d 429, 436 (M.D.N.C. 2004) ("Procedural misjoinder of parties is a relatively new concept that has emerged from the Eleventh Circuit and appears to be part of the doctrine of fraudulent joinder at least in that circuit."); 14B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3723 & n.97 (3d ed. 1998) ("A new concept that appears to be part of the doctrine of fraudulent joinder has begun to emerge in the case law—procedural misjoinder."). Given that many jurisdictions have recognized this emerging concept, this Article will refer to it as the fraudulent misjoinder doctrine.

2. *See, e.g.*, Greene v. Wyeth, 344 F. Supp. 2d 674, 683–85 (D. Nev. 2004) (finding that plaintiffs who brought claims against a diverse drug manufacturer, a non-diverse physician, and a non-diverse drug sales representative were fraudulently misjoined with plaintiffs who brought claims solely against the diverse drug manufacturer); Reed v. Am. Med. Sec. Group, Inc., 324 F. Supp. 2d 798, 803–05 (S.D. Miss. 2004) (finding removal jurisdiction based on the fraudulent misjoinder of plaintiffs in a case involving allegations that numerous plaintiffs were fraudulently induced to buy insurance policies); Grennell v. W.S. Life Ins. Co., 298 F. Supp. 2d 390, 399–400 (S.D. W. Va. 2004) (finding removal jurisdiction based on the fraudulent misjoinder of plaintiffs in a case involving claims of more than 1,800 purchasers of vanishing premium life insurance policies); *In re* Baycol Prods. Liab. Litig., No. MDL 1431 (MJD), No. 03-2931, 2003 WL 22341303, at *4 (D. Minn. 2003) (finding removal jurisdiction based on the fraudulent misjoinder of a non-diverse plaintiff in the Baycol multi-district litigation (MDL)); *In re* Diet Drugs Prods. Liab. Litig., 294 F. Supp. 2d 667, 677–78 (E.D. Pa. 2003) (finding removal jurisdiction based on the fraudulent misjoinder of non-diverse plaintiffs in the Fen-Phen MDL); *In re* Rezulin Prods. Liab. Litig., 168 F. Supp. 2d 136, 147–48 (S.D.N.Y. 2001) (finding removal jurisdiction based on the fraudulent misjoinder of a non-diverse plaintiff in the Rezulin MDL). Pursuant to 28 U.S.C. § 1407, numerous related civil cases filed throughout the United States can be consolidated in one court by the judicial panel on multidistrict litigation for pretrial purposes if the cases involve at least one common question of fact. 28 U.S.C. § 1407(a) (2000). Once the pretrial procedures are complete, the cases that have not been resolved are returned to the transferor court for trial. *Id.* Exhibiting a common pattern, the MDL cases cited above were originally filed in state court, removed to federal court, and then transferred to the MDL court. In MDL litigation and other mass tort cases, removal and remand litigation has increased dramatically in recent years. *See* E. Farish Percy, *Making a Federal Case of It: Removing Civil Cases to Federal Court Based on Fraudulent Joinder*, 91 IOWA L. REV. 189, 192–93 & nn.8–14 (2005) (discussing the increase in removal and remand litigation, particularly fraudulent joinder litigation).

defendants, who generally prefer to litigate in federal court,[3] continue to fight forum selection battles with increasing intensity,[4] the emerging fraudulent misjoinder doctrine may prove to be a vital tool for defendants who desire to litigate in federal court.

Removal based on general diversity jurisdiction is proper only when there is both complete diversity among the parties[5] and there is no properly joined and served in-state defendant.[6] Thus, plaintiffs desiring to litigate in state court may defeat removal jurisdiction by joining a non-diverse or in-state defendant.[7] Traditional fraudulent joinder occurs when a plaintiff sues a diverse defendant in state court and joins a non-diverse or in-state defendant, the jurisdictional spoiler,[8] even though

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3. *See* Percy, *supra* note 2, at 206 & n.110 (discussing numerous factors that may explain these preferences); Howard B. Stravitz, *Recocking the Removal Trigger*, 53 S.C. L. REV. 185, 185 & n.1 (2002) (same).

4. *See* Theodore Eisenberg & Trevor W. Morrison, *Overlooked in the Tort Reform Debate: The Growth of Erroneous Removal*, 2 J. EMPIRICAL LEGAL STUD. 551, 568–76 (2005) (suggesting that empirical evidence of numerous erroneous removals from Alabama state courts may be attributed, at least in part, to defendants' increasingly abusive removal tactics); Georgene Vairo, *Foreward: Developments in the Law: Federal Jurisdiction and Forum Selection*, 37 LOY. L.A. L. REV. 1393, 1393–94 (2004) (observing that forum selection battles are becoming increasingly more fierce); s*ee also* Rosamond v. Garlock Sealing Techs., Inc., No. 3:03CV235, 2004 WL 943924, at *4 (N.D. Miss. Apr. 5, 2004) ("This court is also aware that asbestos removal litigation, as it has developed in this state, generally has less to do with effecting valid removals than with attempting to obtain a transfer of the case to a multi-district litigation (MDL) court, where the case generally languishes for a protracted period of time."). From 2002 to 2003, there was an eighty percent increase in the number of cases removed to federal court. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, JUDICIAL FACTS AND FIGURES, TABLE 2.12: U.S. DISTRICT COURTS—CIVIL CASES FILED BY ORIGIN (2004), *available at* http://www.uscourts.gov/judicialfactsfigures/table2.12.pdf.

5. Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267, 267 (1806). *See* 28 U.S.C. § 1441(a) (2000) (authorizing removal of cases that could have originally been brought in federal district court); 28 U.S.C. § 1332(a) (2000) (authorizing original jurisdiction based on diversity); *see, e.g.*, Carden v. Arkoma Assocs., 494 U.S. 185, 187 (1990) (noting that the diversity statute, 28 U.S.C. § 1332(a), requires complete diversity). Complete diversity exists when no plaintiff and defendant are citizens of the same state. ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 5.3.3 (4th ed. 2003).

6. 28 U.S.C. § 1441(b) (2000).

7. *See* Christopher N. Weiss, *Practical Considerations for National Coordinating Counsel in Complex Litigation*, 71 DEF. COUNS. J. 357, 357 (2004) (observing that plaintiffs often name a local seller or other in-state defendant, thereby defeating diversity jurisdiction). A non-diverse defendant is a defendant who is a citizen of the same state as one or more of the plaintiffs.

8. "Jurisdictional spoiler" refers to a party whose joinder defeats complete diversity. *See* Grupo Dataflux v. Atlas Global Group, L.P., 541 U.S. 567, 580 (2004) (referring to the non-diverse defendants as "jurisdictional spoilers").

the plaintiff has no reasonable basis for the claim against the spoiler.[9] The diverse defendant may then remove the case to federal court even though the case lacks complete diversity. The federal court will ignore the citizenship of the fraudulently joined defendant, assume jurisdiction over the case, and dismiss the claims against the spoiler.[10]

Fraudulent misjoinder occurs when a plaintiff sues a diverse defendant in state court and joins a non-diverse or in-state defendant even though the plaintiff has no reasonable procedural basis to join such defendants in one action.[11] While the traditional fraudulent joinder doctrine inquires into the substantive factual or legal basis for the plaintiff's claim against the jurisdictional spoiler, the fraudulent misjoinder doctrine inquires into the procedural basis for the plaintiff's joinder of the spoiler. Most state joinder rules are modeled after the federal joinder rule that authorizes permissive joinder of parties when the claims brought by or against them arise "out of the same transaction, occurrence, or series of transactions or occurrences" and give rise to a common question of law or fact.[12] Thus, in a case where the joined claims are totally unrelated, a federal district court may find removal jurisdiction pursuant to the fraudulent misjoinder doctrine even though the plaintiff has a reasonable substantive basis for the claim against the jurisdictional spoiler.

For example, suppose Ann, a New York citizen, has a colorable fraud claim for more than $75,000 against Smith Motors, a New Jersey corporation, arising from Smith Motors's sale of an automobile to Ann. Suppose that Ann also has a colorable fraud claim against Best Bargains, a New York corporation,

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9. *See* Chesapeake & Ohio Ry. Co. v. Cockrell, 232 U.S. 146, 153 (1914) (holding that joinder was not a fraudulent device to prevent removal "unless it was without any reasonable basis"); Wecker v. Nat'l Enameling & Stamping Co., 204 U.S. 176, 185 (1907) (finding traditional fraudulent joinder based on the "want of basis for the allegations" against the jurisdictional spoiler); *see also infra* Part II for a more detailed discussion of the traditional fraudulent joinder doctrine.

10. *See, e.g.*, 17th Street Assocs. v. Markel Int'l Ins. Co., 373 F. Supp. 2d 584, 606 (E.D. Va. 2005); West v. Visteon Corp., 367 F. Supp. 2d 1160, 1163–65 (N.D. Ohio 2005).

11. Tapscott v. MS Dealer Serv. Corp., 77 F.3d 1353, 1360 (11th Cir. 1996) (finding fraudulent misjoinder in a case where the controversy involving the in-state defendants "[had] no real connection with the controversy involving [the diverse defendant]"), *overruled on other grounds by* Cohen v. Office Depot, Inc., 204 F.3d 1069, 1072–73 (11th Cir. 2000).

12. FED. R. CIV. P. 20(a); *see also* cases cited *infra* note 114 (noting the similarity of various state joinder rules to the federal joinder rule).

arising from Best Bargains's sale of a television to Ann.[13] Further, assume Smith Motors's sale of the automobile was completely unrelated to Best Bargains's sale of the television. Ann should not be able to defeat removal jurisdiction by joining her claim against Smith Motors with her claim against Best Bargains in the same civil action in state court. If Ann joins the unrelated claims in state court, Smith Motors, the diverse defendant, could remove the case to the appropriate district court pursuant to the fraudulent misjoinder doctrine. The district court could then sever the misjoined claims, retain jurisdiction over the claim against Smith Motors, and remand the claim against Best Bargains to state court.

Although the fraudulent misjoinder doctrine may be necessary to protect a defendant's statutory right to remove a civil case from state to federal court based on diversity jurisdiction, the few appellate opinions that have discussed this new doctrine have provided little guidance concerning its application.[14] The Eleventh Circuit first found fraudulent misjoinder a decade ago in *Tapscott v. MS Dealer Service Corp.*[15] As commentators have noted, parts of the *Tapscott* opinion, particularly the court's holding that only "egregious" misjoinder constitutes fraudulent misjoinder, are rather cryptic and have produced a great deal of ambiguity concerning the contours of the fraudulent misjoinder doctrine.[16]

In the wake of *Tapscott*, district courts have been forced to resolve many questions concerning the application of the new doctrine; unfortunately, they have failed to establish a coherent, uniform framework. For example, at least two district courts have rejected the doctrine entirely.[17] Of the courts that

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13. These hypothetical facts are a slight variation of the *Tapscott* facts discussed *infra* notes 61–71 and accompanying text.

14. *See* Asher v. Minn. Mining & Mfg. Co., No. Civ.A. 04CV522KKC, 2005 WL 1593941, at *5 (E.D. Ky. June 30, 2005) ("the governing legal standards regarding the fraudulent misjoinder doctrine are far from clear" (quoting Walton v. Tower Loan of Miss., 338 F. Supp. 2d 691, 695 (N.D. Miss. 2004))); *see also* 14B WRIGHT ET AL., *supra* note 1, § 3723 (predicting that numerous additional decisions may be needed to clarify the doctrine); *infra* Part III (discussing the appellate court opinions establishing and considering the fraudulent misjoinder doctrine).

15. 77 F.3d at 1360.

16. *See, e.g.*, 14B WRIGHT ET AL., *supra* note 1, § 3723.

17. *See* Rabe v. Merck & Co., No. Civ. 05-363-GPM, Civ. 05-378-GPM, 2005 WL 2094741, at *2 (S.D. Ill. Aug. 25, 2005) (holding that "whatever precedential value *Tapscott* may have elsewhere, it has none in the Seventh Circuit"); Osborn v. Metro. Life Ins. Co., 341 F. Supp. 2d 1123, 1127 (E.D. Cal. 2004) (rejecting the

have accepted it, many have adopted the Eleventh Circuit's position that only egregious misjoinder constitutes fraudulent misjoinder,[18] while others have held that mere misjoinder gives rise to removal jurisdiction.[19] Courts have also split on the issue of whether the federal or state joinder rule controls; some have referred to the state joinder rule, while others have referred to the federal joinder rule.[20] There also appears to be some uncertainty whether the doctrine is equally applicable to the misjoinder of plaintiffs and defendants.[21] Additionally, the responses to fraudulent misjoinder differ. Some courts have remanded the misjoined claims over which they cannot exercise diversity jurisdiction, while other courts have dismissed such claims despite lacking jurisdiction over them.[22] Thus, at a time when an increasing number of defendants are removing complex civil cases based on allegations of fraudulent misjoinder,[23] the doctrine giving rise to such removal lacks clarity and is applied inconsistently by the district courts.

In addition to the current lack of clarity and uniformity concerning the doctrine's application, some courts have framed the fraudulent misjoinder doctrine in a manner that raises serious

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fraudulent misjoinder doctrine, in part because of the additional procedural complexity it would create).

18. *See, e.g.*, *Asher*, 2005 WL 1593941, at *7 (holding that "something more than 'mere misjoinder' is required" and concluding that egregious misjoinder occurs when there is no "reasonable basis for predicting that the state court would find that the claims were properly joined"); Coleman v. Conseco, Inc., 238 F. Supp. 2d 804, 814 (S.D. Miss. 2002) (adopting the egregious misjoinder standard and equating it with totally unsupported joinder). Some courts have avoided defining egregious misjoinder by concluding that the challenged joinders in the cases before them were not egregious. *See, e.g.*, Glenn v. Purdue Pharma Co., No. 4:03CV75-D-B, 2003 WL 22243939, at *5 (N.D. Miss. Sept. 25, 2003) ("even if misjoinder can ever be so 'egregious as to constitute fraudulent joinder,' this case does not present such a situation"); Brooks v. Paulk & Cope, Inc., 176 F. Supp. 2d 1270, 1276–77 (M.D. Ala. 2001) (finding joinder appropriate and thereby making it unnecessary to determine what constitutes "egregious misjoinder"). See *infra* Parts V.C.1–3 for a more detailed discussion of the various definitional standards created by the district courts.

19. *See, e.g.*, Burns v. W.S. Life Ins. Co., 298 F. Supp. 2d 401, 403 (S.D. W. Va. 2004); *In re* Rezulin Prods. Liab. Litig., 168 F. Supp. 2d 136, 147–49 (S.D.N.Y. 2001). See also *infra* Part V.C.2 for a more detailed discussion of these cases.

20. See *infra* notes 109–12 and accompanying text for a discussion of this split among the courts.

21. See *infra* Part V.B for a detailed discussion of this issue.

22. See *infra* Part V.D for a detailed discussion of this issue.

23. *See* sources cited *supra* note 2.

federalism concerns.[24] For instance, courts that analyze allegations of fraudulent misjoinder by referring to the federal joinder rule rather than the state joinder rule arguably intrude upon the States' authority to govern state court procedure.[25] In addition, courts that authorize removal based on mere misjoinder rather than egregious misjoinder may inappropriately resolve novel or ambiguous issues of state procedural law in cases that lack complete diversity.[26] Finally, when federal courts dismiss misjoined claims between non-diverse parties, rather than remanding them to state court, they do so without jurisdiction over the misjoined claims.[27] For these reasons, it is imperative that appellate courts carefully review and refine the emerging doctrine, not only to clarify the existing uncertainty and create uniformity, but also to ensure that federal district courts do not overstep the bounds of their limited statutory jurisdiction and intrude upon the "judicial 'turf' of the state courts."[28]

This Article examines the emerging fraudulent misjoinder doctrine in an attempt to more clearly define and articulate its contours. Part II reviews the development of the traditional fraudulent joinder doctrine for the purpose of determining how it might inform the evolving fraudulent misjoinder doctrine. Part III examines *Tapscott* and the appellate court opinions that cite *Tapscott* and discuss the emerging doctrine. Part IV analyzes whether the new doctrine is necessary given the additional complexity and increased litigation it has already created and will likely continue to create. Following the fourth Part's conclusion that the doctrine is necessary to protect a diverse defendant's statutory right to remove, Part V addresses many of the issues raised by the doctrine's application. First, it

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24. The exercise of diversity jurisdiction poses serious federalism concerns because it creates the opportunity for federal courts to resolve issues of state law without the possibility of appeal to the state's highest court. When federal courts are forced to make *Erie* guesses about how state courts might resolve issues of state law, not only do federal courts often mispredict what the state courts will do, they also make the type of policy decisions that are reserved to the States by the Constitution. In addition, the exercise of diversity jurisdiction retards the development of state law because it diverts cases from state to federal court. *See* Percy, *supra* note 2, at 201–03; Dolores K. Sloviter, *A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism*, 78 VA. L. REV. 1671 (1992).

25. See *infra* Part V.A.1–3 for a discussion of this issue.

26. See *infra* notes 231–32 and accompanying text for a discussion of this issue.

27. See *infra* Part V.D for a discussion of this issue.

28. B., Inc. v. Miller Brewing Co., 663 F.2d 545, 554 (5th Cir. Unit A Dec. 1981).

considers whether state or federal joinder rules should be used to determine when a jurisdictional spoiler has been fraudulently misjoined and concludes that state rules must be used. Second, Part V demonstrates that the doctrine should be applied to the procedural misjoinder of non-diverse plaintiffs as well as defendants. Third, it surveys the various definitional tests used by district courts when applying the new doctrine and suggests that the emerging fraudulent misjoinder doctrine should mimic the traditional fraudulent joinder doctrine: Courts should find fraudulent misjoinder only when the plaintiff has no reasonable basis under state procedural law for joining the jurisdictional spoiler. Finally, Part V argues that federal district courts should remand, rather than dismiss, misjoined claims.

II. THE TRADITIONAL FRAUDULENT JOINDER DOCTRINE[29]

For more than a century, plaintiffs have attempted to defeat removal jurisdiction based on diversity by joining a non-diverse or in-state defendant.[30] In response to plaintiffs' "attempts to wrongfully deprive parties entitled to sue in the Federal courts of the protection of their rights in those tribunals,"[31] the Supreme Court developed the fraudulent joinder doctrine.[32] The emerging fraudulent misjoinder doctrine is based upon the same proposition as the traditional fraudulent joinder doctrine: Courts should not permit plaintiffs to wrongfully defeat a defendant's statutory right to remove a civil case based on diversity jurisdiction. Thus, before establishing the contours of the fraudulent misjoinder doctrine, it is worthwhile to examine the traditional fraudulent joinder doctrine to determine how it might influence the emerging fraudulent misjoinder doctrine.

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29. For a significantly more detailed discussion and examination of the traditional fraudulent joinder doctrine, see Percy, *supra* note 2 (examining the history of and rationale for removal based on diversity jurisdiction and suggesting a definitional test for traditional fraudulent joinder and methods by which to evaluate allegations of traditional fraudulent joinder). This Article contains a condensed summary of the detailed and thorough examination contained therein.

30. *See, e.g.*, Wecker v. Nat'l Enameling & Stamping Co., 204 U.S. 176, 184–86 (1907) (finding that the in-state engineer was fraudulently joined); *see also* Weiss, *supra* note 7, at 357 (noting that many plaintiffs continue to name in-state defendants).

31. Ala. Great S. Ry. Co. v. Thompson, 200 U.S. 206, 218 (1906).

32. *Wecker*, 204 U.S. at 180–81, 185–86.

The Supreme Court established the traditional fraudulent joinder doctrine in a series of cases in the early 1900s and has not clarified or elaborated upon the doctrine since then.[33] In *Kansas City Suburban Belt Railway v. Herman*,[34] the diverse defendant based his argument that the plaintiff had fraudulently joined the non-diverse railway in part on the state trial court's grant of a demurrer to the non-diverse railway.[35] In refusing to find fraudulent joinder, the Court held,

> [T]he bare fact that the trial court held [the evidence] insufficient to justify a verdict against the [non-diverse defendant] was not conclusive of bad faith. The trial court may have erred in its ruling, or there may have been evidence which, though insufficient to sustain a verdict, would have shown that plaintiff had reasonable ground for a *bona fide* belief in the liability of both defendants.[36]

In determining whether the plaintiff fraudulently joined the non-diverse railway, the Court clearly focused on whether the plaintiff had a reasonable basis for the claim against the non-diverse railway.

The Supreme Court first affirmed removal based on fraudulent joinder in *Wecker v. National Enameling & Stamping Co.*[37] There, Wecker, who lost his balance while dumping grease into boiling pots on top of a furnace and fell into one such pot, sued his diverse corporate employer and two co-employees alleged to be residents of the same state as Wecker.[38] Wecker charged the corporation with negligence for failing to guard the pots and charged his two co-employees with negligence for failing to reasonably design and construct the furnace and failing to reasonably instruct him in the performance of his duties.[39] The diverse employer removed, arguing that one of the co-employees was in fact not a citizen of the same state as Wecker and that the other co-employee was not charged with the supervision of Wecker or the design or construction of the furnace and, therefore, had been fraudulently joined to prevent

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33. *See* Chesapeake & Ohio Ry. Co. v. Cockrell, 232 U.S. 146 (1914); *Wecker*, 204 U.S. 176; Kan. City Suburban Belt Ry. v. Herman, 187 U.S. 63 (1902); *see also* Percy, *supra* note 2, at 206, 211–14.

34. 187 U.S. 63 (1902).

35. *Id.* at 65.

36. *Id.* at 71.

37. 204 U.S. 176 (1906).

38. *Id.* at 178.

39. *Id.* at 178–79.

removal.[40] Wecker moved to remand. In response, the defendants submitted affidavits demonstrating that the non-diverse co-employee had no authority to plan or direct the construction of the furnace or to supervise Wecker.[41] Wecker submitted an affidavit in which he stated that he believed that the non-diverse co-employee was charged with planning and constructing the furnace.[42] After reviewing all of the affidavits, the Court found that Wecker had fraudulently joined the non-diverse defendant because Wecker was unable to demonstrate a reasonable basis for his claim.[43]

In *Chesapeake & Ohio Railway Co. v. Cockrell*,[44] the Court elaborated upon the newly established fraudulent joinder doctrine, holding that removal cannot be defeated by the "fraudulent joinder of a resident defendant having no real connection with the controversy."[45] The Court further held that joinder is not fraudulent "unless it [is] without any reasonable basis."[46]

Based on this precedent, many appellate courts have established a definitional test for traditional fraudulent joinder that requires the removing defendant to prove that the plaintiff lacked a reasonable basis for the claim against the jurisdictional spoiler.[47] Not all appellate courts, however, employ the "reasonable basis for the claim" test. Some use the "no possibility of recovery" test, which requires the removing defendant to prove that the plaintiff has no possibility of recovering from the spoiler.[48] Others employ the "no reasonable possibility of recovery" test, which requires the removing defendant to prove that the plaintiff has no reasonable possibility of recovering from the spoiler; a mere theoretical possibility of recovery will

40. *Id.* at 179–80.

41. *Id.* at 183–84.

42. *Id.*

43. *Id.*

44. 232 U.S. 146 (1914).

45. *Id.* at 152.

46. *Id.* at 153.

47. *See* Percy, *supra* note 2, at 216 & n.196 (citing, among other cases, Filla v. Norfolk S. Ry. Co., 336 F.3d 806, 810 (8th Cir. 2003); Boyer v. Snap-On Tools Corp., 913 F.2d 108, 111 (3d Cir. 1990)).

48. *See* Percy, *supra* note 2, at 216 & n.197 (citing Hartley v. CSX Transp., Inc., 187 F.3d 422, 424 (4th Cir. 1999); Pampillonia v. RJR Nabisco, Inc., 138 F.3d 459, 461 (2d Cir. 1998); Crowe v. Coleman, 113 F.3d 1536, 1538 (11th Cir. 1997)).

not defeat removal jurisdiction.[49] At least one appellate court appears to apply a test equating fraudulent joinder with the failure to state a claim.[50] No court has established a definitional test that emphasizes the plaintiff's subjective motive for joining the spoiler, presumably because such a test would require federal trial courts to engage in lengthy and fact-intensive investigations to determine jurisdiction.[51] Instead, courts use an objective test as a proxy to determine whether the plaintiff's motives are proper.[52]

Of all the tests, the "reasonable basis for the claim" test is most consistent with Supreme Court precedent and also most sensitive to federalism concerns because it ensures that cases involving non-frivolous claims against non-diverse or in-state

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49. *See* Percy, *supra* note 2, at 216 & n.198 (citing Gray v. Beverly Enters.-Miss., Inc., 390 F.3d 400, 405–06 (5th Cir. 2004); Poulos v. Naas Foods, Inc., 959 F.2d 69, 73 (7th Cir. 1992)).

50. *See* Percy, *supra* note 2, at 216 & n.199 (citing Polyplastics, Inc. v. Transconex, Inc., 713 F.2d 875, 877 (1st Cir. 1983)). For a test imposing a slightly higher burden on the removing defendant, see Ritchey v. Upjohn Drug Co., 139 F.3d 1313, 1318 (9th Cir. 1998) (quoting McCabe v. Gen. Foods Corp., 811 F.2d 1336, 1339 (9th Cir. 1987)), which holds that joinder is fraudulent if the plaintiff's failure to state a claim "is obvious according to settled rules of the state."

51. *See* Smallwood v. Ill. Cent. R.R., 385 F.3d 568, 578 & n.4 (5th Cir. 2004) (en banc) (Jolly, J., dissenting) (noting that the court eschewed a subjective test because such a test would "require attempts to penetrate the mind of the plaintiff and turn removal hearings into lengthy proceedings"), *cert. denied*, 125 S. Ct. 1825 (2005); *see also* THE AMERICAN LAW INSTITUTE, FEDERAL JUDICIAL CODE REVISION PROJECT 515 (2004) [hereinafter ALI] ("[I]n most instances, 'fraudulent' is a term of art that is applied without regard to the plaintiff's state of mind."). Moreover, Supreme Court precedent indicates the plaintiff's motive for joining the spoiler is irrelevant if there is a reasonable basis for the plaintiff's claim. *See* Mecom v. Fitzsimmons Drilling Co., 284 U.S. 183, 189 (1931); Chi., Rock Is. & Pac. Ry. Co. v. Dowell, 229 U.S. 102, 113–14 (1913); Chi., Rock Is. & Pac. Ry. Co. v. Schwyhart, 227 U.S. 184, 193 (1913); Chi., Burlington, & Quincy Ry. Co. v. Willard, 220 U.S. 413, 427 (1911); Ill. Cent. R.R. Co. v. Sheegog, 215 U.S. 308, 318–19 (1909). Given that use of the term "fraudulent" complicates the doctrine by suggesting that the plaintiff's motive is relevant, courts might find it beneficial to rename the doctrine the "unreasonable joinder" doctrine. Although the Fifth Circuit renamed the doctrine the "improper joinder" doctrine, such nomenclature might be confusing when applied to procedural misjoinder because it suggests that all procedural misjoinder is fraudulent. *See Smallwood*, 385 F.3d at 572–74 (majority opinion) (renaming the doctrine the "improper joinder" doctrine). As argued *infra* Part V.C.3, courts should find fraudulent procedural misjoinder only when the plaintiff has no reasonable basis for the joinder of the spoiler pursuant to state joinder law.

52. *See Smallwood*, 385 F.3d at 578 & nn.4–5 (Jolly, J., dissenting) (noting that the court's objective fraudulent joinder "test produces a practical 'truth'" because "it is always 'improper' . . . to join any party to a suit if there is no basis of recovery").

defendants will be tried in state court.[53] That a party may lose or even probably will lose "does not affect the party's right to present its claim, make its arguments, and receive a ruling from the court with proper jurisdiction."[54] The lack of a reasonable factual or legal basis for the plaintiff's claim against the jurisdictional spoiler, however, provides sufficient indicia of fraudulent joinder, because, in the absence of a reasonable basis for the claim, the court can assume the plaintiff fraudulently joined the spoiler to defeat removal.[55] Similarly, if the claim against the spoiler lacks a reasonable basis, then the spoiler has "no real connection with the controversy,"[56] and the remaining dispute is between completely diverse parties. The other tests are problematic and raise federalism concerns because they inappropriately encourage federal courts to resolve ambiguous or novel questions of state law.[57]

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53. *See* Percy, *supra* note 2, at 216–20 (containing an exhaustive evaluation of the various definitional tests and concluding that the "reasonable basis for the claim" test is superior to the others).

54. Davis v. Prentiss Props. Ltd., 66 F. Supp. 2d 1112, 1115 (C.D. Cal. 1999).

55. *See* Percy, *supra* note 2 at 217–18 & n.206. The lack of a reasonable basis for the claim against the jurisdictional spoiler does not provide sufficient indicia of fraudulent joinder when the defect in the plaintiff's claim against the spoiler also exists with respect to the claim against the diverse defendant. *See Smallwood*, 385 F.3d at 576 (majority opinion); *see also* Percy, *supra* note 2, at 230–39 (arguing that courts should not find traditional fraudulent joinder based on common defenses or common defects).

56. Chesapeake & Ohio Ry. Co. v. Cockrell, 232 U.S. 146, 152–53 (1914).

57. The "no possibility of recovery" and the "no reasonable possibility of recovery" tests encourage district courts to evaluate the likelihood of the plaintiff's success on the merits. To do so, courts might inappropriately resolve ambiguous or novel issues of state law. *See, e.g.*, Gray v. Beverly Enters.-Miss., 390 F.3d 400, 407–10 (5th Cir. 2004) (reversing the district court's denial of remand in a case where the district court found no reasonable possibility that the plaintiff would recover from the non-diverse defendants even though the district court acknowledged that the plaintiff's claims against the non-diverse defendants raised a cloudy issue of state law); Hartley v. CSX Transp., 187 F.3d 422, 424–26 (4th Cir. 1999) (reversing the district court's denial of remand in a case where the district court found no possibility that the plaintiff would recover from the non-diverse defendant even though the plaintiff's claim against the spoiler involved a novel issue of state law over which courts have differing opinions). A test equating fraudulent joinder with the failure to state a claim inappropriately requires a federal court, in a case removed based on fraudulent joinder, to determine whether the plaintiff's claim is recognized under state law. *See* Filla v. Norfolk S. Ry. Co., 336 F.3d 806, 809–11 (8th Cir. 2003) (noting that a court sitting in diversity and ruling on a motion to dismiss must ascertain state law, no matter how difficult the task, but that the same court's task when ruling on a motion to remand is more limited because the court must only determine whether the plaintiff's claim against the non-diverse defendant is non-frivolous); Batoff v. State Farm Ins. Co., 977 F.2d 848, 852–53 (3d Cir. 1992) (arguing that the court's inquiry when ruling

Application of the "reasonable basis for the claim" test is straightforward in instances where the removing defendant alleges that the plaintiff's claim against the spoiler lacks a reasonable legal basis because the plaintiff's claim is not recognized under state law. In such cases, the federal court should refrain from deciding ambiguous or novel issues of state law, and should simply determine whether the plaintiff's claim has a reasonable legal basis.[58] Where the removing defendant alleges that the plaintiff has no reasonable factual basis for the allegations against the spoiler, application of the doctrine is more complicated because courts differ in the degree to which they pierce the pleadings and consider extrinsic evidence.[59] In order to avoid lengthy and costly removal-remand litigation and to ensure that courts do not inappropriately wade into the factual merits of a case lacking diversity, courts should employ limited piercing of the pleadings only in those cases where piercing into a discrete and summary factual issue, allegedly misrepresented or omitted by the plaintiff, is likely to produce evidence of fraudulent joinder.[60] In light of these conclusions, the remainder of this Article will proceed based on the following assumptions: (1) Traditional fraudulent joinder occurs when the plaintiff lacks a reasonable basis for the claim against the jurisdictional spoiler; (2) courts evaluating allegations of traditional fraudulent joinder based on legal inadequacy need not determine novel or ambiguous issues of state law, but must only determine whether the plaintiff has a colorable legal basis for the claim against the spoiler; and (3) courts evaluating allegations of traditional fraudulent joinder based on factual in-

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on a motion to remand is not as searching as its inquiry when ruling on a motion to dismiss for failure to state a claim because when ruling on the latter, the court must determine the legal merits of the plaintiff's claim, but when ruling on the former, the court need only determine whether the plaintiff's claim is "so wholly insubstantial and frivolous that it may be disregarded for purposes of diversity jurisdiction"); *see also* Percy, *supra* note 2, at 216–20 (critiquing the definitional tests for traditional fraudulent joinder).

58. *See Filla*, 336 F.3d at 809–11; *Batoff*, 977 F.2d at 853; *see also* Percy, *supra* note 2, at 221–24.

59. *See* ALI, *supra* note 51, at 516–18 (describing the two major approaches as the "pleadings only" approach and the "pierce the pleadings" approach); Percy, *supra* note 2, at 224–29 (surveying the extent to which different courts pierce the pleadings).

60. *See* Smallwood v. Ill. Cent. R.R., 385 F.3d 568, 573–74 (5th Cir. 2004); *see also* Percy, *supra* note 2, at 224–29 (comparing the different approaches to piercing the pleadings and arguing that the *Smallwood* court's limited piercing approach is preferable).

adequacy should permit only limited piercing of the pleadings in a narrow range of cases involving a discrete and summary factual issue allegedly misstated or omitted by the plaintiff, where such piercing is likely to yield evidence that the plaintiff lacked a colorable factual basis for the allegations against the spoiler. With these parameters established, it is feasible to consider how the traditional fraudulent joinder doctrine should shape the emerging fraudulent misjoinder doctrine.

III. DEVELOPMENT OF THE FRAUDULENT MISJOINDER DOCTRINE

In *Tapscott v. MS Dealer Service Corp.*,[61] the Eleventh Circuit recognized egregious procedural misjoinder as a new and distinct type of fraudulent joinder.[62] There, plaintiffs brought a putative class action in state court against diverse and non-diverse defendants alleging statutory fraud arising from the sale of service contracts covering automobiles.[63] The plaintiffs amended the complaint to add claims by two additional named plaintiffs against diverse and non-diverse product merchants alleging statutory fraud arising from the sale of service contracts covering retail products.[64] The plaintiffs dismissed the non-diverse merchant defendants, leaving Lowe's, a diverse defendant, as the sole defendant to the claims concerning service contracts covering retail products. Diagram 1 depicts the alignment of the parties. Lowe's, the sole remaining merchant defendant, removed the case based on diversity jurisdiction, alleging that the claims against it had been improperly joined with the claims against the automobile defendants.[65] The trial court found Lowe's removal proper, severed the claims against Lowe's from the remainder of the case, retained jurisdiction over the claims against Lowe's, and remanded the claims against the diverse and non-diverse automobile defendants to state court.[66]

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61. 77 F.3d 1353 (11th Cir. 1996), *overruled on other grounds by* Cohen v. Office Depot, Inc., 204 F.3d 1069, 1072–75 (11th Cir. 2000).

62. *Id.* at 1359–60.

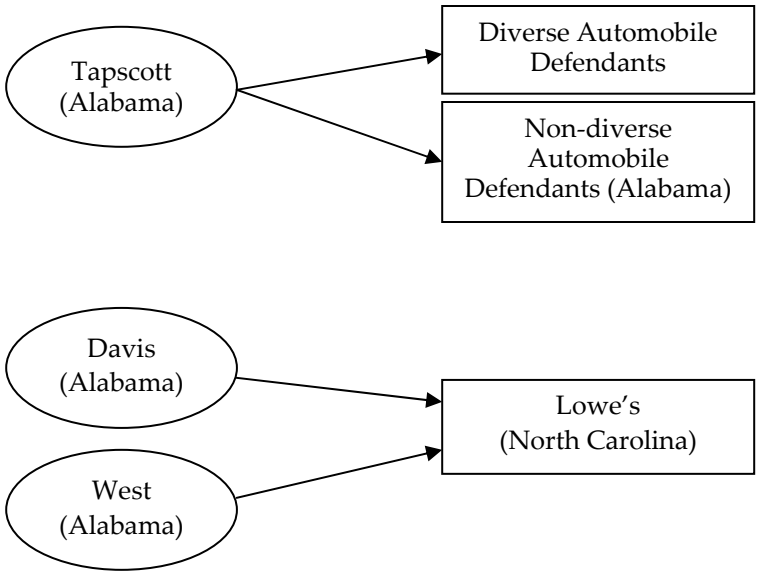
63. *Id.* at 1355.

64. *Id.*

65. *Id.*

66. *Id.*

A. Diagram 1: Tapscott v. MS Dealer Service Corp.



On appeal, the plaintiffs argued that procedural misjoinder of non-diverse parties could not constitute fraudulent joinder.[67] The Eleventh Circuit disagreed:

> 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. A defendant's "right of removal cannot be defeated by a fraudulent joinder of a resident defendant having no real connection with the controversy." Although certain putative class representatives may have colorable claims against resident defendants in the putative "automobile" class, these resident defendants have no real connection with the controversy . . . in the putative "merchant" class action.[68]

The Eleventh Circuit found the claims in the automobile class to be wholly distinct from the claims in the merchant class as there was no overlap of plaintiffs or defendants between the two classes.[69] The court found no allegations of a conspiracy or joint liability and further found that the transactions giving rise

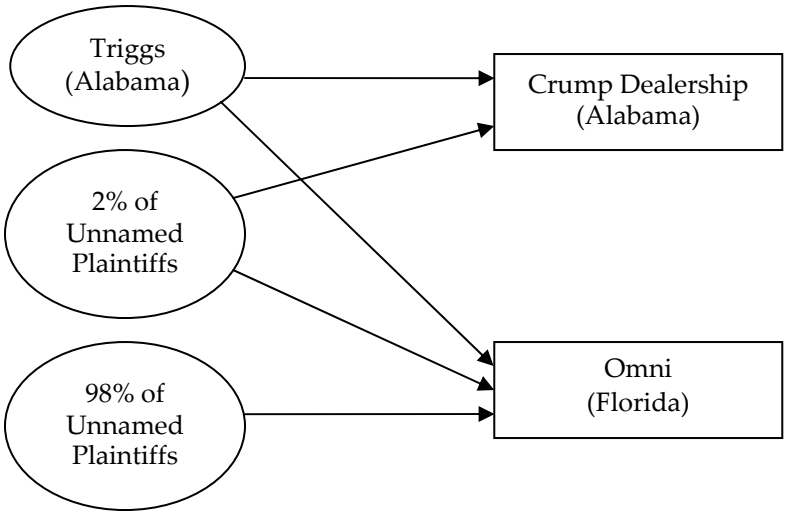
67. *Id*. at 1360.
68. *Id.* (citations omitted).
69. *Id.*

to the claims against Lowe's were completely distinct from the transactions giving rise to the claims against the automobile defendants. Thus, the court held that the automobile claims and merchant claims were not properly joined because they did not arise out of the same transaction, occurrence, or series of transactions and occurrences and did not involve a common question of law or fact as required by Rule 20(a) of the Federal Rules of Civil Procedure.[70] The Eleventh Circuit concluded its opinion by stating, "We do not hold that mere misjoinder is fraudulent joinder, but we do agree with the district court that Appellants' attempts to join these parties is so egregious as to constitute fraudulent joinder."[71] The court, however, gave no guidance regarding how to distinguish egregious misjoinder from mere misjoinder.

Since the *Tapscott* decision in 1996, the Eleventh Circuit has evaluated allegations of fraudulent procedural misjoinder only once. In *Triggs v. John Crump Toyota, Inc.*,[72] the court refused to find fraudulent misjoinder as a basis for removal.[73] There, Triggs, an Alabama resident and the sole named plaintiff in a putative class action, sued a diverse automobile lessor, World Omni Financial Corp. (Omni), and a non-diverse automobile dealership, John Crump Toyota (Crump), alleging that Crump and other unnamed dealerships sold cars at inflated prices to Omni, which in turn passed the excess cost on to the plaintiff class.[74] This alignment of parties is demonstrated in Diagram 2. Omni then removed, arguing that because ninety-eight percent of the plaintiffs in the class were diverse from Omni and had no claims against Crump, the district court should bifurcate the plaintiff class into two categories: one including claims solely against Omni, over which the district court should retain jurisdiction, and another including claims against Omni and Crump, which the district court should remand to the state court.[75]

70. *Id.*
71. *Id.*
72. 154 F.3d 1284 (11th Cir. 1998).
73. *Id.* at 1289–90.
74. *Id.* at 1286.
75. *Id.* at 1288–90.

B. Diagram 2: Triggs v. John Crump Toyota, Inc.



Considering only the citizenship of the named parties, the Eleventh Circuit concluded that complete diversity was lacking because Triggs and Crump were both citizens of Alabama.[76] The court then held, however, that *Tapscott* established a basis to bifurcate or sever class action cases if all of the claims were not logically related.[77] The Eleventh Circuit found the named plaintiff and others who had dealt with Omni through Crump had properly joined their claims against Omni and Crump.[78] The court further held that the claims of plaintiffs who sought relief from both Omni and Crump were properly joined with the claims of plaintiffs who sought relief only from Omni.[79] The court found joinder proper under Rule 20(a) after concluding that the claims of the plaintiffs seeking relief only from Omni arose out of a "series of transactions precisely like the [transactions giving rise to the claims against Omni and Crump] and

76. *Id.* at 1288 (citing Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921) (establishing the rule that the citizenship of named parties determines diversity jurisdiction in class action cases)).

77. *Id.* at 1289. Although *Tapscott* involved a putative class action, the *Tapscott* opinion focused primarily on the claims brought by the named plaintiffs rather than the unnamed plaintiffs. *See Tapscott*, 77 F.3d at 1358–60.

78. *Triggs*, 154 F.3d at 1289.

79. *Id.* at 1288–90.

[gave] rise to common questions of law and fact."[80] Having found proper joinder, the court remanded the case to state court even though only two percent of the putative plaintiff class had claims against Crump, the non-diverse dealer.[81] Given the court's finding of proper joinder, the *Triggs* opinion provides no insight into how to distinguish between mere misjoinder and egregious misjoinder.

The Fifth and Ninth Circuits are the only other federal appellate courts that have addressed procedural misjoinder as a type of fraudulent joinder.[82] Without determining whether it would accept the *Tapscott* fraudulent misjoinder doctrine, the Ninth Circuit remanded a case to state court, finding that even if it were to accept the doctrine, the non-diverse plaintiff had not been egregiously misjoined.[83] In that case, numerous trucking companies had sued numerous engine manufacturers.[84] All but one of the plaintiffs was a citizen of California and diverse from the defendants. One plaintiff, however, was not a citizen of California and was a citizen of the same state as one of the defendant engine manufacturers.[85] The court found "some connection or nexus" between the diverse plaintiffs' claims and the non-diverse plaintiff's claims.[86] In remanding the case, the Ninth Circuit held that because removal statutes are to be strictly construed, the state court, rather than the federal court, should decide the joinder issue.[87]

Although the Fifth Circuit has not found fraudulent joinder based on procedural misjoinder, it appears receptive to such an argument.[88] In a lead paint products liability action brought by seventeen Mississippi residents against diverse paint manufacturers, diverse distributors, and non-diverse retailers, the diverse manufacturers and distributors removed, arguing that the joined claims did not arise out of the same transaction, oc-

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80. *Id.* Rule 20(a) actually requires the claims to arise out of the "same transaction, occurrence or series of transactions or occurrences," rather than identical transactions. FED. R. CIV. P. 20(a).

81. *Triggs*, 154 F.3d at 1286, 1291.

82. *See In re* Benjamin Moore & Co., 318 F.3d 626 (5th Cir. 2002); Cal. Dump Truck Owners Ass'n v. Cummins Engine Co., D.C. No. CV-99-11422-JSL, 2001 WL 1563913 (9th Cir. Dec. 5, 2001).

83. *Cal. Dump Truck,* 2001 WL 1563913, at *1–2.

84. *Id.* at *1.

85. *Id.*

86. *Id.* at *2.

87. *Id.*

88. *See In re* Benjamin Moore & Co., 318 F.3d 626, 630–31 (5th Cir. 2002).

currence, or series of transactions or occurrences, and contending that only four of the plaintiffs had any possibility of recovering from the non-diverse retailers.[89] The diverse defendants requested the court to sever and remand the claims of these four plaintiffs and to retain jurisdiction over the claims brought by the remaining thirteen plaintiffs who had no viable claims against the non-diverse retailers.[90] The federal district court rejected the defendants' misjoinder argument and remanded the case.[91] The diverse defendants petitioned for a writ of mandamus asking the Fifth Circuit to sever the claims against the diverse defendants and retain jurisdiction over those claims.[92] Although the Fifth Circuit dismissed the appeal because it lacked jurisdiction to review the district court's remand order, it stated, "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."[93] Therefore, it appears that the Fifth Circuit will follow the Eleventh Circuit's lead and explicitly recognize egregious procedural misjoinder as a new and distinct type of fraudulent joinder.

These few circuit court opinions concerning the fraudulent misjoinder doctrine provide little insight into its proper application. Although leading commentators recognize that the doctrine "hold[s] the promise of providing strong protection for the defendant's statutory right of removal," they also warn that the doctrine further complicates fraudulent joinder jurisprudence and will likely increase litigation over jurisdiction, particularly in light of the need to clarify the Eleventh Circuit's distinction between egregious misjoinder and mere misjoinder.[94]

Despite the paucity of guidance from appellate courts concerning the application of the fraudulent misjoinder doctrine as a means of establishing removal jurisdiction, district courts in a

89. *Id.* at 629.

90. *Id.*

91. *Id.*

92. *Id.* at 630. Prior to petitioning for this second writ of mandamus, the diverse defendants unsuccessfully moved the district court to reconsider its remand motion and unsuccessfully petitioned the Fifth Circuit to issue a writ of mandamus ordering the district court to consider misjoinder. *Id.*

93. *Id.* at 630–31.

94. 14B WRIGHT ET AL., *supra* note 1, § 3723.

large majority of circuits have adopted and applied the doctrine in numerous complex cases, particularly in mass tort and multi-district litigation.[95] In doing so, these district courts have expended substantial judicial resources grappling with several unresolved issues raised by the application of the fraudulent misjoinder doctrine.[96]

IV. NECESSITY OF THE FRAUDULENT MISJOINDER DOCTRINE

Before attempting to define the contours of the fraudulent misjoinder doctrine, it is first essential to determine whether the fraudulent misjoinder doctrine is necessary. As recognized by courts and commentators alike, the new doctrine is certain to create additional confusion surrounding fraudulent joinder jurisprudence as well as increased removal and remand litigation.[97] In addition, to the extent that it requires federal courts to analyze the appropriateness of joinder pursuant to state rules,[98] it has been argued that the doctrine will force federal courts to "[master] an otherwise irrelevant body of law": state procedural law governing joinder of parties.[99]

In light of these negative consequences, it has been suggested that the additional confusion caused by this new concept of fraudulent procedural misjoinder could be avoided by requir-

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95. *See, e.g.*, *In re* Silica Prods. Liab. Litig., No. MDL 1153, 2005 WL 1593936, at *72–74 (S.D. Tex. June 30, 2005) (district court within the Fifth Circuit); Asher v. Minn. Mining & Mfg. Co., No. Civ. A. 04CV522KKC, 2005 WL 1593941, at *6–7 (E.D. Ky. June 30, 2005) (district court within the Sixth Circuit); Greene v. Wyeth, 344 F. Supp. 2d 674, 684–85 (D. Nev. 2004) (district court within the Ninth Circuit); Grennell v. W.S. Life Ins. Co., 298 F. Supp. 2d 390, 396 (S.D. W. Va. 2004) (district court within the Fourth Circuit); *In re* Diet Drugs Prods. Liab. Litig., 294 F. Supp. 2d 667, 673–74 (E.D. Pa. 2003) (district court within the Third Circuit); *In re* Bridgestone/Firestone, Inc. (Tires Prods. Liab. Litig.), 260 F. Supp. 2d 722, 728–31 (S.D. Ind. 2003) (district court within the Seventh Circuit); *In re* Baycol Prods. Liab. Litig., MDL No. 1431, 2003 WL 22341303, at *2–4 (D. Minn. 2003) (district court within the Eighth Circuit); *In re* Rezulin Prods. Liab. Litig., 168 F. Supp. 2d 136, 147–48 (S.D.N.Y. 2001) (district court within the Second Circuit). *But see* Rabe v. Merck & Co., No. Civ. 05-363-GPM, Civ. 05-378-GPM, 2005 WL 2094741, at *2 (S.D. Ill. Aug. 25, 2005) (refusing to adopt the fraudulent misjoinder doctrine) (district court within the Seventh Circuit); Osborn v. Metro. Life Ins. Co., 341 F. Supp. 2d 1123, 1127 (E.D. Cal. 2004) (rejecting the fraudulent misjoinder doctrine) (district court within the Ninth Circuit).

96. *See supra* notes 18–23 and accompanying text.

97. *See, e.g.*, *Osborn*, 341 F. Supp. 2d at 1127; 14B WRIGHT ET AL., *supra* note 1, § 3723.

98. *See infra* Parts V.A.1–5 (arguing that state joinder rules should control fraudulent misjoinder).

99. *Osborn*, 341 F. Supp. 2d at 1129 & n.13. As argued *infra* note 193 and accompanying text, however, this task should not prove very difficult.

ing the state court first to address the joinder issue.[100] Proponents of this approach argue that if the state court finds misjoinder and severs the claims, the diverse defendant can then remove based on diversity jurisdiction.[101] Although this approach has the appeal of avoiding the complexities raised by application of the fraudulent misjoinder doctrine, it is problematic for two reasons. First, in some cases, the state court may not sever the misjoined claims until more than one year after the case was filed. In such cases, the diverse defendant would be prohibited from removing based on the statutory one-year deadline for removing cases based on diversity jurisdiction.[102] Second, removal of a case after the state court has severed the misjoined claims arguably violates the "voluntary/involuntary" rule which provides that a case unremovable upon filing only becomes removable if the plaintiff voluntarily creates complete diversity.[103] The voluntary-involuntary rule serves two important purposes. First, in the event that the state appellate court finds that the trial court erred in severing the claims, application of the rule avoids having to remand the severed case back to state court after progress has been made in a federal court that lacks jurisdiction.[104] Second, application of the rule preserves a plaintiff's right to be the "master of the

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100. *Id.* at 1127; 14B WRIGHT ET AL., *supra* note 1, § 3723.

101. *Osborn*, 341 F. Supp. 2d at 1127 ("[T]he better rule would require [the removing defendant] to resolve the claimed misjoinder in state court, and then, if that court severed the case and diversity then existed, it could seek removal of the cause to federal court."); 14B WRIGHT ET AL., *supra* note 1, § 3723 ("In many situations this confusion easily could be avoided by having the removing party challenge the misjoinder in state court before seeking removal.").

102. 28 U.S.C. § 1446(b) (2000). The general requirement that the removing defendant file a notice of removal within thirty days of receiving a copy of the complaint, *see* 28 U.S.C. § 1446(b) (2000), would not pose a problem because the removal statute also provides that if the case stated by the initial pleading was not removable but later becomes removable, the defendant may remove within thirty days of the defendant's receipt of "an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable." *Id.*; *see also* 14B WRIGHT ET AL., *supra* note 1, § 3723 ("Because removal is not possible until the misjoined party that destroys removal jurisdiction is dropped from the action, the thirty-day time limit for removal . . . would not begin to run until that had occurred. . . .").

103. *See* Whitcomb v. Smithson, 175 U.S. 635, 637–38 (1900) (holding that a case does not become removable when diversity jurisdiction is created without the consent of the plaintiff); Powers v. Chesapeake & Ohio Ry. Co., 169 U.S. 92, 101–02 (1898) (holding that a case becomes removable upon the plaintiff's voluntary dismissal of the non-diverse defendants); *see also* ALI, *supra* note 51, at 509–15 (discussing the "voluntary/involuntary" rule); Percy, *supra* note 2, at 207–11 (same).

104. *See* ALI, *supra* note 51, at 509; Percy, *supra* note 2, at 208 (same).

complaint" and to select a forum.[105] Thus, unless the Supreme Court abolishes the voluntary-involuntary rule or Congress amends the removal statute to alter application of the rule,[106] the fraudulent misjoinder doctrine is necessary to protect a diverse defendant's right to remove.[107] Otherwise, a plaintiff could defeat removal by unreasonably joining a spoiler.[108]

V. UNRESOLVED ISSUES

A. Federal Versus State Procedural Rules

Courts are divided on whether to analyze alleged fraudulent misjoinder pursuant to the state or federal procedural rule governing permissive joinder of parties.[109] In both *Tapscott* and

105. *See* Great N. Ry. Co. v. Alexander, 246 U.S. 276, 282 (1918) ("The obvious principle of these decisions is that, in the absence of a fraudulent purpose to defeat removal, the plaintiff may by the allegations of his complaint determine the status with respect to removability of a case, arising under a law of the United States, when it is commenced, and that this power to determine the removability of his case continues with the plaintiff throughout the litigation, so that whether such a case non-removable when commenced shall afterwards become removable depends not upon what the defendant may allege or prove or what the court may, after hearing upon the merits, *in invitum*, order, but solely upon the form that the plaintiff by his voluntary action shall give to the pleadings in the case as it progresses towards a conclusion."); *see also* ALI, *supra* note 51, at 509 (discussing this second rationale for the rule); Percy, *supra* note 2, at 208–10 (same). The well-pleaded complaint rule established by the Supreme Court in Louisville & Nashville R.R. v. Mottley, 211 U.S. 149, 153 (1908), similarly preserves the plaintiff's ability to choose the forum.

106. Given that the voluntary-involuntary rule serves legitimate purposes, particularly maximizing judicial efficiency, s*ee* 14B WRIGHT ET AL., *supra* note 1, § 3723, it is unlikely that the Court or Congress will abolish the rule. In fact, the ALI recently proposed amending 28 U.S.C. § 1446(b) to codify the rule. ALI, *supra* note 51, at 340 (offering the proposed amendment), 453 (explaining the proposed amendment).

107. Obviously, if Congress were to amend the removal statute to explicitly authorize removal in cases where the plaintiff has unreasonably joined a non-diverse party, such amendment would obviate the need for the fraudulent joinder and fraudulent misjoinder doctrines. Before amending the removal statue so as to codify the fraudulent misjoinder doctrine, however, Congress would have to determine the same issues that are currently unresolved under the judicially created doctrine.

108. *See* Laura J. Hines & Steven S. Gensler, *Driving Misjoinder: The Improper Party Problem in Removal Jurisdiction*, 57 ALA. L. REV. (forthcoming 2006) (manuscript Part IV.C, on file with author) (similarly concluding that federal courts should apply a procedural misjoinder doctrine in the removal context and arguing that federal courts have the authority to do so).

109. Asher v. Minn. Mining & Mfg. Co., No. CIV.A.04-CV522KKC, 2005 WL 1593941, at *6 (E.D. Ky. June 30, 2005) ("[Y]et another unclear issue under the fraudulent misjoinder analysis is whether the state or federal joinder rules should

Triggs, the Eleventh Circuit examined the challenged joinder pursuant to the federal procedural rule rather than the state procedural rule without commenting on its choice, noting in *Tapscott* that the federal and state procedural rules were identical.[110] While a minority of district courts evaluate allegations of fraudulent misjoinder pursuant to the federal joinder rule,[111] most evaluate such allegations by reference to the state joinder rule.[112]

Rule 20(a) of the Federal Rules of Civil Procedure governs permissive joinder of parties and authorizes joinder of plaintiffs or defendants when the claims brought by them or asserted against them arise out of the same transaction, occurrence, or series of transactions or occurrences and give rise to a common question of law or fact.[113] Although most states' per-

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determine [the propriety of the joinder]."); Jamison v. Purdue Pharma Co., 251 F. Supp. 2d 1315, 1320–21 (S.D. Miss. 2003) (acknowledging the dilemma over whether federal or state procedural rules control); Bright III v. No Cuts Inc., No. CIV.A.03-640, 2003 WL 22434232, at *6 (E.D. La. Oct. 27, 2003) (commenting that the question of whether state or federal procedural joinder rules control is unsettled).

110. Triggs v. John Crump Toyota, Inc., 154 F.3d 1284, 1288–91 (11th Cir. 1998); Tapscott v. MS Dealer Serv. Corp., 77 F.3d 1353, 1355 n.1, 1360 (11th Cir. 1996).

111. *See, e.g.*, *In re* Silica Prods. Liab. Litig., No. MDL 1553, 2005 WL 1593936, at *74 & n.141 (S.D. Tex. June 30, 2005) (following the Eleventh Circuit's lead in applying the federal rule); Burns v. W.S. Life Ins. Co., 298 F. Supp. 2d 401, 402–03 (S.D. W. Va. 2004) (finding fraudulent misjoinder manifest because the federal joinder rule was not satisfied); Brooks v. Paulk & Cope, Inc., 176 F. Supp. 2d 1270, 1274 (M.D. Ala. 2001) (holding that the court's analysis of misjoinder begins with the text of the federal rule); Koch v. PLM Int'l, Inc., No. Civ. A. 97-0177-BH-C, 1997 WL 907917, at *3–4 (S.D. Ala. Sept. 24, 1997) (holding that only the federal rule is relevant when determining the issue of fraudulent joinder). One Mississippi district court found that the joinder rules were procedural rather than substantive and that therefore the federal rule controls. Coleman v. Conseco, Inc., 238 F. Supp. 2d 804, 814–16 (S.D. Miss. 2002). In a later case, however, that same court abrogated its earlier decision and held that the state procedural rule controls. Sweeney v. Sherwin Williams Co., 304 F. Supp. 2d 868, 872–75 (S.D. Miss. 2004).

112. *Asher*, 2005 WL 1593941, at *6 (observing that most courts use the state joinder rules rather than the federal joinder rule). *See, e.g.*, Walton v. Tower Loan of Miss., 338 F. Supp. 2d 691, 695–96 (N.D. Miss. 2004) (applying MISS. R. CIV. P. 20); Lyons v. Lutheran Hosp., No. 104CV0728DFHVSS, 2004 WL 2272203, at *5 (S.D. Ind. Sept. 15, 2004) (applying IND. T.R. 20(a)); *In re* Diet Drugs Prods. Liab. Litig., 294 F. Supp. 2d 667, 673–74 (E.D. Pa. 2003) (applying Georgia procedural law where the case was originally filed in Georgia state court, removed to federal district court in Georgia and then transferred to the Pennsylvania federal district court having jurisdiction over the MDL litigation); Brazina v. Paul Revere Life Ins. Co., 294 F. Supp. 2d 667, 673–74 (N.D. Cal. 2003) (holding that if joinder is proper under state law, it cannot be deemed a fraudulent effort to avoid federal jurisdiction).

113. FED. R. CIV. P. 20(a).

missive joinder rules are substantially similar, if not identical, to the federal rule,[114] some states apply joinder rules in a more liberal fashion, authorizing joinder that might not be accomplished pursuant to the federal rule.[115] Other states apply joinder rules in a more conservative fashion, prohibiting joinder that might be accomplished under the federal rule.[116] At least one state has a joinder rule that is not modeled after the federal rule and emphasizes different criteria.[117] Thus, the issue of which procedural rule controls—state or federal—is not insignificant.[118]

1. Reasonable Joinder Under State Rules Cannot Be Fraudulent

Under the traditional fraudulent joinder doctrine, courts evaluating allegations of fraudulent joinder must determine whether the plaintiff had a reasonable basis for the claim against the non-diverse defendant. The lack of a reasonable basis for the plaintiff's claim against the non-diverse defendant

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114. *See, e.g.*, *Asher*, 2005 WL 1593941, at *7 (concluding that it was not necessary to determine whether the Kentucky or the federal joinder rule controlled because they are identical in all significant respects); Guider v. Hertz Corp., No. 1:04CV00126, 2004 WL 1497611, at *6 (M.D.N.C. June 28, 2004) (noting that North Carolina's joinder rule is a close counterpart to the federal joinder rule); Conk v. Richards & O'Neil, LLP, 77 F. Supp. 2d 956, 971 (S.D. Ind. 1999) (noting that the Indiana joinder rule closely parallels the federal joinder rule).

115. *See, e.g.*, Osborn v. Metro. Life Ins. Co., 341 F. Supp. 2d 1123, 1128 (E.D. Cal. 2004) (noting that California's rule permits broader joinder than the federal rule); *Walton*, 338 F. Supp. 2d at 695–96 (noting that, prior to the February 26, 2004 revision, Mississippi's joinder rule was more liberal than the federal rule); *In re* Diet Drug Prods. Liab. Litig., 294 F. Supp. 2d at 673 (noting that although the language of Georgia's rule is almost identical to the federal rule, Georgia's rule is more permissive).

116. For example, in 2004, the Mississippi Supreme Court revised the comment to MISS. R. CIV. P. 20 so that it now requires that there be a distinct litigable event linking the joined parties. Mississippi Supreme Court Order No. 89-R-99001-SCT (Feb. 20, 2004), *available at* http://www.mssc.state.ms.us/news/sn111468.pdf. In light of this requirement, Mississippi's joinder rule is now arguably more conservative than the federal joinder rule pursuant to which many federal courts permit joinder if there is a logical relationship between the events giving rise to the claims to be joined. *See, e.g.*, Mosley v. Gen. Motors Corp., 497 F.2d 1330, 1333 (5th Cir. 1974).

117. *See* LA. CODE CIV. PROC. ANN. art. 463 (1999) (requiring a community of interest between joined parties and further requiring that the joined claims be mutually consistent).

118. At least one court that applied the federal joinder rule found joinder of non-diverse plaintiffs fraudulent even though the court acknowledged the plaintiffs had a colorable basis under state procedural law for joining the non-diverse plaintiffs at the time they filed their complaint. *See In re* Silica Prods. Liab. Litig., No. MDL 1553, 2005 WL 1593936, at *75–76 (S.D. Tex. June 30, 2005).

acts as a proxy for fraudulent joinder because, in the absence of a reasonable basis for the claim, it is safe to assume that the plaintiff wrongfully joined the non-diverse defendant for the purpose of defeating removal jurisdiction. Moreover, when the claim against the spoiler is so completely lacking, the spoiler's citizenship should be ignored; the only claim that has a reasonable basis is between completely diverse parties.

There are many legitimate reasons why a plaintiff might choose to join non-diverse and diverse defendants or why many claimants might choose to join as plaintiffs under state joinder rules.[119] Joinder may save substantial litigation costs.[120] In addition, plaintiffs may legitimately join together to increase their leverage during settlement negotiations or to obtain venue in state court in a county that is more favorable than others.[121] If joinder is permissible under state rules but impermissible under federal rules, no intent to wrongfully defeat removal jurisdiction can be inferred from such joinder simply because it fails to meet the federal threshold for joinder of claims.[122] When the plaintiff has a reasonable basis for the claim against the non-diverse defendant and a reasonable basis to argue that joinder of the diverse and non-diverse defendants is permissible under state joinder rules, the plaintiff should be able to have the merits of the procedural joinder as well as the merits of the underlying substantive claim tried in state court.

2. Statutory Language Suggests State Joinder Rules Control

The language of the removal statute itself suggests that state procedural law controls. Section 1441(a) authorizes removal of "any civil action brought in a State court of which the district

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119. *See Walton*, 338 F. Supp. 2d at 696.

120. *In re* Rezulin Prods. Liab. Litig., 168 F. Supp. 2d 136, 147 (S.D.N.Y. 2001) (noting the cost and efficiency benefits of joinder).

121. *Walton*, 338 F. Supp. 2d at 696.

122. *See* Asher v. Minn. Mining & Mfg. Co., No. CIV. A.04-CV522KKC, 2005 WL 1593941, at *7 n.3 (E.D. Ky. June 30, 2005) (suggesting that because the inquiry is whether the parties were properly joined in the complaint filed in state court, state court procedural rules should govern the joinder issue); Jamison v. Purdue Pharma Co., 251 F. Supp. 2d 1315, 1321 n.6 (S.D. Miss. 2003) (noting that if joinder were proper under state law, it would make little sense to conclude that joinder "became fraudulent only after removal and only under the federal rule"); Conk v. Richards & O'Neil, LLP, 77 F. Supp. 2d 956, 971 (S.D. Ind. 1999) (opting to apply the state rule because the plaintiff was under no obligation to comply with the federal procedural rule when filing the complaint in state court).

courts of the United States have original jurisdiction."[123] Section 1441(b) then provides that cases over which diversity jurisdiction exists may be removed "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."[124] Pursuant to the statute, the presence of an in-state defendant will only defeat removal jurisdiction if that in-state defendant was "properly joined and served."[125] Thus, section 1441(b) arguably refers to the proper joinder and service of defendants in the state court proceeding, which would clearly be governed by state procedural rules.[126] State procedural rules are used to determine whether in-state defendants were properly served.[127] Thus, it seems logical that state procedural rules would be used to determine whether in-state defendants were properly joined.

Although the removal statute addresses only the joinder of an in-state defendant and does not directly address the joinder of a non-diverse defendant,[128] it is reasonable to extend the same logic to the joinder of a non-diverse defendant. The requirement of complete diversity and the bar on removal of cases involving an in-state defendant both serve the same goal of limiting federal jurisdiction based on diversity to those cases in which it is more likely that the jury might be biased against an out-of-state party. The apparent justification for the complete diversity requirement is that when there is at least one plaintiff and one defendant who are citizens of the same state, a jury in state court is less likely to exhibit the type of bias that typically justifies diversity jurisdiction. Similarly, the rationale for the bar on removal of cases involving an in-state defendant is that when there is at least one in-state defendant, diversity jurisdiction is not necessary because the jury is less likely to exhibit bias against any of the defendants. Although the traditional justification for diversity jurisdiction has been seriously

123. 28 U.S.C. § 1441(a) (2000).

124. 28 U.S.C. § 1441(b) (2000).

125. *Id*.

126. *See* Jones v. Nastech Pharm., 319 F. Supp. 2d 720, 726 (S.D. Miss. 2004).

127. *See, e.g.*, Freeman v. Freeman, No. 02-2032-JWL, 2002 WL 539061, at *1 (D. Kan. Mar. 18, 2002) (applying Kansas law governing service to determine whether the defendant was properly served).

128. Proper joinder of an in-state defendant defeats removal because of the prohibition contained in 28 U.S.C. § 1441(b) (2000). Proper joinder of a non-diverse defendant defeats removal because of the requirement that complete diversity exist. Carden v. Arkoma Assoc., 494 U.S. 185, 187 (1990); Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267, 267–68 (1806).

questioned,[129] the apparent purposes of the statutory requirement of complete diversity and the statutory bar on removal of cases involving in-state defendants are the same: to limit diversity jurisdiction to that category of cases where bias against out-of-state parties is most likely. Thus, given that state procedural rules determine when the presence of an in-state defendant bars removal, state procedural rules should also determine when the presence of a non-diverse party bars removal.

3. Application of the Federal Joinder Rule Violates Rule 82 of the Federal Rules of Civil Procedure

Applying the federal rule to determine misjoinder violates Rule 82 of the Federal Rules of Civil Procedure if such application inappropriately expands federal jurisdiction. Rule 82 cautions that the federal rules "[should] not be construed to extend or limit the jurisdiction of the United States district courts . . . ."[130] As one district court reasoned, if a federal court used the federal joinder rule as the basis to find fraudulent misjoinder even though the claims were properly joined under state law, the court would be creating federal removal jurisdiction where none previously existed, in violation of Rule 82.[131]

4. The District Courts' Rationales for Applying the Federal Rule Are Misguided

No district court has provided a compelling explanation for its reference to the federal joinder rule when evaluating allegations of fraudulent misjoinder. One district court applied the federal joinder rule after determining that the joinder rule was procedural rather than substantive.[132] While the district court's substantive-versus-procedural analysis would be appropriate if the court were determining whether the federal or state joinder rule governed joinder of parties in a case originally filed in fed-

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129. *See* Percy, *supra* note 2, at 195–99.

130. FED. R. CIV. P. 82.

131. Jamison v. Purdue Pharma Co., 251 F. Supp. 2d 1315, 1321 n.6 (S.D. Miss. 2003); *see also* Sweeney v. Sherwin Williams, 304 F. Supp. 2d 868, 874 & n.6 (S.D. Miss. 2004) (adopting this logic). Rule 81(c) also suggests that state law, rather than federal law, should govern when determining misjoinder in this context. It provides: "These rules apply to civil actions removed to the United States district courts from the state courts and govern procedure *after* removal." FED. R. CIV. P. 81(c) (emphasis added). Thus, although the federal rule controls after removal, it cannot be used to create removal jurisdiction.

132. Coleman v. Conseco, Inc., 238 F. Supp. 2d 804, 815–16 (S.D. Miss. 2002), *abrogated by* Sweeney v. Sherwin Williams Co., 304 F. Supp. 2d 868 (S.D. Miss. 2004).

eral court, the court's analysis is inappropriate in the context of a removal proceeding involving allegations of fraudulent misjoinder. In the removal context, the issue is whether the plaintiff's procedural joinder of the diversity-defeating party was a wrongful attempt to defeat the diverse defendant's right to remove. As argued above, and as the same district court later concluded,[133] the most logical method of determining whether the procedural joinder was fraudulent is to refer to the state law controlling the plaintiff's filing of the complaint. If there is a reasonable basis for the plaintiff's joinder of the diversity-defeating party under the state procedural rules, then there is no basis upon which to conclude that plaintiff wrongfully joined such party to defeat removal jurisdiction.

Another district court cited *Shamrock Oil & Gas Corp. v. Sheets*[134] and *Chicago, Rock Island & Pacific Railroad Co. v. Stude*[135] as supportive of the application of the federal joinder rule.[136] Although the district court eventually concluded that the statutory reference to "properly joined and served defendant" implicates the state joinder rule,[137] further examination of the Supreme Court opinions reveals that they offer little support for application of the federal joinder rule in this context.

In *Shamrock*, the Court determined that a plaintiff against whom a counterclaim had been filed could not remove the case to federal court because the removal statute granted the privilege of removal to defendants only.[138] The plaintiff argued that it was essentially a defendant because, under state procedural rules, a judgment could be entered against it.[139] The Court stated,

> But 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. 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, ir-

133. *Sweeney*, 304 F. Supp. 2d at 872–75.
134. 313 U.S. 100 (1941).
135. 346 U.S. 574 (1954).
136. Jones v. Nastech Pharm., 319 F. Supp. 2d 720, 726 n.2 (S.D. Miss. 2004).
137. *Id.* at 727 n.2.
138. 313 U.S. at 104.
139. *Id.*

> respective of local law, for determining in what circumstances suits are to be removed from state to the federal courts.[140]

The Court then held that in light of congressional intent to narrow removal jurisdiction by generally prohibiting plaintiffs from removing, the plaintiff could not remove even though it was a counter-defendant.[141]

In *Stude*, the Supreme Court asserted that state "procedural provisions cannot control the privilege [of] removal granted by the federal statute."[142] There, a railroad instituted condemnation proceedings against a landowner pursuant to state law and was ordered to pay a specified sum for the condemned land.[143] The railroad appealed the order to a state court, arguing that the amount was excessive.[144] Pursuant to a state statute, the appeal was docketed with the landowner named as plaintiff and the railroad named as defendant.[145] The railroad, as the nominal defendant, removed and the district court denied the landowner's motion to remand.[146] On appeal, the Court held there was no removal jurisdiction because, for purposes of the removal statute limiting removal to defendants, the railroad would be considered a plaintiff.[147]

Although some language in both opinions suggests that state procedural rules cannot determine removal jurisdiction, neither case is directly on point because neither involved allegations of fraudulent misjoinder. In both cases, the Court was determining whether the removing party was in fact a "defendant" as required by the removal statute. In *Shamrock*, the Court relied upon the legislative history of the Removal Act of 1887.[148] In particular, the Court noted congressional sentiment that a plaintiff who chooses to file a lawsuit in state court should not later be permitted to remove the case to federal court.[149] In both

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140. *Id.* (internal citations omitted).

141. *Id.* at 108–09.

142. Chi., Rock Is. & Pac. R.R. Co. v. Stude, 346 U.S. 574, 580 (1954).

143. *Id*. at 575–76.

144. *Id*. at 577.

145. *Id*.

146. *Id*.

147. *Id*. at 579–80.

148. Shamrock Oil Co. & Gas Corp. v. Sheets, 313 U.S. 100, 106–07 & n.2 (1941) (citing the legislative history of the Removal Act of 1887, ch. 373, 24 Stat. 552, 552–54 (1887)).

149. *Id*.

cases, the Court appropriately concluded that federal law, rather than state law, determines whether parties are "defendants" for the purposes of removal. The real import of both opinions is that the party that initially selected state court as the forum for the litigation should not be permitted later to remove the case, even if that party might be characterized as a defendant under state law. Neither opinion supports the proposition that federal joinder rules must be considered when evaluating allegations of fraudulent misjoinder.

At the time *Shamrock* was decided, the removal statute authorized removal of the entire case if it involved a separable controversy between diverse parties.[150] A separable controversy between diverse parties existed if the non-diverse party was not a necessary and indispensable party to the claim between the diverse parties.[151] In other words, removal was authorized when the joinder of the non-diverse party was permissible but not necessary.[152] Defendants alleged to be jointly liable were not parties to a separable controversy.[153] Given that the removal framework at the time completely foreclosed the need for the application of a fraudulent misjoinder doctrine because it authorized removal even when the diversity-defeating party was appropriately joined under state law,[154] there is no reason to interpret the *Shamrock* Court's pronouncements, later quoted in *Stude*, as applicable to the fraudulent procedural misjoinder context.

Moreover, although the removal statute at the time authorized removal of separable controversies, the Supreme Court held in *Alabama Great Southern Railway Co. v. Thompson*[155] that state law would be considered to determine whether defendants could be held jointly liable, in which case removal based on a separable controversy was barred.[156] Given that the Su-

150. Judicial Code of 1911, ch. 231, 36 Stat. 1087 (1911).

151. *See infra* notes 167–82 and accompanying text.

152. *See infra* notes 177–80 and accompanying text (discussing Young v. S. Pac. Co., 15 F.2d 280 (2d Cir. 1926)).

153. S. Ry. Co. v. Miller, 217 U.S. 209, 215 (1910).

154. *See infra* note 169 and accompanying text.

155. 200 U.S. 206 (1906).

156. *Id.* at 219; *see also* Pullman Co. v. Jenkins, 305 U.S. 534, 545 (1939) (Black, J., concurring) ("In cases which have involved the right of removal . . . , this Court has repeatedly held that the joint liability of the defendants (one of whom is a non-resident) under the declaration as amended is a matter of state law, and upon that we shall not attempt to go behind the decision of the highest court of the state before which the question could come.") (citations omitted); Ill. Cent. R.R. Co. v.

preme Court held that federal courts must defer to state law on the issue of joint liability in the context of determining whether the case contained a removable separable controversy, it is perfectly consistent for modern federal courts to refer to state joinder rules to determine fraudulent procedural misjoinder.[157]

Sheegog, 215 U.S. 308, 317 (1909) (whether lessor and lessee of railroad tracks could be held jointly liable based on lessee's negligence was an issue solely for the state).

157. Another case that has been cited in support of using federal joinder rules is Grubbs v. Gen. Elec. Credit Corp., 405 U.S. 699 (1972). *See* Hines & Gensler, *supra* note 108 (manuscript Part IV.C). In that case, General Electric Credit Corp. (GECC), a New York corporation, brought suit on a promissory note against Grubbs, a citizen of Texas, in state court in Texas. Grubbs counter-claimed against GECC and General Electric Company (GE), a New York corporation, alleging slander and conspiracy. *Grubbs,* 405 U.S. at 700. Later, Grubbs brought an additional claim against the United States pursuant to FED. R. CIV. P. 22, the interpleader rule, alleging that he may be subjected to double or multiple liability and asking the Court to determine the priority of persons holding judgments against him. *Id.* at 700–01. The United States then removed the case to federal court pursuant to 28 U.S.C. § 1444, which authorizes the United States to remove actions brought against it pursuant to 28 U.S.C. § 2410. *Id.* at 701. Grubbs apparently added non-diverse defendants as additional defendants to his interpleader claim. The trial court dismissed GE and the United States, finding that it could not determine the priority of liens between the various parties and entered judgment against GECC on its promissory note claim and in favor of Grubbs on his cross-claim against GECC. *Id.* GECC appealed to the Fifth Circuit, which raised an inquiry concerning jurisdiction. The Fifth Circuit found that Grubbs had spuriously joined the United States, and that therefore, removal had been improper and remand was required. *Id.* at 702. Although the case could not have been removed (based on diversity jurisdiction) because Grubbs was an in-state defendant, the Supreme Court found that the federal district court would have had original diversity jurisdiction over the case if it had been originally filed in federal court. *Id.* at 704. Based on this finding, the Court affirmed the judgment. *Id.* The Court held that because the trial court would have had jurisdiction over the case if it had been filed in federal court and actually did have jurisdiction over the claims between Grubbs and GECC and GE, it would serve no purpose to dismiss the entire case for lack of jurisdiction simply because Grubbs could not demonstrate that jurisdiction also extended over the virtually unrelated claims the state court permitted to be joined. *Id.* 705–06. In passing, the Court stated, "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." *Id.* at 705 (citing Shamrock Oil Corp. v. Sheets, 313 U.S. 100 (1941)). Although this language, if taken out of context, might support the use of federal rules to determine fraudulent misjoinder, the language does not specifically address fraudulent joinder because the Court in *Grubbs* was not considering whether removal jurisdiction was appropriate. *Grubbs* did not even involve a plaintiff joining a spoiler. Moreover, as demonstrated above, the Court's pronouncement in *Shamrock* that the removal statutes were intended to have uniform nationwide application is misleading given that removal statutes were not uniformly applied, as evidenced by the federal courts' reference to state law on the issue of joint liability when determining whether a case contained a separable controversy. *Grubbs* should be construed as standing for the limited proposition

One district court recently cited the Fifth Circuit's opinion in *Edwards v. E.I. du Pont de Nemours & Co.*[158] as support for its holding that the federal joinder rule determines the jurisdictional issue of fraudulent misjoinder.[159] In particular, the district court focused on the following language from *Edwards*:

> [I]n procedural matters we are controlled by the Federal Rules of Civil Procedure. . . . [W]e look to the federal statutes as construed by . . . federal decisions to determine whether the case is removable . . . , all questions of joinder, nonjoinder, and misjoinder being for the federal court.[160]

The quoted passage does not mandate application of the federal rule to evaluate allegations of fraudulent misjoinder. The fact that federal rules govern procedural matters before a court having federal jurisdiction does not mandate that those same rules be used to determine whether removal is proper based on alleged procedural misjoinder. Moreover, although it is certainly true that federal statutes such as the removal statute must be construed by federal courts and that the issue of fraudulent misjoinder is an issue for the federal courts, it does not follow that the federal joinder rule should control a court's disposition of the fraudulent misjoinder issue.

5. The Use of State Joinder Rules Is Supported by Legislative History

Although the argument for national uniformity might at first glance suggest that the federal procedural rule be used to evaluate claims of misjoinder in removal proceedings, the removal statute itself incorporates reference to state law concerning the joinder and service of defendants. Moreover, some uniformity can be achieved by establishing a misjoinder rule that directs the federal trial court to consider whether the plain-

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that when a case has been improperly removed and then tried on the merits without objection, the issue is "not whether the case was properly removed, but whether the federal district court would have had jurisdiction." *Grubbs*, 405 U.S at 702; *see, e.g.*, Caterpillar Inc. v. Lewis, 519 U.S. 61, 73 (1996) ("*Grubbs* instructs that an erroneous removal need not cause the destruction of a final judgment, if the requirements of federal subject-matter jurisdiction are met at the time judgment is entered."); Chivas Prods. Ltd. v. Owen, 864 F.2d 1280, 1286 (6th Cir. 1988) ("The *Grubbs* rule is eminently sensible and conservative of judicial economy.").

158. 183 F.2d 165 (5th Cir. 1950).

159. *In re* Silica Prods. Liab. Litig., No. MDL 1553, 2005 WL 1593936, at *74 n.141 (S.D. Tex. June 30, 2005).

160. *Id.* (citing *Edwards*, 183 F.2d at 168).

tiff had a reasonable basis for the joinder under state law, in much the same way federal courts deferred to state law on the issue of joint liability when determining whether a removable separable controversy existed.[161]

A brief survey of the tortured history of the statutory provisions authorizing removal of "separable controversies" and "separate and independent claims" also indicates that state procedural law should be used to evaluate misjoinder. From 1866 until 1990, federal statutes explicitly authorized removal in cases lacking complete diversity if the claims against the diverse defendant and the non-diverse defendant were not sufficiently related.[162] Early removal statutes authorized removal of a separable controversy between diverse parties even when the case lacked complete diversity.[163] Later removal statutes authorized removal if the case lacked complete diversity but involved a separate and independent claim between diverse parties.[164] In 1990, Congress amended the removal statute so that it no longer permits removal of separate and independent claims based on diversity jurisdiction.[165] In doing so, Congress determined that it was no longer worthwhile to authorize removal in cases where it might be argued that the claims against the diverse and non-diverse defendants are not sufficiently related.[166]

Pursuant to the Separable Controversy Act of 1866,[167] a nonresident defendant in a case lacking complete diversity filed in state court could remove part of the case to federal court as long as the removed part was a "separable controversy" wholly between diverse parties.[168] Removal of the claim against the diverse defendant was appropriate only when the diverse defendant was not a necessary and indispensable party to the

161. *See supra* notes 154–55 and accompanying text.

162. *See infra* notes 167–87 and accompanying text.

163. *See infra* notes 167–80 and accompanying text.

164. *See infra* notes 181–87 and accompanying text.

165. *See infra* notes 188–90 and accompanying text.

166. H.R. REP. NO. 101-734, at 23 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 6860, 6868–69.

167. Ch. 288, 14 Stat. 306 (1866).

168. *See* Edward Hartnett, *A New Trick From an Old and Abused Dog: Section 1441(c) Lives and Now Permits the Remand of Federal Question Cases*, 63 FORDHAM L. REV. 1099, 1115–16 (1995); Daniel R. Vega, *Separate Claim Removal vs. Article III: Is Section 1441(c) Unconstitutional?*, 11 ST. THOMAS L. REV. 289, 293–94 (1990).

remainder of the action.[169] By authorizing removal of separable controversies, the Act dealt specifically with the problem of jurisdictional spoilers who were not necessary and indispensable parties to the claim against the diverse defendant. If a plaintiff in good faith sued two defendants alleged to be jointly liable, the case did not present a separable controversy that could be removed.[170] The Act resulted in piecemeal removal and increased litigation costs.[171]

The Judiciary Act of 1875,[172] which was intended to address some of the concerns raised by the Separable Controversy Act,[173] provided that a plaintiff or defendant interested in a separable controversy between diverse citizens could remove the entire case to federal court, even though complete diversity was lacking.[174] Thus, the complete diversity requirement still applied to cases originally filed in federal court and to removed cases where there was no separable controversy. In cases involving a separable controversy between diverse parties, however, removal of the entire case was appropriate despite the lack of complete diversity.[175]

This removal provision continued in some form through 1948[176] and authorized removal even when the claims were

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169. Barney v. Latham, 103 U.S. 205, 210 (1880) (removal of separable controversy appropriate only where the non-diverse defendant is not an indispensable party to the claim between the plaintiff and the diverse defendant); *see also* Hartnett, *supra* note 168, at 1117; Vega, *supra* note 168, at 294.

170. S. Ry. Co. v. Miller, 217 U.S. 209, 215 (1910). Thus, at the time, plaintiffs could defeat removal jurisdiction by joining a non-diverse defendant who could be held jointly liable with the diverse defendant. Many of the early fraudulent joinder cases involve the joinder of spoilers alleged to be jointly liable with the diverse defendant. *See, e.g.*, Wecker v. Nat'l Enameling & Stamping Co., 204 U.S. 176 (1906).

171. Hartnett, *supra* note 168, at 1117; Vega, *supra* note 168, at 294 (quoting *Barney*, 103 U.S. at 213).

172. Ch. 137, 18 Stat. 470 (1875).

173. Hartnett, *supra* note 168, at 1118–19; Vega, *supra* note 168, at 294.

174. Ch. 137, § 2, 18 Stat. 470, 470–71 (1875).

175. Vega, s*upra* note 168, at 295.

176. The Removal Act of 1887 eliminated a plaintiff's ability to remove and defined removal jurisdiction by referring to cases that could have been filed originally in federal court. Removal Act of 1887, ch. 373, §§ 1–2, 24 Stat. 552, 552–53 (1887). Although the Removal Act of 1887 defined removal jurisdiction by referring to original jurisdiction, the Act continued to authorize defendants to remove an entire case lacking complete diversity to federal court when it involved a separable controversy. Hartnett, *supra* note 167, at 1125; Vega, *supra* note 167, at 294–95. The Judicial Code of 1911 incorporated the separable controversy provisions. Judicial Code of 1911, Ch. 231, 36 Stat. 1087 (1911).

properly joined under state law. For example, in a 1926 case, the Second Circuit affirmed removal in a case that lacked complete diversity.[177] There, sixteen plaintiffs each sued the defendant and demanded a certain amount of stock.[178] Two of the plaintiffs and the defendant were from Kentucky; the remaining fourteen plaintiffs were diverse from the defendant.[179] Even though the claims were properly joined pursuant to New York's procedural law, which required only that the joined claims give rise to a common question of law or fact, the court determined that each of the plaintiffs' claims against the defendant was a separable controversy, thereby entitling the defendant to remove.[180]

From 1866 until 1948, the various statutory provisions authorizing removal of separable controversies gave rise to much confusion and uncertainty, thereby prompting Congress to enact the Revised Judicial Code of 1948,[181] which, among other things, amended the provision authorizing removal of cases involving separable controversies.[182] The amended version of section 1441(c) of the Judicial Code provided,

> Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.[183]

The Supreme Court interpreted the 1948 amendment in *American Fire & Casualty Co. v. Finn*.[184] Noting that Congress intended to restrict removal jurisdiction by enacting the amendment, the Court concluded that a "separate and independent claim or cause of action" emphasized a "more com-

177. Young v. S. Pac. Co., 15 F.2d 280 (2d Cir. 1926).

178. *Id.* at 281.

179. *Id.*

180. *Id.* Oddly, the court only affirmed the removal of the diverse plaintiffs' claims and did not discuss the statutory language authorizing removal of the entire suit. Hartnett, *supra* note 167, at 1128.

181. Ch. 646, 62 Stat. 869 (1948) (codified as amended in scattered sections of 28 U.S.C.).

182. Hartnett, *supra* note 168, at 1129–30; Vega, *supra* note 168, at 296.

183. Revised Judicial Code of 1948, ch. 646, 62 Stat. 868, 938 § 1441(c) (codified as amended at 28 U.S.C. § 1441(c) (2000)).

184. 341 U.S. 6 (1951).

plete disassociation between the federally cognizable proceedings and those cognizable only in state courts"[185] and therefore held that a separable controversy was "no longer an adequate ground for removal unless it also constituted a separate and independent claim or cause of action."[186] The Court then held that "where there is a single wrong to plaintiff, for which relief is sought, arising from an interlocked series of transactions, there is no separate and independent claim or cause of action under § 1441(c)."[187]

Rather than eliminating the confusion concerning separable controversies, the provision for the removal of "separate and independent" claims created so much additional confusion that Congress amended the provision in 1990 to authorize removal of a "separate and independent" claim only if the court has federal question jurisdiction over such a claim.[188] In explaining why it was no longer authorizing removal of separate and independent claims based on diversity jurisdiction, the House of Representatives noted that courts had difficulty applying the "separate and independent" test and had reached "confusing and conflicting results."[189] The House acknowledged that the joinder rules of many states authorized plaintiffs to join completely unrelated claims in a single case but determined that the reasons to continue to authorize removal of separate and independent claims giving rise to federal question jurisdiction remained in "full force," although the "need to provide removal for diverse defendants [was] not great."[190] Thus, the statutory history of these removal provisions indicates that Congress knows how to draft a removal provision that specifically authorizes removal when claims against the diverse defendant and non-diverse defendant are not sufficiently related. Given that Congress has specifically found that such efforts are no longer worthwhile, the use of federal rules to analyze alleged fraudulent misjoinder in the removal context arguably

185. *Id.* at 11–12.

186. *Id.* at 11.

187. *Id.* at 14.

188. Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 312, 104 Stat. 5089 (1990) (codified as amended at 28 U.S.C. § 1441(c) (2000)); *see also* Hartnett, *supra* note 168, at 1138–39 (discussing the considerable confusion caused by *Finn* and the fact that such confusion led to calls for reform).

189. H.R. REP. NO. 101-734, at 23 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 6860, 6868–69.

190. *Id.*

circumvents congressional intent. Although some commentators have argued that policy concerns, primarily that of giving out-of-state defendants access to federal court, mandate use of the federal rule,[191] federal courts may not expand their limited statutory jurisdiction based on policy considerations. It is certainly within Congress's power to expand federal court jurisdiction by statute, but until it does so, federal courts must limit their jurisdiction to existing statutory confines.

Admittedly, the use of state procedural rules will require the federal courts to become somewhat familiar with a body of otherwise irrelevant law. This byproduct of the fraudulent misjoinder doctrine, however, simply cannot be avoided on the grounds of inconvenience or judicial economy. Federalism concerns require that the diversity and removal statutes be strictly construed to assure that the federal courts do not overstep their limited statutory jurisdiction.[192] Use of the federal rules to evaluate allegations of fraudulent misjoinder would violate this mandate, and, in some instances, create federal jurisdiction where it did not previously exist. The use of federal rules to evaluate allegations of fraudulent joinder also impermissibly intrudes upon a state's authority to promulgate state law governing procedural issues in its courts. Moreover, given that the state joinder rules in most states are substantially similar or identical to the federal rule, judges should not have too much difficulty referring to the state joinder rules, particularly because their inquiry should be limited to determining whether there is a reasonable basis for joinder under state rules, an inquiry that is more narrow than determining whether joinder is actually proper under state rules.[193]

The legislative history of the removal statutes certainly indicates that Congress is aware that state joinder rules may permit plaintiffs to join spoilers and thereby defeat removal jurisdiction. It also indicates that Congress not only is capable of drafting a removal statute authorizing removal when the claims against the diverse and non-diverse defendants are not suffi-

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191. *See* Hines & Gensler, *supra* note 108 (manuscript Part IV.C).

192. Syngenta Crop Prot., Inc. v. Henson, 537 U.S. 28, 32 (2002) (noting that removal statutes must be strictly construed); Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 108–09 (1941) (same); Healy v. Ratta, 292 U.S. 263, 270 (1934) (noting that the general diversity statute must be strictly construed).

193. *See infra* notes 53–57 and accompanying text (arguing that the appropriate inquiry in the fraudulent misjoinder context is whether there is a reasonable basis for the joinder).

ciently related, but also that Congress, in 1990, made a clear choice not to authorize removal based on such considerations.[194] In the future, Congress may determine that joinder of spoilers under state rules is too permissive and that removal should be based on a federal standard requiring complete diversity only between parties bringing or defending claims that are sufficiently related. For example, Congress could pass a removal statute authorizing diverse defendants to remove the claims against them if they do not arise out of the same transaction, occurrence, or series of transactions or occurrences as the claims against the non-diverse defendant. In the meantime, federal courts cannot second-guess Congress.

B. Application of the Doctrine to Misjoined Plaintiffs

The traditional fraudulent joinder doctrine is typically applied in cases where the removing diverse defendant accuses the plaintiff of fraudulently joining a non-diverse defendant.[195] More recently, courts have applied the traditional fraudulent joinder doctrine to fraudulently joined plaintiffs.[196] At least one district court, however, has refused to extend the doctrine to encompass the alleged fraudulent joinder of a plaintiff.[197] In refusing to extend the doctrine to fraudulently joined plaintiffs, the court simply analyzed the language of previous opinions

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194. In the face of this clear legislative history, it is difficult to argue that federal joinder rules should control. *But see* Hines & Gensler, *supra* note 108 (manuscript Parts IV.A, C & V.C) (acknowledging that the legislative history of these statutory removal provisions is significant but arguing that it does not prohibit the use of a federal joinder standard to determine misjoinder in removal proceedings because the repealed removal provisions were primarily aimed at establishing removal in cases involving related claims, whereas removal based on misjoinder only concerns cases involving unrelated claims). In 1990, knowing that some state joinder rules authorized the joinder of arguably unrelated claims, Congress repealed the statute authorizing removal of cases involving separate and independent claims between diverse parties. In doing so, Congress signaled its intent to let state joinder rules control the issue of whether complete diversity exists.

195. *See* Foslip Pharm., Inc. v. Metabolife Int'l, Inc., 92 F. Supp. 2d 891, 903 (N.D. Iowa 2000); Johnston Indus., Inc. v. Milliken & Co., 45 F. Supp. 2d 1308, 1311 (M.D. Ala. 1999).

196. *See, e.g.*, Miller v. Home Depot, U.S.A., Inc., 199 F. Supp. 2d 502, 508 (W.D. La. 2001); Elk Corp. v. Valmet Sandy-Hill, Inc., No. CIV.A. 3:99-CV-2298G, 2000 WL 303637, at *2 (N.D. Tex. Mar. 22, 2000); Lerma v. Univision Commc'ns, Inc., 52 F. Supp. 2d 1011, 1014 (E.D. Wis. 1999); Sims v. Shell Oil Co., 130 F. Supp. 2d 788, 796 (S.D. Miss. 1999).

197. *See Johnston Indus.*, 45 F. Supp. 2d at 1312.

and did not examine the rationale behind extension of the rule to the fraudulent joinder of plaintiffs.[198]

Tapscott involved the procedural misjoinder of plaintiffs and defendants because it involved two completely separate types of claims: those brought by named plaintiffs against the automobile defendants and those brought by completely different named plaintiffs against the merchant defendants.[199] The claims brought by the automobile plaintiffs against the automobile defendants arose from different transactions and occurrences than the claims brought by the merchant plaintiffs against the merchant defendants.[200] There appears to be general agreement among most courts that the fraudulent misjoinder doctrine applies to the misjoinder of plaintiffs as well as defendants.[201]

Even though section 1441(b) prohibits removal of a diversity case if any of the individuals "properly joined and served as defendants" is a resident of the state where the action was filed,[202] it would make little sense to limit fraudulent misjoinder to cases where a non-diverse or in-state defendant had been misjoined. Plaintiffs may also attempt to defeat removal jurisdiction by joining non-diverse plaintiffs. For example, assume two plaintiffs, one a citizen of Texas and the other a citizen of

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198. *Id.* at 1312 & n.4; *see also Foslip*, 92 F. Supp. 2d at 903–04 (critiquing the court's decision in *Johnston Industries*).

199. Tapscott v. MS Dealer Serv. Corp., 77 F.3d 1353, 1359–60 (11th Cir. 1996). A few district courts have incorrectly interpreted *Tapscott* as applying only to the misjoinder of defendants. *See, e.g.*, Sweeney v. Sherwin Williams Co., 304 F. Supp. 2d 868, 872 & n.2 (S.D. Miss. 2004) ("Although the misjoinder in *Tapscott* involved the egregious misjoinder of defendants, its rational [sic] also applies to misjoinder of plaintiffs.").

200. *Tapscott*, 77 F.3d at 1359–60. See *supra* notes 61–70 for a more detailed discussion of the claims in *Tapscott*.

201. *See, e.g.*, *In re* Benjamin Moore & Co., 318 F.3d 626, 630–31 (5th Cir. 2002) (describing "the Tapscott principle that fraudulent misjoinder of plaintiffs is no more permissible than fraudulent misjoinder of defendants to circumvent diversity jurisdiction" as forceful); Grennell v. W.S. Life Ins. Co., 298 F. Supp. 2d 390, 395–96 (S.D. W. Va. 2004) ("The Court can see no logic in prohibiting plaintiffs from defeating diversity jurisdiction by fraudulently joining nondiverse defendants, but allowing them to do so through fraudulently joining nondiverse plaintiffs"); *In re* Diet Drugs Prods. Liab. Litig., 294 F. Supp. 2d 667, 673 (E.D. Pa. 2003) ("We also conclude that the same principles of fraudulent joinder apply where a plaintiff is improperly joined with another plaintiff so as to defeat diversity jurisdiction"); *In re* Baycol Prods. Litig., Blakeney, MDL No. 1431 (MJD), No. 03-2931, 2003 WL 22341303, at *3 (D. Minn. 2003) (finding fraudulent misjoinder of the nondiverse plaintiff); Koch v. PLM Int'l, Inc., No. Civ. A. 97-0177-BH-C, 1997 WL 907917, at *2 (S.D. Ala. Sept. 24, 1997) ("nothing in the *Tapscott* court's opinion limits itself to joinder of defendants").

202. 28 U.S.C. § 1441(b) (2000).

Louisiana, were to join their unrelated malpractice claims against the same physician who was a citizen of Texas. Further assume that both plaintiffs have a reasonable substantive basis for their respective claims and that the Louisiana plaintiff's claim is for more than $75,000. If the fraudulent misjoinder doctrine does not apply to the misjoinder of plaintiffs, the Texas physician would not be able to remove the Louisiana plaintiff's claim to federal court. If the joinder of the two separate malpractice claims is clearly impermissible under state procedural rules, then the Louisiana plaintiff should not be permitted to misjoin the Texas plaintiff in an effort to defeat removal jurisdiction. Given the Supreme Court's holding that "[t]he Federal courts may and should take such action as will defeat attempts to deprive wrongfully parties entitled to sue in the Federal courts of the protection of their rights in those tribunals,"[203] it is appropriate for courts to apply the fraudulent misjoinder doctrine to cases where diverse plaintiffs have misjoined non-diverse plaintiffs in an attempt to defeat removal.[204]

C. Defining Fraudulent Misjoinder

Of all the unresolved issues concerning the application of the fraudulent misjoinder doctrine, establishing an appropriate definitional test appears to have posed the most difficulty to district courts. The only guidance given by any appellate court is the Eleventh Circuit's admonition that only egregious misjoinder, as opposed to mere misjoinder, constitutes fraudulent misjoinder.[205] Although most courts have accepted *Tapscott*'s distinction between mere misjoinder and egregious misjoinder,[206] a few courts have rejected the distinction, holding that

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203. Ala. Great S. Ry. Co. v. Thompson, 200 U.S. 206, 218 (1906).

204. *See also* Hines & Gensler, *supra* note 108 (manuscript at Part IV.C) (observing that the doctrine will likely have a large impact in cases where unrelated claimants join as plaintiffs in product liability lawsuits against the same manufacturer).

205. Tapscott v. MS Dealer Serv. Corp., 77 F.3d 1353, 1360 (11th Cir. 1996); *see also In re* Bridgestone/Firestone, Inc., 260 F. Supp. 2d 722, 728 (S.D. Ind. 2003) (acknowledging that something more than "mere misjoinder" is necessary but stating that "what the 'something more' is was not clearly established in *Tapscott* and has not been established since"); Bright III v. No Cuts, Inc., No. Civ. A. 03-640, 2003 WL 22434232, at *4 n.21 (E.D. La. Oct. 27, 2003) ("While the *Tapscott* Court was clear that 'mere misjoinder' is not equivalent to *fraudulent* misjoinder, this aspect of the *Tapscott* holding has engendered confusion among the courts and commentators alike.").

206. *See* Greene v. Wyeth, 344 F. Supp. 2d 674, 684 (D. Nev. 2004) ("it appears that a majority of courts have held that the misjoinder must be 'egregious' to war-

removal is proper based on mere misjoinder.[207] No specific definitional test is readily discernable under either the "egregious misjoinder" standard or the "mere misjoinder" standard.[208]

1. "Egregious Misjoinder" Standard

The district courts that have adopted *Tapscott*'s "egregious" standard have defined "egregious" in a variety of ways. For example, courts have held that joinder must be "grossly improper"[209] or "totally unsupported"[210] to be egregious. One court found removal improper because there was at least a "palpable connection" between the claims against the diverse and non-diverse defendants.[211] Another court found fraudulent joinder because the "attempted joinder [was] so egregious, unreasonable, and patently wanting in any colorable basis. . . ."[212] Yet another court found egregiousness lacking because the outcome of the claim against the in-state defendant might affect the outcome of the claim against the diverse defendant.[213] "Col-

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rant severance"); Barron v. Miraglia, No. 4:04-CV-376-A, 2004 WL 1933225, at *2 (N.D. Tex. Aug. 30, 2004) ("the misjoinder must represent totally unsupported or egregious misjoinder"); Walton v. Tower Loan of Miss., 338 F. Supp. 2d 691, 695 (N.D. Miss. 2004) ("this court would only be able to accept jurisdiction based on the misjoinder of either plaintiffs or defendants if such misjoinder were 'egregious'"); Brooks v. Paulk & Cope, Inc., 176 F. Supp. 2d 1270, 1277 (M.D. Ala. 2001) ("misjoinder must be egregious in order for there to be fraudulent joinder").

207. *See, e.g.*, Burns v. W.S. Life Ins. Co., 298 F. Supp. 2d 401, 403 (S.D. W. Va. 2004) ("in this district, the 'egregious' nature of the misjoinder is not relevant to the analysis"); Grennell v. W.S. Life Ins. Co., 298 F. Supp. 2d 390, 396–97 (S.D. W. Va. 2004) (holding that the court will deny a plaintiff's motion to remand if joinder is improper); *In re* Rezulin Prods. Liab. Litig., 168 F. Supp. 2d 136, 147–48 (S.D.N.Y. 2001) ("While aware that several courts have applied *Tapscott*'s egregiousness standard when considering misjoinder of plaintiffs in the context of remand petitions, this Court respectfully takes another path.").

208. *Bright III*, 2003 WL 22434232, at *4 n.21; *In re* Baycol Prods. Litig., Blakeney, MDL No. 1431 (MJD), No. 03-2931, 2003 WL 22341303, at *3 (D. Minn. 2003) ("the relevant case law does not set forth a specific standard to apply to a fraudulent misjoinder claim, under either the egregious standard, or the standard adopted in *Rezulin*").

209. *Walton*, 338 F. Supp. 2d at 695.

210. *Barron*, 2004 WL 1933225, at *2.

211. Terrebonne Parish Sch. Bd. v. Texaco, Inc., No. Civ. A. 98-0115, 1998 WL 160919, at *3 (E.D. La. April 3, 1998).

212. Rudder v. K Mart Corp., No. Civ. A. 97-0272-BH-S, 1997 WL 907916, at *6 (S.D. Ala. Oct. 15, 1997).

213. Sullivan v. UNUM Life Ins. Co., No. C. 04-00326, 2004 WL 828561, at *4 (N.D. Cal. Apr. 15, 2004) (citing Brazina v. Paul Revere Life Ins. Co., 271 F. Supp. 2d 1163 (N.D. Cal. 2003)).

lusive joinder" for the purpose of defeating diversity jurisdiction is required in at least one jurisdiction,[214] suggesting something akin to a "bad faith" standard.[215] Other courts explicitly state that a finding of bad faith is not necessary and reject the proposition that the plaintiff's subjective motive is relevant or determinative.[216] One court suggested it would require a clearer showing of "egregious misjoinder" in cases where a finding of fraudulent misjoinder would necessitate multiple separate federal trials, thereby thwarting the goal of judicial economy.[217] Still other courts purport to follow *Tapscott*, but have found fraudulent misjoinder without making specific findings of egregiousness.[218] Thus, there is presently no clear, uniform definitional standard for identifying "egregious misjoinder."

2. "Mere Misjoinder" Standard

Of the courts that have rejected the egregious misjoinder standard, the federal district court for the Southern District of New York, having jurisdiction over the Rezulin multi-district litigation, offered the most detailed explanation for its rejection. In *In re Rezulin Products Liability Litigation*,[219] multiple diabetes

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214. Coleman v. Conseco, Inc., 238 F. Supp. 2d 804, 817 (S.D. Miss. 2002) (citing Koch v. PLM Int., Inc., No. Civ. A. 97-0177-BH-C, 1997 WL 907917 (S.D. Ala. Sep. 24, 1997)), *abrogated on other grounds by* Sweeney v. Sherwin Williams Co., 304 F. Supp. 2d 868 (S.D. Miss. 2004).

215. Greene v. Wyeth, 344 F. Supp. 674, 684 (D. Nev. 2004) (observing that some courts have imported a bad-faith analysis into the fraudulent misjoinder standard (citing *Coleman*, 238 F. Supp. 2d at 814)); *In re* Rezulin Prods. Liab. Litig., 168 F. Supp. 2d 136, 147 (S.D.N.Y. 2001) (observing that "courts considering the issue generally have looked for the additional element of a bad faith attempt to defeat diversity").

216. *See, e.g.*, Asher v. Minn. Mining & Mfg. Co., No. Civ. A. 04 CV522KKC, 2005 WL 1593941, *7 n.2 (E.D. Ky. June 30, 2005) ("As with the fraudulent joinder analysis, the Court does not believe that the plaintiff's actual motive is relevant to the analysis of whether the plaintiffs' claims are misjoined under state or federal rules."); *Greene*, 344 F. Supp. 2d at 685 (finding fraudulent misjoinder but rejecting "the notion that Plaintiffs have committed an egregious act or a fraud upon the Court").

217. Walton v. Tower Loan of Miss., 338 F. Supp. 2d 691, 697 n.6 (N.D. Miss. 2004).

218. *See, e.g.*, *In re* Diet Drugs Prods. Liab. Litig., No. MDL 1203, 1998 WL 254976, at *4 (E.D. Pa. Apr. 16, 1998) (concluding that the plaintiff's joinder of non-diverse defendants was "improper at best and fraudulent at worst" and then retaining jurisdiction based on fraudulent misjoinder); Smith v. Nationwide Mut. Ins. Co., 286 F. Supp. 2d 777, 781 (S.D. Miss. 2003) ("In this court's view, the plaintiffs have combined unrelated lawsuits resulting in a fraudulent misjoinder of claims.").

219. 168 F. Supp. 2d 136 (S.D.N.Y. 2001).

patients who had taken prescription medication before it was withdrawn from the market sued the diverse drug manufacturer, pharmacies, home health care providers, and physicians.[220] In one case removed from Mississippi, each of the plaintiffs sued the drug manufacturer, but only one sued an in-state home health care provider.[221] The court concluded that joinder was not egregious given the empirical relationship of the claims,[222] but then determined that application of the egregious misjoinder standard is inappropriate in cases involving the alleged misjoinder of plaintiffs:

> [I]t is not clear why the standard used in *Tapscott* with respect to misjoined defendants necessarily applies to misjoined plaintiffs. Arguably a plaintiff's right to choose among defendants and claims—the principal reason for imposing a strict standard of fraudulent joinder to effect removal—is not compromised where claims of co-plaintiffs are severed or dismissed. This is not to say the cost and efficiency benefits to joined plaintiffs are immaterial; they simply do not carry the same weight when balanced against the defendant's right to removal. While aware that several courts have applied *Tapscott*'s egregiousness standard when considering misjoinder of plaintiffs in the context of remand petitions, this Court respectfully takes another path.[223]

The court then found improper joinder and remanded the claims brought by the misjoined plaintiff.[224] The *Rezulin* court's opinion refusing to apply the egregious misjoinder standard to the alleged misjoinder of plaintiffs further complicates fraudulent misjoinder law.[225]

The district court for the Southern District of West Virginia found the *Rezulin* court's logic compelling and elaborated upon it.[226] The court theorized that the risk to the plaintiff posed by removal based on traditional fraudulent joinder was dismissal of the non-diverse defendant from the case, "thereby . . . extinguishing [the] plaintiff's opportunity to recover from the now-absent party."[227] The court then observed that in cases involv-

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220. *Id.* at 136.
221. *Id.* at 144.
222. *Id.* at 147.
223. *Id.* at 147–48.
224. *Id.* at 148.
225. *See* 14B WRIGHT ET AL., *supra* note 1, § 3723.
226. Grennell v. W.S. Life Ins. Co., 298 F. Supp. 2d 390, 396 (S.D. W. Va. 2004).
227. *Id.*

ing fraudulent misjoinder, the risk to the plaintiff is not as great because the claims against the non-diverse defendant are not dismissed; instead, they are remanded to state court.[228] The court concluded that because fraudulent misjoinder poses a slighter risk to the plaintiff, the threshold for establishing it should be lower.[229] The court also predicted the distinction would "add a very subjective and troublesome element of complexity to an already knotty calculus."[230]

Use of the "mere misjoinder" standard, while avoiding the difficulty of having to determine what constitutes "egregious misjoinder," poses another more serious problem because it requires federal courts to determine whether joinder is proper under state rules, even when state procedural law is ambiguous or uncertain. Just as federal courts should not decide novel or ambiguous issues of state substantive law when evaluating allegations of traditional fraudulent joinder,[231] federal courts should also not decide novel or ambiguous issues of state procedural law when evaluating allegations of fraudulent misjoinder.[232] If the plaintiff has a reasonable basis for arguing that joinder is proper, and state law is ambiguous, the plaintiff's joinder of the jurisdictional spoiler cannot be deemed so "wholly

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228. *Id.* at 396–97.

229. *Id.* at 397.

230. Burns v. W.S. Life Ins. Co., 298 F. Supp. 2d 401, 403 (S.D. W. Va. 2004).

231. *See* Hartley v. CSX Transp., 187 F.3d 422, 425 (4th Cir. 1999) (holding that a "truly 'novel' issue . . . cannot be the basis for finding fraudulent joinder"); Crowe v. Coleman, 113 F.3d 1536, 1539 (11th Cir. 1997) (holding that "any ambiguity or doubt about the substantive state law favors remand to state court"); Batoff v. State Farm Ins. Co., 977 F.2d 848, 853 (3d Cir. 1992) ("A claim which can be dismissed only after an intricate analysis of state law is not so wholly insubstantial and frivolous that it may be disregarded for purposes of diversity jurisdiction."); *see also* Percy, s*upra* note 2, at 221–24; *supra* note 57 and accompanying text.

232. *See, e.g.*, Bright III v. No Cuts, Inc., No. Civ. A. 03-640, 2003 WL 22434232, at *9 (E.D. La. Oct. 27, 2003) ("'mere misjoinder' is more properly addressed to the state district court"); Johnson v. Glaxo Smith Kline, 214 F.R.D. 416, 421 (S.D. Miss. 2002) ("Since the Court has found that . . . joinder of the plaintiffs' claims against the [defendants], even if not proper, does not rise to the level of fraudulent joinder, the Court shall let the state court decide the issues of improper joinder and severance."); Alman v. Glaxo Smith Kline Corp., No. Civ. A. 02-006, 2002 WL 465202, at *4 (E.D. La. Mar. 25, 2002) ("Whereas 'fraudulent joinder' is properly addressed by the federal District Court, the issue of 'misjoinder' is more properly addressed to the state District Court."); Miller v. Am. Bankers Ins. Co. of Fla., No. 4:01CV8, 2001 WL 34403076, at *4 (N.D. Miss. Sept. 20, 2001) ("It is not necessary for this Court to actually decide whether joinder was appropriate under Rule 20.").

insubstantial and frivolous that it may be disregarded for purposes of diversity jurisdiction."[233]

In addition, the New York federal district court's rationale for applying the mere misjoinder standard in *Rezulin* was misplaced. The court argued that the principal purpose for requiring removing defendants to meet a high threshold to establish traditional fraudulent joinder was to preserve the plaintiff's right to pick and choose among defendants and claims.[234] While that may be one purpose, there are certainly others that the court overlooked. The primary purpose of placing a high burden of proof upon a removing defendant is to ensure that federal district courts do not exceed the scope of their limited jurisdiction and inappropriately intrude on jurisdiction reserved to state courts.[235] For the same reason, courts require diversity and removal statutes to be strictly construed.[236] Another purpose for placing a high burden on removing defendants is preservation of the plaintiff's right to choose a forum and to be master of the complaint,[237] which right presumably includes deciding whether to join other plaintiffs. The *Rezulin* court's approach is also problematic because it applies the mere misjoinder standard only to alleged misjoinder of plaintiffs and not to alleged misjoinder of defendants,[238] even though either could equally deprive the diverse defendant of the right to remove.[239] Although the mere misjoinder standard would pre-

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233. *Batoff*, 977 F.2d at 853.

234. *In re* Rezulin Prods. Liab. Litig., 168 F. Supp. 2d 136, 147 (S.D.N.Y. 2001).

235. *See* Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994); s*ee also* Univ. of S. Ala. v. Am. Tobacco Co., 168 F.3d 405, 411 (11th Cir. 1999) (holding that all jurisdictional doubts must be resolved in favor of remand); Boyer v. Snap-On Tools Corp., 913 F.2d 108, 111 (3d Cir. 1990) (same).

236. *See supra* note 192 and accompanying text.

237. One of the primary purposes of the "voluntary-involuntary" rule governing removal is to give deference to the plaintiff's ability to choose a forum and be "master of the complaint." *See* Percy, *supra* note 2, at 208–10; *supra* notes 103–05 and accompanying text.

238. *Rezulin*, 168 F. Supp. 2d at 147.

239. The West Virginia district court that followed the *Rezulin* court's holding argued that the threshold for removal based on fraudulent misjoinder should be lower than the threshold for removal based on traditional fraudulent joinder because, in the fraudulent misjoinder context, the plaintiff does not risk dismissal of the misjoined claim. Grennell v. W.S. Life Ins. Co., 298 F. Supp. 2d 390, 396 (S.D. W. Va. 2004). While this is true in many cases, the court did not account for the risk that the plaintiff might be deprived of his chosen forum or the risk that the federal court might inappropriately intrude upon the jurisdiction of the state court. In addition, some courts have dismissed the misjoined claims rather than remanding them back to state court. *See infra* note 248 and accompanying text.

sumably give rise to removal jurisdiction in more cases involving diverse defendants,[240] the jurisdictionally limited nature of federal courts prevents them from adopting a standard solely because it promotes removal. The misjoinder standard should be carefully crafted, keeping in mind the traditional fraudulent joinder standard, which specifically and purposefully avoids intrusion into ambiguous or novel areas of state law.

3. "Reasonable Basis for the Joinder" Standard

Rather than defining fraudulent misjoinder in terms of either "egregious" or "mere," the standard for fraudulent misjoinder should mimic that of traditional fraudulent joinder. The confusion caused by *Tapscott*'s proviso that the misjoinder be egregious could be largely avoided if courts were to frame the fraudulent misjoinder inquiry in the same way they frame the traditional fraudulent joinder inquiry. Thus, in jurisdictions that apply the "reasonable basis for the claim" test to allegations of traditional fraudulent joinder, the proper inquiry in the fraudulent misjoinder context would be whether there is a reasonable basis for the procedural joinder of the diversity-defeating party under the state joinder rule.[241] Although a few courts have specifically recognized the logic of this approach,[242]

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240. *See* Hines & Gensler, *supra* note 108 (manuscript Part IV.D) (rejecting the egregious misjoinder standard because the mere misjoinder standard best promotes a diverse defendant's ability to seek a federal forum).

241. As argued above, the "reasonable basis for the claim" test is superior to the other tests used by courts to define traditional fraudulent joinder. To the extent, however, that a jurisdiction uses an alternative test to identify traditional fraudulent joinder, its fraudulent misjoinder test should be consistent. For example, a jurisdiction using the "no possibility of recovery" test to identify traditional fraudulent joinder would use a "no possibility of proper procedural joinder" test to identify fraudulent misjoinder. Under such a test, the removing defendant would have to prove that there is no possibility that the state court would find the procedural joinder of the jurisdictional spoiler proper. *See supra* note 48 and accompanying text.

242. *See, e.g.*, Asher v. Minn. Mining & Mfg. Co., No. Civ. A. 04CV522KKC, 2005 WL 1593941, *7 (E.D. Ky. June 30, 2005) (applying the "same rationale to fraudulent *mis* joinder as to fraudulent joinder"); Conk v. Richards & O'Neil, LLP, 77 F. Supp. 2d 956, 971 (S.D. Ind. 1999) ("[T]he court believes the controlling standard is essentially the same that applies to fraudulent joinder: Is there a reasonable possibility that a state court would find [proper joinder]?"). In both cases, the court was applying a standard based on and substantially consistent with its standard for traditional fraudulent joinder. A few other courts appear to be doing the same thing but have not explicitly so stated. *See, e.g.*, Moore v. Smith Kline Beecham Corp., 219 F. Supp. 2d 742, 746 (N.D. Miss. 2002) (finding that the joinder of plaintiffs was not egregious because there was "at least a possibility that the state court would find joinder proper in this case"); Johnson v. Glaxo Smith Kline, 214 F.R.D.

many continue to struggle to define fraudulent misjoinder. If the plaintiff had a reasonable procedural basis to join the spoiler, then a court cannot infer the spoiler was joined for the purpose of defeating removal jurisdiction. More importantly, the state court should determine the joinder issue in this situation. Although *Tapscott*'s egregious misjoinder standard may have been motivated by the Eleventh Circuit's recognition that federal courts should not decide novel or ambiguous issues of state procedural law in analyzing fraudulent misjoinder claims, the better approach, in light of the confusion *Tapscott* has caused, would be simply to model the fraudulent misjoinder doctrine on the traditional fraudulent joinder doctrine. For example, just as a plaintiff's subjective motive is not determinative under traditional fraudulent joinder law,[243] neither should it be determinative under fraudulent misjoinder.

Application of the "reasonable basis for the joinder" test should not be too onerous in most instances. A federal court examining the plaintiff's motion to remand should simply review the allegedly misjoined claims as stated in the pleadings and then review the defendant's argument that the plaintiff had no legal reasonable basis under state procedural law for joining the claims. If the plaintiff has a reasonable basis for joinder, then removal based on fraudulent misjoinder is inappropriate because such joinder does not provide sufficient indicia that the spoiler was joined for the purpose of preventing removal jurisdiction.[244] As with traditional fraudulent joinder,[245] courts should rarely pierce the pleadings when ruling on motions to remand in the fraudulent misjoinder context, doing so only when piercing into a discrete factual question is likely

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416, 422 (S.D. Miss. 2002) (finding that the joinder of defendants was not fraudulent because there was a possibility that the state court would find joinder proper).

243. *See supra* notes 51–52 and accompanying text.

244. In determining whether the plaintiff had a reasonable basis for the joinder, the court could refer to Rule 3.1 by way of analogy. Rule 3.1 of the Model Rules of Professional Conduct prohibits a lawyer from bringing a proceeding "unless there is a basis in law and fact for doing so that is not frivolous." MODEL RULES OF PROF'L CONDUCT R. 3.1 (2002). The Comment to the Rule indicates that when a claim is not based on existing law, there must be a good faith argument for the "extension, modification or reversal of existing law," and further provides that claims are not frivolous merely because "the lawyer believes that the client's position ultimately will not prevail." *Id.*

245. *See supra* notes 59–60 and accompanying text.

to demonstrate fraudulent misjoinder.[246] Using the "reasonable basis for the joinder" test to define fraudulent misjoinder is most consistent with Supreme Court precedent,[247] is most sensitive to federalism concerns, avoids the difficulties posed by the egregious misjoinder and mere misjoinder standards, and relieves courts of the burden of having to develop an entirely new framework for evaluating fraudulent procedural misjoinder because it simply mimics the traditional fraudulent joinder framework.

D. The Appropriate Response: Dismissal Versus Remand

One final issue that needs clarification concerns the proper response when the district court does find fraudulent misjoinder. Some federal courts have severed the misjoined claims, retained jurisdiction over the claims between diverse parties, and remanded the other claims back to state court.[248] Others have severed and dismissed without prejudice those claims over which they lacked jurisdiction.[249] In dismissing the claims brought by or against the misjoined parties, many courts relied, at least partially, on Rule 21 of the Federal Rules of Civil Procedure,[250] which provides,

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246. In the fraudulent misjoinder context, courts will probably need to pierce the pleadings less frequently than in the traditional fraudulent joinder context because allegations of fraudulent misjoinder will more likely focus on the plaintiff's legal basis for joining the spoiler under the state joinder rule, rather than the plaintiff's misstatement or omission of a fact relevant to the joinder issue.

247. *See supra* notes 34–46 and accompanying text.

248. *See, e.g.*, Tapscott v. MS Dealer Serv. Corp., 77 F.3d 1353, 1355 (11th Cir. 1996) (affirming the district court's remand of certain claims to the state court); Greene v. Wyeth, 344 F. Supp. 2d. 674, 685 (D. Nev. 2004); Jones v. Nastech Pharm., 319 F. Supp. 2d 720, 728–29 (S.D. Miss. 2004).

249. *See, e.g.*, *In re* Diet Drugs Prods. Liab. Litig., 294 F. Supp. 2d 667, 679 (E.D. Pa. 2003) (dismissing the claims of the misjoined plaintiffs without prejudice); Coleman v. Conseco Inc., 238 F. Supp. 2d 804, 819 (S.D. Miss. 2002) (same); *In re* Diet Drugs Prods. Liab. Litig., No. Civ.A. 98-20478, 1203, 1999 WL 554584, at *4 (E.D. Pa. July 16, 1999) (same); Lyons v. Am. Tobacco Co., No. Civ.A. 96-0881-BH-S, 1997 WL 809677, at *4 (S.D. Ala. Sept. 30, 1997) (same); Koch v. PLM Int'l, Inc., No. Civ.A. 97-0177-BH-C, 1997 WL 907917, at *5 (S.D. Ala. Sept. 24, 1997) (same).

250. *See, e.g.*, *Diet Drugs*, 294 F. Supp. 2d at 679 ("[W]e . . . will exercise our discretion under Rule 21 to dismiss the [misjoined plaintiffs] without prejudice . . . ."); *Coleman*, 238 F. Supp. 2d at 819 (dismissing the non-diverse plaintiffs "pursuant to Rule 21 of the Federal Rules of Civil Procedure"); *Diet Drugs*, 1999 WL 554584, at *4 (exercising "its discretion under Federal Rule of Civil Procedure 21 [to] dismiss the non-diverse Plaintiffs' claims without prejudice"); *Koch*, 1997 WL 907917, at *4 (citing Rule 21 in support of its dismissal of the non-diverse plaintiff). Some courts that remanded the claims brought by or against the misjoined parties also cited Rule 21 as precedent supporting severance of the claims.

> Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately.[251]

What is troubling about these opinions is that some courts suggest that a finding of fraudulent joinder is not a prerequisite to severance and dismissal.[252]

In *Newman-Green, Inc. v. Alfonzo-Larrain*,[253] the Supreme Court held that courts of appeals may dismiss non-diverse dispensable parties and thereby retroactively create diversity jurisdiction.[254] There, Newman-Green, Inc., an Illinois corporation, had filed a breach of contract action in federal district court against a Venezuelan corporation.[255] Newman-Green also sued five individuals, alleging that they were joint and several guarantors of royalty payments owed pursuant to the contract.[256] Four of the five individual defendants were Venezuelan citizens. The fifth, Bettison, was a United States citizen domiciled in Venezuela.[257] After years of discovery, the trial court granted partial summary judgment to the individual guarantors and to Newman-Green on its claims against the Venezuelan corporation.[258]

See, e.g., *Greene*, 344 F. Supp. 2d at 685 (exercising the court's "authority under . . . Rule 21, to add or drop parties to a suit 'at any stage of the action and on such terms as are just'" by severing the claims brought by non-diverse plaintiffs and remanding them to state court); *In re* Rezulin Prods. Liab. Litig., 168 F. Supp. 2d 136, 153 (S.D.N.Y. 2001) (citing Rule 21 as providing authority to sever and remand the claims of the non-diverse plaintiffs); Turpeau v. Fidelity Fin. Servs., 936 F. Supp. 975, 980–82 (N.D. Ga. 1996) (citing Rule 21 as providing authority to sever and remand the claims against the misjoined non-diverse defendants).

251. FED. R. CIV. P. 21.

252. *See, e.g.*, John S. Clark Co. v. Travelers Indem. Co. of Ill., 359 F. Supp. 2d 429, 440 (M.D.N.C. 2004) ("[I]t is well settled that Rule 21 invests district courts with authority to allow a dispensable non-diverse party to be dropped at any time . . . ." (quoting Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 832 (1989))); *Lyons*, 1997 WL 809677, at *4 ("Rule 21 of the Federal Rules of Civil Procedure explicitly places it within the sound discretion of this Court to sever and dismiss misjoined parties 'on such terms as are just.'"); *Koch*, 1997 WL 907917, at *4 ("[I]t is always within the sound discretion of the court to drop indispensable [sic] parties in order to preserve its lawfully ordained diversity jurisdiction.").

253. 490 U.S. 826 (1989).

254. *Id.* at 837.

255. *Id.* at 828.

256. *Id.*

257. *Id.*

258. *Id*.

Newman-Green appealed.[259] At oral argument before a panel of the Seventh Circuit Court of Appeals, Judge Easterbrook questioned the district court's jurisdiction, noting that 28 U.S.C. § 1332(a)(3) confers jurisdiction when a citizen of one state sues both an alien and a citizen of a state different from the plaintiff's.[260] Judge Easterbrook pointed out that such jurisdiction was lacking because Bettison was a citizen of the United States but not a citizen of any state, given his domicile in Venezuela. The jurisdiction could not have been based on 28 U.S.C. § 1332(a)(2) either, because the case was not brought solely against aliens.[261] The panel held that the appellate court could dismiss a dispensable party, such as Bettison, pursuant to Rule 21 of the Federal Rules of Civil Procedure, and then proceed to the merits of the case.[262] On rehearing en banc, the Seventh Circuit reversed the panel opinion, finding that Rule 21 did not give the appellate court authority to dismiss Bettison, and remanded the case to the district court for it to consider dismissing Bettison.[263] Other circuit courts had held that appellate courts do have authority to dismiss jurisdictional spoilers,[264] so the Supreme Court granted Newman-Green's petition for certiorari to resolve the conflict.[265]

Reversing the en banc Seventh Circuit, the Supreme Court first stated that it was "well settled that Rule 21 invests district courts with authority to allow a dispensable party to be dropped at any time, even after judgment has been rendered."[266] It then held that Rule 21 also granted appellate courts the authority to dismiss dispensable non-diverse parties to create diversity jurisdiction.[267] The Court's opinion was based, in large part, on its

259. *Id.*

260. *Id*.

261. *Id.*

262. *Id.* at 829.

263. *Id.*

264. *See, e.g.*, Long v. District of Columbia, 820 F.2d 409, 416–17 (D.C. Cir. 1987) (holding that an appellate court has authority to respond to a jurisdictional defect by dismissing a dispensable party); Cont'l Airlines, Inc. v. Goodyear Tire & Rubber Co., 819 F.2d 1519, 1523 & n.3 (9th Cir. 1987) ("[I]t is now settled in this circuit that practicality prevails over logic and that we may dismiss a dispensable, nondiverse party in order to perfect retroactively the district court's original jurisdiction."); Caspary v. La. Land Exploration Co., 725 F.2d 189, 191–92 (2d Cir. 1984) (holding that an appellate court had authority to grant the plaintiff's motion to amend the complaint so as to delete all claims against the jurisdictional spoiler).

265. *Newman-Green*, 490 U.S. at 830.

266. *Id.* at 832.

267. *Id.* at 833–37.

concern that a contrary result would waste precious judicial resources, as Newman-Green would simply be forced to refile its claims.[268] The Court emphasized that appellate courts should exercise such authority sparingly and should forego dismissal if it would prejudice parties to the litigation.[269]

Dissenting from the Court's ruling, Justice Kennedy challenged the majority's statement that it was "well settled" that district courts could dismiss dispensable but properly joined jurisdictional spoilers in order to retroactively create diversity jurisdiction.[270] He further argued that Rule 21 only addresses actions involving misjoinder or non-joinder, not actions involving permissible joinder.[271] Justice Kennedy also questioned whether the majority's application of Rule 21 conflicted with Rule 82's admonition that the procedural rules may not be used to extend federal jurisdiction.[272]

Rule 21 was promulgated in response to the common-law rule requiring dismissal of an entire case involving some type of defective joinder, either misjoinder or non-joinder.[273] In cases involving misjoinder in violation of Rule 20(a), the district court may sever the misjoined claims or drop a misjoined party.[274] In cases involving non-joinder where a necessary party, pursuant to Rule 19, has not been joined, the district court may add the necessary party.[275] Arguably, Rule 21 was not intended to create jurisdiction where no basis for jurisdiction would otherwise exist.[276]

Appellate courts have appropriately cited *Newman-Green* as binding precedent to support their use of Rule 21 to create jurisdiction retroactively in cases originally filed in federal court where the plaintiff has no objection to the dismissal of the spoiler and where dismissal for lack of jurisdiction would waste

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268. *Id.* at 837 ("the practicalities weigh heavily in favor of the decision made by the Court of Appeals").

269. *Id.* at 837–38.

270. *Id.* at 839 (Kennedy, J., dissenting).

271. *Id.* at 839–40.

272. *Id.* at 840.

273. Taylor Simpson-Wood, *Has the Seductive Siren of Judicial Frugality Ceased to Sing?:* DataFlux *and Its Family Tree*, 53 DRAKE L. REV. 281, 295 n.90 (2005).

274. *Id.*

275. *Id.*

276. A court's use of Rule 21 to dismiss a permissibly joined but dispensable party also arguably violates the Rules Enabling Act's proviso that the "rules shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b) (2000); *see also Newman-Green*, 490 U.S. at 839–40 (Kennedy, J., dissenting).

judicial resources.[277] Even so, however, *Newman-Green* does not support the proposition that district courts may use Rule 21 to dismiss properly joined dispensable parties in order to create removal jurisdiction.[278]

After a finding of fraudulent misjoinder has been made, the question becomes whether the severed claims between non-diverse parties should be remanded or dismissed. Because Rule 21 was generally intended to apply to the misjoinder of parties in cases already within the federal court's jurisdiction, the suggestion in Rule 21 that a court may dismiss a misjoined party should not be given much weight in the fraudulent misjoinder context. Nor should the federal district courts' routine dismissal of the fraudulently joined parties in traditional fraudulent joinder cases suggest that dismissal of procedurally misjoined parties is appropriate. In the traditional fraudulent joinder context, the federal court has made a determination that there is no reasonable basis for the claim against the misjoined party. Therefore, there is no harm in dismissing the fraudulently joined party. The same is not true in the procedural misjoinder context. As one court appropriately observed,

> While [other courts have] dismissed the nondiverse plaintiffs, this Court finds that action unnecessarily harsh. When a court finds that nondiverse or resident defendants have been fraudulently joined, it has done so only upon concluding that the plaintiff cannot state a cause of action against

277. *See, e.g.*, Gardner v. Benefits Comm'ns Corp., 175 F.3d 155, 160–61 (9th Cir. 1999) (dismissing dispensable non-diverse defendants at plaintiff's request on appeal to create diversity jurisdiction); Sweeney v. Westvaco Co., 926 F.2d 29, 41–42 (1st Cir. 1991) (same); Curley v. Brignoli, Curley & Roberts Assocs., 915 F.2d 81 (2d Cir. 1990) (dismissing non-diverse defendant on appeal to create diversity).

278. Ferry v. Beckum Am. Corp., 185 F. Supp. 2d 1285, 1290 (M.D. Fla. 2002) (refusing to use Rule 21 to dismiss properly joined plaintiffs in order to create removal jurisdiction); Allendale Mut. Ins. Co. v. Excess Ins. Co., 62 F. Supp. 2d 1116, 1123 (S.D.N.Y. 1999) (refusing to dismiss the non-diverse defendant over the plaintiff's objection in a case originally filed in federal court); Garbie v. Chrysler Corp., 8 F. Supp. 2d 814, 817–18 (N.D. Ill. 1998) (refusing to use Rule 21 to dismiss properly joined plaintiffs in order to create removal jurisdiction); Oliva v. Chrysler Corp., 978 F. Supp. 685, 688 (S.D. Tex. 1997) (same); Spann v. Nw. Mut. Life Ins., 795 F. Supp. 386, 390–91 (M.D. Ala. 1992) (refusing to dismiss the non-diverse defendant over the plaintiff's objection to create removal jurisdiction). "[I]f [the plaintiff] can avoid the federal forum by the device of properly joining a nondiverse defendant or a nondiverse co-plaintiff, he is free to do so." Iowa Pub. Serv. Co. v. Med. Bow Coal Co., 566 F.2d 400, 406 (8th Cir. 1977). *See also* Hines & Gensler, *supra* note 108 (manuscript Part V.C) (arguing that it would be inappropriate for federal courts to use Rule 21 to sever or dismiss related claims in order to create removal jurisdiction).

> them, thereby making dismissal appropriate. In finding non-diverse plaintiffs misjoined, however, the court only finds that their claims should not have been brought alongside those of the diverse plaintiffs, not that they fail to state claims. Thus, remand is the appropriate remedy, not dismissal.[279]

Arguably, the federal district court has no jurisdiction over the misjoined claim, and therefore has no authority to dismiss the claim. Moreover, it is more efficient for the federal court to remand the misjoined claim back to the state court where it was filed. If the plaintiff no longer desires to prosecute the misjoined claim, the plaintiff can easily dismiss the claim in state court. If, however, the court dismisses the claim brought by or against the misjoined party without prejudice, and the plaintiff intends to pursue it in state court, the plaintiff will be forced to refile the claim in state court. Thus, the more expedient approach is simply to remand the misjoined claims to state court.

VI. CONCLUSION

In light of the significant rise in procedural misjoinder litigation, it is crucial for courts to clearly define and articulate the contours of the emerging fraudulent misjoinder doctrine, both to protect diverse defendants' rights to remove, and to ensure that federal district courts do not overstep the bounds of their limited jurisdiction and intrude on that of state courts. To date, district courts have spent a great deal of time and resources struggling to articulate a workable fraudulent misjoinder doctrine. Rather than increasing clarity, however, they have further complicated the doctrine by deciding many issues inconsistently and sometimes by resolving issues in a manner that raises serious federalism concerns.

This Article argues that instead of creating an entirely new framework for analyzing allegations of fraudulent misjoinder, courts should model the fraudulent misjoinder doctrine after the traditional fraudulent joinder doctrine. Thus, in analyzing allegations of fraudulent misjoinder, federal district courts should inquire whether the plaintiff had a reasonable basis for joining the non-diverse plaintiff or non-diverse defendant under state procedural law. If so, there should be no finding of fraudulent misjoinder. If not, then the federal court should

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279. Grennell v. W.S. Life Ins. Co., 298 F. Supp. 2d 390, 400 n.11 (S.D. W. Va. 2004).

sever the misjoined claims, retain jurisdiction over the claims between diverse parties and remand, rather than dismiss, the claims between non-diverse parties. This approach is preferable, both because it is judicially economical in avoiding the labor-intensive demarcation of a new doctrine, and because it favors preserving the delicate balance between state and federal courts.